

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN R. GEORGE,)
) Petitioner,)
) v.) No. 21-234
DENIS R. McDONOUGH, SECRETARY OF)
VETERANS AFFAIRS,)
) Respondent.)

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KEVIN R. GEORGE,)
Petitioner,)

v.) No. 21-234

DENIS R. McDONOUGH, SECRETARY OF)
VETERANS AFFAIRS,)
Respondent.)

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Washington, D.C.

Tuesday, April 19, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

MELANIE L. BOSTWICK, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ANTHONY A. YANG, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-234, George versus McDonough.

Ms. Bostwick.

ORAL ARGUMENT OF MELANIE L. BOSTWICK
ON BEHALF OF THE PETITIONER

MS. BOSTWICK: Mr. Chief Justice, and may it please the Court:

Our nation's veterans benefits system is intended to be strongly and uniquely pro-claimant. In this non-adversarial system, veterans enjoy distinct procedural protections, and review of otherwise final decisions for Clear and Unmistakable Error, or CUE, is one of those unique protections. It prevents the agency's obvious errors from depriving veterans of the benefits to which their service entitles them.

There is no dispute that a clear and unmistakable error has occurred when VA adjudicators misapply the terms of a plain statute. But the government seeks to impose an atextual exception to that general rule, that

1 the agency does not clearly err when it
2 enshrines its misapplication of law in a
3 regulation.

4 That cannot be correct. As this Court
5 has said over and over, an agency regulation has
6 the force of law only if it is consistent with
7 Congress's command. And the government cannot
8 deny this feature of our separation of powers,
9 and its attempts to avoid it are unsuccessful.

10 A VA adjudicator is directed to apply
11 not only the agency's regulations but also
12 Congress's statutes. When the regulation
13 conflicts with the statute, the adjudicator
14 cannot possibly follow both.

15 But this dilemma created by the
16 agency's own unlawful acts does not stop a later
17 tribunal from identifying and remedying the
18 clear legal error that infected the decision.

19 Nor is this legal error a mere change
20 in interpretation. VA's regulations have long
21 distinguished between genuine legal changes that
22 might warrant updating prior benefits rulings
23 and legal errors that entitle veterans to
24 revision of a flawed ruling.

25 Furthermore, what the agency did here

1 could not even colloquially be called an
2 interpretation. VA's presumption of soundness
3 regulation tracked the statute most of the way
4 and then simply lopped off the end of the
5 sentence, eliminating the second half of VA's
6 two-part obligation. It is not difficult to
7 call that an error, and it is not difficult to
8 say that denying Mr. George's claim based on
9 this plainly invalid regulation was clearly and
10 unmistakably erroneous.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Before we get to the
13 substance or the merits of that, what is the
14 posture of this case? Is this -- would you
15 consider this a direct review?

16 MS. BOSTWICK: No. This is a -- I'm
17 sorry, I'm not sure I'm understanding your
18 question, Justice Thomas.

19 JUSTICE THOMAS: Is this a direct
20 appeal from the initial decision?

21 MS. BOSTWICK: This not a direct
22 appeal, no. This is a -- a claim under the CUE
23 statute, Section 7111.

24 JUSTICE THOMAS: So -- so do we then
25 review this in the same way that you would

1 normally review a direct appeal, or is there a
2 different standard?

3 MS. BOSTWICK: The review for CUE is
4 -- the -- the two different parts of the test,
5 whether there's error and whether it's
6 outcome-determinative, are reviewed under
7 different standards. Certainly, whether there
8 has been a legal error, a clear and unmistakable
9 error, is reviewed de novo.

10 JUSTICE THOMAS: Okay. This term
11 "clear" -- "clear and unmistakable error," where
12 does that come from?

13 MS. BOSTWICK: It comes originally
14 from the agency's regulations. It -- it dates
15 back to the 1920s. And in this and other
16 regulations, when VA uses the term "clear and
17 unmistakable," what it means is obvious or
18 manifest.

19 JUSTICE THOMAS: So how was it applied
20 when it was simply a regulation and before it
21 was enacted as a statute?

22 MS. BOSTWICK: It was applied exactly
23 as -- as we suggest, and I think that is most
24 evident in the Look decision that the Veterans
25 Court issued before Congress codified CUE into

1 the statute.

2 JUSTICE THOMAS: So it was applied to
3 subsequent rulings that changed the law, as
4 opposed to a mistake involving an extant rule,
5 regulation, or law?

6 MS. BOSTWICK: So it -- it's not a
7 decision that changed the law, right? Wagner
8 didn't change the law. It announced what the
9 law had been at -- at -- at all times, as -- as
10 this Court has explained in cases --

11 JUSTICE THOMAS: So how was --

12 MS. BOSTWICK: -- since Rivers.

13 JUSTICE THOMAS: -- how was CUE
14 applied when it was regulatory?

15 MS. BOSTWICK: The -- the Look -- when
16 there's a regulation that violates a statute?
17 Is that your -- your question, Your Honor?

18 JUSTICE THOMAS: Yes.

19 MS. BOSTWICK: Yes. So -- so the Look
20 decision is an example of that. There, VA's
21 regulation imposed a fault requirement that the
22 statute did not. That's the very regulation
23 that this Court held plainly invalid in Brown
24 versus Gardner.

25 In the Look decision, the Veterans

1 Court said first there was a clear and
2 unmistakable error by VA applying that unlawful
3 regulation, and, also, there was a further,
4 second clear and unmistakable error because even
5 under a different clause in the regulation, the
6 veteran should have prevailed there. So that's
7 -- that's an example, but Look is not the only
8 indication that that is how CUE was understood
9 before Congress codified it.

10 You know, the -- the government agrees
11 with us that -- that the Russell decision, the
12 en banc decision from the Veterans Court, is
13 instructive. And what Russell said is that
14 statutory or regulatory provisions extant at the
15 time, if those were incorrectly applied, that's
16 CUE. That's exactly what we have here. The
17 statutory provision extant at the time was
18 incorrectly applied.

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: You say that
21 Wagner didn't change the law --

22 MS. BOSTWICK: Correct.

23 CHIEF JUSTICE ROBERTS: -- right? But
24 that's not the question. The question is
25 whether there's been a change in the

1 interpretation of the statute. And there surely
2 has, right?

3 MS. BOSTWICK: So, Your Honor, I don't
4 think that is the question, in part because the
5 change in interpretation language from the
6 agency's regulation was not actually codified by
7 Congress. But, more importantly, you have to
8 look at why it wasn't codified.

9 That language appears --

10 CHIEF JUSTICE ROBERTS: I'm sorry,
11 just -- I don't meant to interrupt, but why does
12 it --

13 MS. BOSTWICK: Certainly.

14 CHIEF JUSTICE ROBERTS: -- why does it
15 matter whether it was codified by Congress?

16 MS. BOSTWICK: Because the Court
17 doesn't even have to get into it. The statute
18 does not have an exception for changes in
19 interpretation. And what this Court is doing is
20 applying the CUE statute, and so, you know, if
21 the Court is looking at the statutory text, that
22 exception isn't in there.

23 But even if the Court wanted to look
24 at how VA had -- had applied that -- that
25 language, what function that language was

1 serving, it's not the one that the government
2 suggests.

3 So the -- the -- I want to first draw
4 the Court's attention to the entirety of
5 Section 3.105. That is the VA's regulation that
6 governs CUE at the regional office level,
7 although now there is a corresponding provision
8 for the Board-level CUE that we have here.

9 And you can see the -- the 1997
10 version of that statute at page 16a of the
11 appendix attached to our -- our opening brief.
12 The -- the regulation as a whole covers many
13 things other than CUE. 3.105(a) is what deals
14 with clear and unmistakable error. 3.105(b),
15 for instance, deals with difference of opinion,
16 which is a totally different basis for
17 challenging an agency's decision. There are
18 other provisions about severance or reduction of
19 service connection.

20 So the preamble is not, as the
21 government suggests, taking things that would
22 have been CUE and carving them out. It is -- it
23 is, first of all, saying nothing in 3.105(a) or
24 otherwise applies when you have a change in law
25 or a change in interpretation of law.

1 And, more importantly, what it's
2 doing, as we -- we demonstrated this at pages 36
3 to 40 of our opening brief, and the government
4 doesn't respond. What this has long done is
5 referred -- it referred to a separate mechanism
6 for -- for changing or revising an otherwise
7 final VA decision, right?

8 And -- and -- and there's long been
9 this distinction between errors on the one hand
10 and changes on the other. The government faults
11 us and says, oh, your view of change in
12 interpretation wouldn't include any errors.
13 That's right. It -- it -- it's not meant to.
14 These are two different things.

15 And so, if you look at the original,
16 like, the 1920 --

17 JUSTICE KAGAN: But what -- what sense
18 does that make? Usually, you don't exclude
19 things that aren't covered in the first place.
20 So why would anybody have excluded something
21 that, on your view, wasn't an error at all?

22 MS. BOSTWICK: Certainly, Justice
23 Kagan. If -- if you look at the original
24 regulation, it had all the different mechanisms
25 for challenging an otherwise final agency

1 decision in it. It had CUE. It had new and
2 material evidence. It had difference of
3 opinion. It had -- it covered when there's
4 discovered to have been fraud in a veteran
5 seeking service connection, and it told you what
6 to do when there's a change in law or VA issue
7 or -- or an interpretation thereof.

8 And what happened was, in the 1950s,
9 that change in law, change in interpretation got
10 separated out, put in its own regulation. It's
11 now in 3.114, which tells you what to do when
12 there's been a liberalizing law or a -- a -- a
13 -- a law that -- that cuts against the veteran's
14 favor.

15 And so these are -- the reason it
16 matters is you have to understand the words
17 "change in interpretation" in that context and
18 not in the abstract, as the government wants to
19 do.

20 JUSTICE KAGAN: So you think it's just
21 like an unfortunate part of that, of -- of
22 something, of --

23 MS. BOSTWICK: I -- I don't think it's
24 --

25 JUSTICE KAGAN: I mean, nobody writes

1 this provision in such a way to say "change in
2 interpretation" is excluded from CUE if that
3 change in interpretation has -- you know, is --
4 is -- is not an error in the first place.

5 So I -- I guess I'm -- I'm struggling
6 a little bit to understand what your view of the
7 history is that would produce that consequence.

8 MS. BOSTWICK: I think what I -- what
9 I'm trying to highlight for the Court, Your
10 Honor, is that that's not what the regulation
11 says. The preamble does not say this is an
12 exception from CUE.

13 What it says -- and, again, this is at
14 16a, Appendix B to our opening brief -- "the
15 provisions of this section apply except where an
16 award was based on an act of commission or
17 omission by the veteran" or "there is a change
18 in law or Department of Veterans Affairs issue,
19 or change in interpretation of law or Department
20 of Veterans Affairs issue," bracket, go see
21 Section 3.114, "or the evidence establishes that
22 service connection was clearly illegal."

23 And that's not carving those things
24 out of CUE. It's carving them out of
25 Section 3.105 as a whole. It's telling you --

1 it's a cross-reference. It says, if this is the
2 situation you're in, here's where you go look.

3 Now, of course, you still have to
4 distinguish between what falls under CUE and
5 what falls under a -- a change in law, change in
6 interpretation, but, as we've demonstrated, the
7 latter one has consistently been understood
8 throughout its history to mean a genuine change,
9 a new act of Congress, a switch from one
10 permissible interpretation of the statute to
11 another by the agency.

12 And that's why, when you have a
13 change, what you do is you -- you -- you go back
14 and update the decision and you say: Okay, now
15 that this is the law, we're going to give the
16 veteran -- adjust the veteran's benefits going
17 forward to comply with that law.

18 JUSTICE KAVANAUGH: What do you do
19 with the General Counsel opinion from 1994 which
20 seemed to suggest or said "decisions of the
21 Court of Veterans Appeals invalidating VA
22 regulations or statutory interpretations do not
23 have retroactive effect in relation to prior
24 final adjudications of claims," which the
25 government cites and the -- the lower court

1 cited as evidence of a common understanding, the
2 Russell case, as well as this and other
3 understandings that they say are incorporated
4 into the statute.

5 So how do you respond to that?

6 MS. BOSTWICK: Certainly. So I -- I
7 don't think the government has actually relied
8 on it, at least not very heavily in its merits
9 briefing, and there's good reason for that. As
10 we've -- we've demonstrated, that opinion --
11 first of all, it says that the practice was
12 inconsistent, so it doesn't purport to identify
13 a consistent practice.

14 But, moreover, even the -- the -- the
15 inconsistency label is inaccurate. It just --
16 that General Counsel opinion simply
17 mis-describes the holding of Look and it doesn't
18 otherwise point to, nor has the government
19 pointed to, any example of the VA or the
20 Veterans Court precodification saying that when
21 you have the situation we have here, when you
22 have a -- a regulation that violates a statute,
23 that that's not CUE. There's no counterexample
24 that they've identified.

25 JUSTICE KAVANAUGH: How about the

1 broader context that Justice Thomas was
2 referring to, that what we're talking about here
3 is not direct review but collateral review, and
4 the government says, therefore, the standard for
5 relief should be higher because the implications
6 are going to be dramatic. And the Veterans
7 Court here, for example, has said that doing
8 this would impose tremendous hardship under --
9 on the agency, and -- and all of that's the
10 reason for the high bar.

11 So how do you respond to all that?

12 MS. BOSTWICK: Certainly. I'll --
13 I'll address the -- the high bar issue first and
14 then -- and then potentially the -- the -- the
15 floodgates problem.

16 It is a high bar. It is -- CUE is
17 much narrower than direct appeal. On direct
18 appeal, you -- a veteran can raise all kinds of
19 legal, procedural, factual errors that are not
20 available for CUE.

21 JUSTICE KAVANAUGH: Can I just stop
22 you there? Because --

23 MS. BOSTWICK: Yes.

24 JUSTICE KAVANAUGH: -- I'm wondering
25 how high a bar you're saying it is. Anytime a

1 regulation is determined to be an impermissible
2 interpretation of the statute, it seems to me
3 you're saying that's clear and unmistakable
4 error. And if it's not, can you tell me what
5 the delta is?

6 MS. BOSTWICK: No. I -- I -- I would
7 agree with you, Your Honor, right? So a -- a --
8 a clear and unmistakable error is one that is
9 obvious or manifest. We do think that any error
10 of statutory interpretation, so long as it
11 affected the outcome, falls within CUE. And
12 that makes sense. That's consistent with other
13 high bar standards --

14 JUSTICE KAVANAUGH: But how does
15 that -- I guess, how does that make sense?
16 Because you could have, as here, 20 years later,
17 a regulation that everyone's followed and then a
18 court finally says, you know, that actually is
19 inconsistent with the statute.

20 You're saying you go back -- you don't
21 just do that going forward with a supplemental
22 claim, you go back and retroactively give
23 benefits for all those years the agency relied
24 on the regulation?

25 MS. BOSTWICK: Yes, absolutely. That

1 is what Congress intended in this -- right,
2 because the -- the point is, under the law,
3 under the statute, the veteran was supposed to
4 receive those benefits all along. And so we go
5 back and we put him close to the position he
6 would have been in. There isn't an interest
7 payment, but --

8 JUSTICE BARRETT: But --

9 JUSTICE KAGAN: But --

10 JUSTICE BARRETT: -- Ms. Bostwick, can
11 I just follow up on what Justice Kavanaugh said?

12 So it's your position that every
13 single time the agency misinterprets a statute,
14 it's always clear and unmistakable?

15 So it seems to me like sometimes you
16 have here -- and -- and -- and, here, you know,
17 as -- as Justice Kavanaugh said, you had 20
18 years of an interpretation one way, and you had
19 the Federal Circuit pointing out that it made
20 1111 look illogical and awkward because it
21 didn't really have to do with the presumption of
22 -- of sound condition.

23 Are all misinterpretations of a
24 statute clear?

25 MS. BOSTWICK: So we think they are,

1 but even if the Court thinks that there are some
2 statutory interpretation errors that wouldn't
3 satisfy CUE, this is the paradigmatic example.
4 And I want to address what you've brought up
5 about the supposed lack of clarity in the -- the
6 statute and -- and the VA's regulation.

7 This is -- this is laid out most
8 clearly -- it's laid out in Wagner itself. It's
9 also laid out at pages 24 to 25 of the NVLSP
10 amicus brief. Before 1961, VA's regulation
11 tracked the statute. It tracked the statute
12 word for word. It included -- it -- it said
13 that you -- the agency had to have "clear and
14 unmistakable evidence demonstrating that the
15 injury or disease existed prior to acceptance
16 and enrollment and was not aggravated by such
17 service." That was Section 3.63 of the Code of
18 Federal Regulations in 1956.

19 Congress then codified the presumption
20 of soundness into the statute in 1958, again
21 using that two-part formulation, "existed before
22 acceptance and enrollment" and "was not
23 aggravated by such service."

24 Three years later, VA came back in
25 what was supposed to be simply an administrative

1 repromulgation of its rules, no substantive
2 change -- no -- no explanation, certainly, for
3 any -- any substantive change that might be in
4 there, and they simply deleted the end of the
5 sentence.

6 This is not an interpretation. This
7 is certainly not a considered interpretation.
8 And when Wagner talks about it being somewhat
9 difficult to parse, it doesn't mean that the
10 language is difficult to parse.

11 What -- what the Court in Wagner was
12 saying was this seems like a strange thing for
13 Congress to have done for exactly the reason you
14 pointed out, Your Honor, because you're
15 presuming someone was in sound condition even
16 though you're acknowledging that they entered
17 service with a -- a -- a preexisting condition.

18 But Wagner also identifies the reason
19 for that, and it was because of this long
20 struggle between the executive and the
21 legislature where the executive was -- was --
22 was -- was playing games, was -- was discharging
23 veterans who had had no conditions noted on
24 their entry to service and then saying, "oh,
25 that was a medical issue," and there's also a

1 long history of -- of -- excuse me, of the VA
2 telling Congress "don't include this aggravation
3 piece" of -- of the -- the burden and Congress
4 saying "no, we want it in there."

5 This was a very intentional act on the
6 part of Congress and no explanation for VA's
7 elimination of that.

8 JUSTICE BREYER: How did it happen? I
9 mean, look, do I have this correctly? Please
10 correct me if I'm wrong.

11 You have a client.

12 MS. BOSTWICK: Correct.

13 JUSTICE BREYER: If your client was
14 sound at the time he enlisted, he's not sound
15 now.

16 MS. BOSTWICK: Correct.

17 JUSTICE BREYER: And so he gets some
18 money.

19 MS. BOSTWICK: Correct.

20 JUSTICE BREYER: So let's see if he
21 was sound when he enlisted. We have a statute,
22 and the statute says he is sound when he
23 enlisted if A or -- or B. And he -- let's look
24 at it. So he's not going to be sound -- I mean,
25 sorry, he's not -- he is sound unless he's not

1 sound.

2 MS. BOSTWICK: Unless A or B.

3 JUSTICE BREYER: Unless he's not
4 sound.

5 MS. BOSTWICK: Correct.

6 JUSTICE BREYER: He's sound unless
7 he's not sound.

8 MS. BOSTWICK: Correct.

9 JUSTICE BREYER: Now he is not sound
10 if A or B.

11 MS. BOSTWICK: Correct.

12 JUSTICE BREYER: So we look at A. A
13 was he had noted there not sound when he signed
14 up.

15 MS. BOSTWICK: Or that the -- the --
16 the VA examiner had -- had thought.

17 JUSTICE BREYER: Yeah. Had noted it.

18 MS. BOSTWICK: Correct.

19 JUSTICE BREYER: That's not your
20 client.

21 MS. BOSTWICK: Correct.

22 JUSTICE BREYER: So we're not in A.
23 So he's not -- "not sound" under A.

24 MS. BOSTWICK: Correct.

25 JUSTICE BREYER: Oh, so now we look at

1 B, and B says there has to be really good
2 evidence that he was really sick before he was
3 accepted and the sickness was not aggravated by
4 his being in the service.

5 MS. BOSTWICK: I think I might have
6 misunderstood your -- your -- your A and B. I
7 -- I think I made the --

8 JUSTICE BREYER: I probably --
9 (Laughter.)

10 JUSTICE BREYER: That's why I said it,
11 because I wanted to get this right in my mind,
12 that -- that -- that if he is not sound when he
13 signed up --

14 MS. BOSTWICK: Mm-hmm.

15 JUSTICE BREYER: -- no money.

16 MS. BOSTWICK: No. No, no, no.

17 JUSTICE BREYER: Now. Well, wait.

18 Wait --

19 MS. BOSTWICK: Oh, sorry.

20 JUSTICE BREYER: -- because "not
21 sound" has a special definition. Not sound,
22 there are two situations in which he's not
23 sound. The first says "defects, infirmities, or
24 disorder noted at the time of the examination."

25 MS. BOSTWICK: Right.

1 JUSTICE BREYER: He's not sound if it
2 was that. Was it that? No.

3 MS. BOSTWICK: No.

4 JUSTICE BREYER: Okay. Now there's a
5 second way he's not sound, if he really was very
6 sick when he was accepted but the sickness was
7 aggravated during his service.

8 MS. BOSTWICK: Correct.

9 JUSTICE BREYER: So let's see if he
10 fits in B, and the answer is we're not sure, but
11 maybe we are, but, regardless, the reg didn't
12 copy the words "and was not aggravated by
13 service."

14 MS. BOSTWICK: Correct.

15 JUSTICE BREYER: Okay.

16 MS. BOSTWICK: And that's --

17 JUSTICE BREYER: And so how did
18 somebody make that mistake? It's there in the
19 statute. They write a reg, and then they don't
20 put in the words "and was not aggravated by that
21 service."

22 MS. BOSTWICK: Exactly.

23 JUSTICE BREYER: Because they're
24 pretending that people were sound at the time
25 they started, but that isn't really true. But

1 we have a pretending, and what it does by
2 pretending is it says, if you were sick as a dog
3 at the time you signed up, we're still going to
4 count you as not sick as a dog if your disease
5 was aggravated by service.

6 So we're going to treat the aggravated
7 people just as if they were really --

8 MS. BOSTWICK: And -- and what's
9 important --

10 JUSTICE BREYER: -- sick as a dog.
11 Wait, wait.

12 MS. BOSTWICK: -- which was --

13 JUSTICE BREYER: See, I can get it
14 mixed up very easy.

15 MS. BOSTWICK: I -- I hear you. I
16 hear you.

17 JUSTICE BREYER: But you have to
18 explain it so clearly that -- that you produce
19 the reaction when I read it the third time,
20 which is how did they ever not copy those last
21 six words?

22 MS. BOSTWICK: I -- I really can't
23 say, Justice Breyer. They did not put any sort
24 of explanation in when they changed the
25 regulation in 1961, but I want to -- this

1 description of --

2 JUSTICE BREYER: Have I said it
3 correctly? Because, if I haven't, you say it
4 correctly.

5 MS. BOSTWICK: I -- I believe you've
6 said it correctly. And -- and --

7 JUSTICE KAGAN: But I think, Ms.
8 Bostwick, that that's kind of not the issue. I
9 mean, the issue is that there was a regulation
10 that said that, and the question is what effect
11 that regulation had.

12 MS. BOSTWICK: Mm-hmm.

13 JUSTICE KAGAN: And, you know, there's
14 a statute that says the Board is bound in its
15 decision by the regulations. Now, actually,
16 even without that statutory provision, that
17 seems like that's just what the Board is
18 supposed to do.

19 Now, here, there's a statute that lays
20 it out. You're bound by the regulations.
21 You're bound regardless whether the regulations
22 are right or whether the regulations are wrong.

23 So, once you're bound by the
24 regulation, how could it be -- how can it
25 possibly be error, let alone clear and

1 unmistakable error, for the Board to do what
2 they're commanded to do?

3 MS. BOSTWICK: Because the Board was
4 also commanded to follow the statute. And we're
5 not suggesting that the Board should have
6 violated Section 4004 at the time, now 7104.
7 What we're saying is that the Board -- sure, the
8 Board sitting there with both of those
9 directives, it could not comply with both.

10 And so the question is not was the
11 Board -- was the adjudicator somehow at fault.
12 The question is can the court now look back and
13 say --

14 JUSTICE ALITO: But why -- why isn't
15 that the issue? I mean, you're trying to make
16 this a lot simpler than it actually is. You
17 have one interpretation of the concept of error:
18 Is it objectively erroneous? The government has
19 another: Was there an adjudicative error? And
20 we have to decide which one is the correct
21 interpretation. How do we decide?

22 MS. BOSTWICK: So I think you start
23 with the text of the statute. "A decision by
24 the Board is subject to revision on the grounds
25 of clear and unmistakable error." That doesn't

1 say that the Board has to have committed a clear
2 and unmistakable error.

3 JUSTICE ALITO: I mean, well, you're
4 --

5 MS. BOSTWICK: It's a --

6 JUSTICE ALITO: There are two
7 possible -- grant me that there are two possible
8 interpretations. You think it's impossible to
9 interpret the term "error" to mean adjudicative
10 error? It's impossible to use the term that
11 way?

12 MS. BOSTWICK: In this context, yes, I
13 would say so.

14 JUSTICE ALITO: What is it about this
15 context that's unique?

16 MS. BOSTWICK: It's the -- the history
17 of how CUE had been understood before Congress
18 codified it. It's the -- the -- the pro-veteran
19 context in which we're in where we understand
20 that Congress intends to legislate for the
21 benefit of veterans.

22 JUSTICE ALITO: I mean, is that a
23 sound -- is that a sound interpretive tool?

24 MS. BOSTWICK: I think it is, but the
25 Court doesn't need to reach it because we think

1 the statute is --

2 JUSTICE ALITO: All right. If we put
3 that aside, then I don't know what you have
4 left.

5 MS. BOSTWICK: We have -- we have
6 Russell. We have -- have the decisions that
7 Congress looked to that says that when statutory
8 or regulatory provisions -- statutory or
9 regulatory provisions, not "and," as the
10 government would have it, extant at the time
11 were incorrectly applied, that's CUE.

12 We have the Fugo decision that's also
13 cited in the legislative history saying that you
14 judge this CUE from the perspective of a -- a
15 later adjudicator looking at it.

16 JUSTICE BREYER: Could you do this? I
17 mean, this is what I think the problem is.
18 There is a -- there is a statute and it says any
19 veteran who served in World War II -- it says a
20 thousand dollars bonus will go to any veteran
21 who served in World War II or in Korea, okay?

22 The reg says any veteran will get the
23 thousand dollars if he served in World War II.
24 They just left out Korea.

25 MS. BOSTWICK: Yeah.

1 JUSTICE BREYER: Well, I don't know
2 how, but they did. And so someone who served in
3 Korea says read the statute. It says Korea. I
4 served in Korea. Don't I get the money?

5 MS. BOSTWICK: Yes.

6 JUSTICE BREYER: And that's the issue.

7 MS. BOSTWICK: That is --

8 JUSTICE BREYER: And so their -- their
9 point is, well, we had a reg that says World War
10 II. It doesn't say anything about Korea. And
11 they have to follow the reg.

12 And you say?

13 MS. BOSTWICK: The -- the fact that
14 they had to follow the reg does not absolve them
15 of -- it does not absolve the decision of being
16 infected with clear and unmistakable error.

17 And this is a natural way of -- of
18 talking about things. When a -- if a jury is --

19 JUSTICE KAGAN: I'm not sure it is a
20 natural way of talking about things. I mean,
21 suppose this Court issues an -- a decision and
22 it's completely wrong and it's later reversed.

23 But, in the interim, there are, you
24 know, many lower courts that follow our decision
25 because that's what they're supposed to do.

1 Have they made a clear and unmistakable error?

2 MS. BOSTWICK: They've made an error.
3 That's what Agostini says. And they've made an
4 error that's correctible on collateral review.
5 And so it -- remember, there's -- there's --
6 there's sort of two questions: Was there error
7 and what are the consequences?

8 And so something may be an error under
9 our view in many different contexts, but the
10 question then is, okay, what result? Can a --

11 JUSTICE GORSUCH: Counsel, can I --
12 can I pick up there --

13 MS. BOSTWICK: Certainly.

14 JUSTICE GORSUCH: -- on -- on the
15 question of remedy or consequences.

16 MS. BOSTWICK: Yes.

17 JUSTICE GORSUCH: Let's just posit for
18 the moment that I -- I agree with you the
19 Federal Circuit read CUE too narrowly. It ---
20 unduly influenced by the regulation. And I
21 apologize, but this will -- this -- my time.
22 Count this against my time.

23 And it unduly read it -- it didn't
24 read the statute as it's now written. It read
25 it influenced by the background regulation and

1 -- and to the point where it said even a
2 judicial opinion doesn't qualify in these
3 circumstances. Let's say we agree with you
4 that, yes, that's a clear and unmistakable
5 error. Wagner was one. All right. Fine.

6 MS. BOSTWICK: Mm-hmm.

7 JUSTICE GORSUCH: Do we have to reach
8 the question of remedy, or can we -- could we
9 remand it at that point back for the Federal
10 Circuit to decide what the appropriate remedy
11 would be?

12 MS. BOSTWICK: The remedy in this
13 case, Justice Gorsuch?

14 JUSTICE GORSUCH: Yeah. Yeah.

15 MS. BOSTWICK: Yes. No, we -- we're
16 not asking the Court to -- to reach that
17 question. It certainly could. And I'm -- I'm
18 happy to -- to address it if the Court is
19 interested.

20 JUSTICE GORSUCH: But we could say --

21 MS. BOSTWICK: But, no, we think a --

22 JUSTICE GORSUCH: -- we could say
23 we're not sure if it's a clear and unmistakable
24 error, but we're -- one thing we're sure about
25 is that the Federal Circuit analyzed the

1 question incorrectly.

2 MS. BOSTWICK: Certainly. You could
3 say that when you have a -- a regulation that
4 contradicts a plain statute, that can be CUE. I
5 think that it would also be natural for the
6 Court to go on to say: And that's what we have
7 here. The question whether that was, for
8 example, outcome-determinative in Mr. George's
9 case could be addressed on remand.

10 JUSTICE BREYER: Are you aware of any
11 Supreme Court case or any case, because I can't
12 think of one, but there must be some -- one
13 somewhere where the legal error at issue was
14 there's a statute and it says you get money or
15 something good if A or B, and then the error
16 that was made was the reg writer left out B?

17 I can't think of a case like that, but
18 there may be one, in which case how the Supreme
19 Court would behave would be quite relevant
20 because usually, you know, there is sort of two
21 sides to the argument. But I don't know of an
22 error that clear that I can think of.

23 MS. BOSTWICK: I'm not aware of one,
24 Justice Breyer, that fits that exact scenario,
25 but --

1 JUSTICE BREYER: The other side might
2 be.

3 MS. BOSTWICK: But -- but, certainly,
4 you know, it -- it is clear in this Court's
5 cases going back to Manhattan General Equipment,
6 to Dixon, that when the agency's regulation
7 contradicts the statute, that clearly it is a
8 legal nullity.

9 JUSTICE SOTOMAYOR: Counsel, can we go
10 back to your point that this statute is not
11 about adjudicator error, it's about error in the
12 decision, and that's the language of the
13 statute?

14 MS. BOSTWICK: Yes.

15 JUSTICE SOTOMAYOR: An error in a
16 decision, not who was at fault for it, correct?

17 MS. BOSTWICK: Correct, Your Honor.

18 JUSTICE SOTOMAYOR: All right. Am I
19 correct that the -- that the veterans -- that
20 the regulations say that there is -- if there is
21 a material new fact that wasn't before the
22 adjudicator, that that could be grounds for a
23 CUE?

24 MS. BOSTWICK: No, Your Honor.

25 JUSTICE SOTOMAYOR: Ah.

1 MS. BOSTWICK: That is a separate type
2 of revision.

3 JUSTICE SOTOMAYOR: Right.

4 MS. BOSTWICK: It's a -- it's a -- a
5 separate type of claim. That's not clear and
6 unmistakable error precisely because the Board
7 didn't have those facts before it at the time.

8 JUSTICE SOTOMAYOR: But that can
9 reopen a decision?

10 MS. BOSTWICK: It can reopen a
11 decision. You -- you get prospective benefits
12 --

13 JUSTICE SOTOMAYOR: So, if a new
14 material fact can reopen a decision, what you're
15 saying is a new, not interpretation of the
16 statute, but a new -- a -- a -- a decision that
17 a statute says what it says is no different than
18 a new material fact, correct?

19 MS. BOSTWICK: It's different in -- in
20 the consequences. When you have a new and
21 material fact, you bring a supplemental claim.
22 That's not available when you have what we have
23 here. Mr. George can't file a supplemental
24 claim --

25 JUSTICE SOTOMAYOR: Got it.

1 MS. BOSTWICK: -- and say, oh, there's
2 this new decision --

3 JUSTICE SOTOMAYOR: Now let's go back
4 to the question of clarity. Your position is
5 very easy at Chevron step 2. If there's a
6 change in interpretation or a new law, then you
7 agree there's no CUE, correct?

8 MS. BOSTWICK: A change from one
9 legitimate interpretation to another? Yes.
10 Yes, Your Honor.

11 JUSTICE SOTOMAYOR: Or a permissible
12 interpretation. Let's not use the word
13 legitimate.

14 MS. BOSTWICK: Permissible, I'm sorry.

15 JUSTICE SOTOMAYOR: Permissible.
16 Okay. But even in step 1 Chevron, there are
17 some clear and unmistakable errors -- I'm using
18 the language here of the statute, okay -- but I
19 do think that there are some step 1 situations
20 where it's not so clear and unmistakable,
21 meaning, in one case this Court decided not so
22 long ago, SAS Institute -- I was a dissenter --
23 on step 1, the Court said one interpretation and
24 four dissenters said another.

25 So what do we do with that? This goes

1 back to what Justice Gorsuch raised, which is I
2 can genuinely see some situations where the
3 error's not clear and unmistakable even under
4 step 1.

5 MS. BOSTWICK: So I would say the
6 relevant time period is after that decision
7 issues. Certainly, notwithstanding the
8 reasonableness of -- of your view of how the
9 case should have been decided, once it was
10 decided, if a lower court said, "I don't like
11 that, I'm going to follow the dissent instead,"
12 that would be a clear and unmistakable error.
13 And that's what we have here.

14 But moreover, even if some of those
15 errors you think would not be sufficiently clear
16 or unmistakable, that -- that's not the -- the
17 case that's before the Court. We don't have any
18 disagreement. We have the agency -- the
19 government confessing error and saying "please
20 invalidate our regulation, it's wrong," and --

21 JUSTICE SOTOMAYOR: So this goes back
22 to Justice Gorsuch's point, which is, if we say
23 some errors can -- some situations can be clear
24 and unmistakable, you decide why this wasn't, or
25 tell us why it wasn't. That would be enough for

1 you?

2 MS. BOSTWICK: That would certainly be
3 a -- a helpful decision. We are asking the
4 Court to go further, but, no, that would be
5 favorable.

6 JUSTICE SOTOMAYOR: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas, anything further?

10 Justice Breyer, anything?

11 JUSTICE KAVANAUGH: Oh.

12 JUSTICE BARRETT: Is it to me?

13 JUSTICE KAVANAUGH: Yeah, I'm sorry.

14 I had --

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

17 JUSTICE KAVANAUGH: Yeah, I have a
18 couple.

19 Back to the structure of how this
20 works out, the government relies on the
21 regulatory text before 1997 and says that was
22 incorporated into the statutory text and say the
23 long-standing regulatory text to describe the
24 scope of clear and unmistakable error review by
25 reference to the legal understandings that

1 existed when the prior decision was rendered.

2 And I assume your response to that is
3 the regulatory text is not lifted word for word
4 into the statutory text, or am I
5 misunderstanding?

6 MS. BOSTWICK: That's part one of my
7 answer, is that it wasn't lifted into the
8 statutory text. Part two of my answer is, even
9 if it had been, it did not function as an
10 exclusion of things that otherwise would have
11 been CUE and -- and say these are no longer CUE.
12 It instead pointed to a different remedy.

13 JUSTICE KAVANAUGH: Okay. And on the
14 Office of General Counsel opinion, we covered
15 that, but you just think that's wrong?

16 MS. BOSTWICK: The 1994 one? Yes,
17 correct.

18 JUSTICE KAVANAUGH: Okay.

19 MS. BOSTWICK: And also that Congress
20 did not demonstrate any awareness of it.

21 JUSTICE KAVANAUGH: Okay. On the
22 Congress awareness point, is there evidence
23 anywhere that Congress thought any clear and
24 unmistakable errors would trigger retroactive
25 award of benefits back to the original time?

1 MS. BOSTWICK: Yes, it's in the --
2 it's in both CUE statutes that that's the -- the
3 remedy.

4 JUSTICE KAVANAUGH: And then, on the
5 floodgates issue, you got cut off before you
6 issued the question -- you answered the question
7 about the Veterans Court saying this would
8 impose a pretty substantial strain on a system
9 that is already extraordinarily strained.

10 Your response to that?

11 MS. BOSTWICK: Yes. Another two-part
12 answer, Justice Kavanaugh.

13 First of all, veterans can already
14 attempt at least to bring some form of new
15 claim, in theory, a claim under 3.114 if that's
16 what the agency thinks it should be, although
17 there's no clear mechanism for doing so, but --
18 but a veteran can still attempt to file a claim
19 regardless. And so we don't think there's going
20 to be a sudden flood of claims to the agency.

21 But, regardless, these are benefits
22 that Congress wanted these people to have all
23 the time -- from -- from the outset, right?
24 These -- these are payments that Congress
25 accounted for and said this is what we want

1 these veterans to have.

2 And so the fact that, you know, if it
3 creates an administrative difficulty for them to
4 now come back to the agency and -- and right the
5 wrong that was done to them, we don't think
6 that's a -- a problem under Congress's statute.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Could I just follow up
10 on Justice Kavanaugh's first question? And you
11 said you had a two-part answer. The first was
12 it wasn't codified.

13 But let's assume it was codified.
14 And -- and -- and then you said, well, it's only
15 about when you change from one permissible
16 interpretation to another. And even putting
17 aside my prior question of, like, why would that
18 be excluded, but, I mean, just the -- the -- the
19 language, the -- the understanding a change in
20 interpretation, doesn't that encompass both
21 kinds of changes?

22 In other words, there's a -- you know,
23 there's a change about -- you know, from a
24 non-error to a non-error. There's also a change
25 from something that turns out to be an error to

1 a non-error.

2 I mean, it's -- it's still a change.
3 And if you assume that that standard is what was
4 basically understood when they codified this
5 language, why wouldn't this count?

6 MS. BOSTWICK: It's -- it's not a
7 change -- it may be a change in the abstract,
8 but that's not the relevant question, right?
9 You have to look at it in context. It talks
10 about changes in law or changes in
11 interpretation thereof, both of those things
12 together.

13 Certainly, when there's a change in
14 law, that's not something that --

15 JUSTICE KAGAN: Well, focusing on the
16 change in interpretation, you have a rule that
17 interprets the law. It was wrong. But, you
18 know, they changed it. So that's a change in
19 interpretation.

20 MS. BOSTWICK: But I think --

21 JUSTICE KAGAN: I guess that goes back
22 to the Chief Justice's original question.

23 MS. BOSTWICK: -- I think the pairing
24 with change in law -- in law matters, right,
25 because the government's reading of this whole

1 preamble, both parts of it, is that it -- it --
2 it functions to -- to identify some less serious
3 errors that were not going to -- that we're --
4 we're -- we're not going to call CUE. That's
5 not what it's doing.

6 And one of the ways we know that's not
7 what it's doing is, when there is a change in
8 law, nobody would say that the original decision
9 was erroneous. This simply isn't taking errors
10 and carving them out. It's identifying things
11 that were never errors to begin with. That's
12 how this language was used in the regulations
13 dating back to the 1920s.

14 And when Congress codified this
15 concept -- this is -- I believe it's at page 7
16 of our opening brief. When Congress put this
17 into the effective date statutes, 3 -- Section
18 3010, it referred to a change in an act or a
19 change in VA issue. And so it's making clear
20 that when it's talking about changes in
21 interpretation, it's at the regulatory level,
22 not a judicial decision.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 Thank you, counsel.

1 Mr. Yang.

2 ORAL ARGUMENT OF ANTHONY A. YANG

3 ON BEHALF OF THE RESPONDENT

4 MR. YANG: Mr. Chief Justice -- sorry.

5 Mr. Chief Justice, and may it please the Court:

6 Clear and unmistakable error is not a
7 mere error. Congress separately provided for
8 direct judicial review under an appropriately
9 timed appeal to correct errors like that here.

10 This is quite different. Clear and
11 unmistakable error serves the function of
12 allowing for correction on collateral review
13 with no time limits, and it's a very specific
14 type of error based on the legal context that
15 existed at the time of the original decision, an
16 error that no one from that framework could
17 reasonably dispute.

18 The Board's application of a
19 regulation that Congress itself had required the
20 Board to apply does not qualify. The phrase
21 "clear and unmistakable error" standing alone
22 suggests a highly unusual error, more egregious
23 than just clear error, and an adjudicator is not
24 naturally said to commit clear and unmistakable
25 error by doing something it's required to do.

1 When Congress enacted Section 7111
2 using that term, it was already a term of art
3 with an established regulatory meaning. For
4 nearly 60 years now, the regulation governing
5 clear and unmistakable error provided that such
6 error cannot be based on a change in
7 interpretation of the law.

8 And that's exactly what we have here.
9 The interpretation of Section 111 and the VA's
10 regulation changed when the VA and then the
11 Federal Circuit reinterpreted that provision to
12 require more than the regulation did.

13 General Counsel Precedent Opinion 994
14 specifically held that the invalidation of a
15 regulation is a change in legal interpretation
16 that cannot constitute clear and unmistakable
17 error. That opinion was applied almost a dozen
18 times before Congress codified CUE in 1997.

19 And what Petitioner is suggesting is a
20 real radical change here. Notwithstanding the
21 text that eliminated changes in interpretation,
22 they think changes in interpretation is fair
23 game even though the Board was required by
24 Congress to apply that.

25 We believe that's incorrect and that

1 the tradition going back now almost 60 years
2 supports our position.

3 JUSTICE THOMAS: Mr. Yang, you seem to
4 suggest or argue that Congress codified the
5 prior understanding of the CUE, the regulatory
6 understanding, and there seemed to be some
7 disagreement between you and -- and counsel on
8 the other side about that.

9 But how can we be sure that Congress
10 codified your understanding, whatever that is,
11 of CUE?

12 MR. YANG: Well, I think you have two
13 principles -- I guess maybe two or three
14 principles. One, this is a highly unusual term,
15 right? This is not a term that exists
16 elsewhere, "clear and unmistakable error." But
17 it had existed in the regulations for 35 years
18 before 1997.

19 And when Congress adopts such a very
20 unusual term -- this -- this is a term of art
21 from a regulatory context -- this Court has
22 repeatedly recognized that it intends to take
23 the old soil up with that term of art.

24 The term had been understood in '97,
25 as Precedent Opinion 994 suggests, as well as

1 the Berger decision, which cites that precedent
2 opinion and says that a new rule of law from a
3 later statutory construction case cannot
4 possibly be the basis for CUE because CUE is
5 only concerned with the law as it existed at the
6 time.

7 Russell, for instance, which is cited
8 in the legislative history, if you use that, but
9 it was also kind of the en banc decision that --
10 that -- on this -- on this subject said that CUE
11 is where reasonable minds could only conclude
12 that the original decision was fatally flawed at
13 the time it was made. It must be an error in
14 the prior adjudication.

15 And then the relevant error is that
16 statutory/regulatory provisions extant at the
17 time were incorrectly applied. I think all of
18 that points very strongly in one direction.

19 And, you know, I think precedent
20 opinion is -- is -- is a nice way to highlight
21 that. That precedent opinion directly addressed
22 this issue here, and it arose in a very
23 high-profile context. This Court in Brown
24 versus Gardner invalidated a VA regulation
25 concerning liability when an injury is incurred

1 through treatment at a VA facility. It did so
2 just as the Federal Circuit had done so, just as
3 the Veterans Court had done so.

4 While cert was pending in Gardner, the
5 VA issued this precedent opinion because it had
6 to address how do we deal with invalidations of
7 regulations, and it concluded this is a change
8 in interpretation of law, consistent with the
9 reg.

10 The veteran in Gardner, in their
11 brief, cited Precedent Opinion 994 to the court
12 as a reason why that their opinion was right,
13 saying, hey, the VA says this won't apply
14 retrospectively, so, you know, don't worry about
15 it, it's just prospective.

16 Berger, the -- the Board applied
17 Precedent Opinion 994 about a dozen times before
18 1997 in various contexts, half of which --

19 JUSTICE GORSUCH: Counsel, I -- I --

20 MR. YANG: -- involved invalidation of
21 regs. I mean, this is --

22 JUSTICE GORSUCH: If I -- if I --

23 MR. YANG: -- this is something that
24 was --

25 JUSTICE GORSUCH: If I might?

1 MR. YANG: -- well under -- well
2 entrenched in the system.

3 JUSTICE GORSUCH: If I might, counsel?

4 MR. YANG: Sure.

5 JUSTICE GORSUCH: The premise of your
6 argument, I think, is a two-step. First, we
7 have to assume that Congress adopted words from
8 a regulation that it didn't choose to adopt. It
9 took some but not all, and we have to take your
10 presumption that that was just shorthand and all
11 the rest came with it.

12 And then, second, we have to, I think,
13 understand the regulation about changes in
14 interpretation of law or changes in law to
15 encompass judicial interpretations.

16 And what do we do with Professor
17 Mascott's amicus brief, for example, in which
18 she quite rightly points out that we don't
19 normally think of judicial interpretations as
20 changes in the law? In fact, in *Rivers*, we said
21 it's not accurate to say that a change in the
22 law -- that a judicial interpretation of
23 Congress's statute amounts to a change in the
24 law that previously prevailed? What do we do
25 about that?

1 MR. YANG: Yeah, I think that just
2 misunderstands the question. We're not
3 saying --

4 JUSTICE GORSUCH: Professor Mascott
5 just misunderstands the question?

6 MR. YANG: The -- the reframing of it
7 is incorrect. We're not saying the law has
8 changed. The law has meant what it always
9 meant.

10 JUSTICE GORSUCH: Mm-hmm.

11 MR. YANG: What we're saying is that
12 there was an earlier interpretation --

13 JUSTICE GORSUCH: Well, there
14 certainly was --

15 MR. YANG: -- and that interpretation
16 --

17 JUSTICE GORSUCH: -- by the agency,
18 but there hadn't yet been by any court of law.
19 And I guess that takes me to my second question,
20 is, okay, if -- if an agency interpretation --
21 and I assume that would mean not just a
22 regulation but maybe a litigation position. I
23 don't know. Maybe you can clarify that one.

24 MR. YANG: No.

25 JUSTICE GORSUCH: That wouldn't --

1 that wouldn't count. No, no, no. Okay. So it
2 has to be --

3 MR. YANG: Well, I can clarify --

4 JUSTICE GORSUCH: -- a regulation.

5 MR. YANG: -- it has to be applied --

6 JUSTICE GORSUCH: No, no, no. For --

7 MR. YANG: -- it has to be applied in

8 --

9 JUSTICE GORSUCH: -- for purposes of
10 my question, counsel, it doesn't matter.

11 MR. YANG: Okay.

12 JUSTICE GORSUCH: We have a
13 regulation. It's clearly wrong, okay? You --
14 you think this one may or may not qualify. I
15 don't know. Maybe the Federal Circuit will or
16 will -- won't think it will be. It may never
17 get there. We'll find out.

18 But let's say the -- the regulation,
19 since you want a regulation, says that -- that a
20 certain standard for disability applies in -- in
21 a segregated Army differently based on race.
22 That couldn't qualify as a clear and
23 unmistakable error?

24 MR. YANG: No. But there are other
25 ways to correct that error. See --

1 JUSTICE GORSUCH: Oh, within the
2 timeline, but -- but Congress couldn't later
3 authorize and didn't later authorize a court of
4 law to -- to correct that -- that -- that clear
5 and unmistakable error? Two different standards
6 of disability based on race.

7 MR. YANG: If you're talking about
8 what existed in 1997 when Congress enacted CUE,
9 Petitioners argue -- this is at page 43 of their
10 brief -- that Congress did so knowing that
11 there's direct judicial review to correct error,
12 right?

13 JUSTICE GORSUCH: I understand that.

14 MR. YANG: And -- and so --

15 JUSTICE GORSUCH: That's not my
16 question, though, and you know it's not my
17 question.

18 MR. YANG: Well, no, but I -- I guess
19 --

20 JUSTICE GORSUCH: My question is,
21 could a later court correct that or not? And I
22 think, on your interpretation, the answer has to
23 be no.

24 MR. YANG: No. It could do so in a
25 prospective way. The difference here for

1 collateral review, as opposed to filing a
2 supplemental claim, which allows for --

3 JUSTICE GORSUCH: I'm talking about on
4 collateral review.

5 MR. YANG: Well -- well, no, but
6 that's because --

7 JUSTICE GORSUCH: Okay.

8 MR. YANG: -- there's multiple
9 pathways for this correction, error correction,
10 to be done. Congress --

11 JUSTICE GORSUCH: Okay. Last -- last
12 question then is -- so we agree that that --
13 that error could not be corrected, I think.
14 That would not qualify it as a clear and
15 unmistakable error on your account. It's a
16 remarkable claim, but okay.

17 Last question is, do you -- do you
18 agree we should apply the veterans canon?

19 MR. YANG: No. We don't think the
20 veterans canon applies here for a few reasons.

21 First of all --

22 JUSTICE GORSUCH: Do you think it's a
23 sound canon?

24 MR. YANG: We're not challenging -- I
25 would talk about the origin if we'd like to. I

1 had this experience at my last argument with the
2 Court. I am prepared to talk about the origin
3 of the veterans canon this time, and we could
4 talk about it. We're not challenging the
5 veterans canon here, but I -- we think it just
6 -- just accepting it as is, it doesn't apply for
7 -- for three general reasons.

8 JUSTICE GORSUCH: But just so I got
9 you square on the record, the government doesn't
10 contest it's applicable -- that it's a sound
11 canon and -- and -- and could apply?

12 MR. YANG: We're not disputing that in
13 this case. It doesn't -- we don't have to
14 dispute it in the case because there's, I think,
15 three reasons why it wouldn't apply.

16 One, Congress used a preexisting term
17 with a meaning, and the fact that that term in
18 the abstract might be capable of some different
19 meaning really doesn't speak to what Congress's
20 intent was here, which was to take up the body
21 of existing regulatory law.

22 Second, clear and unmistakable error
23 can cut against veterans sometimes. It has the
24 potential to. It's not just errors that always
25 correct in favor of the veteran. It's errors

1 that can cut against the veteran. And if you
2 look at the regulation that existed at the
3 time -- and this is in Petitioner's brief; they
4 reproduce it back at 17a -- severance of service
5 connection applies the same clear and
6 unmistakable error standard. Now it's
7 different, and there are some more protections,
8 but the basic standard cuts both ways.

9 So there are some contexts where some
10 veterans might be on the opposite end of a clear
11 and unmistakable error case. And Congress --
12 when you have that kind of one set of veterans
13 and another, it doesn't make sense to apply the
14 veterans canon.

15 Third, this is a reticulated scheme
16 where there's a balance of policy interests with
17 the different avenues that Congress provided.
18 Congress provided for direct review. That's a
19 generous 120-day appeal period. But it also
20 provided that if you don't appeal, there's
21 finality in the Board's decision. It did
22 provide --

23 JUSTICE SOTOMAYOR: Except -- except,
24 counsel, it created a whole lot of exceptions to
25 finality, and this -- CUE is one of them. So --

1 MR. YANG: This is one of them.

2 JUSTICE SOTOMAYOR: Please let me
3 finish my question, okay? This is one of them.

4 We know that Congress writes statutes
5 giving exemptions that it doesn't give in other
6 areas because it does favor veterans. And
7 whether you believe the veterans canon applies
8 or not, the one thing it can -- one can say is
9 you read it the way Congress wrote it, and if it
10 wrote it in favor of veterans, you don't look
11 for reasons to exempt veterans from the coverage
12 it gives.

13 So going back to Justice Thomas's
14 question, I've read all the cases that you've
15 given me, whether it's Berger, Wagner, Love. I
16 do know that Love is a little bit unclear, but
17 it favors Petitioner's side more than it favors
18 yours.

19 The Veterans Court there said there
20 were two CUEs. It ended up deciding that the
21 second CUE was more the ground for its decision,
22 but it read it contrary to what you're saying it
23 said.

24 None of those other cases you've cited
25 dealt with a situation identical to this one.

1 They dealt with situations in which there were
2 changes in law or changes in permissible
3 regulatory interpretation.

4 The only thing that favors you is what
5 Justice Kavanaugh pointed to, which was that
6 veteran -- the Counsel's decision, but there is
7 no evidence that Congress knew that when it --
8 when it adopted this CUE standard. And that
9 Veterans' Counsel's decision admits that there
10 are some disputes about what this means.

11 And so I don't take it as much. It's
12 telling us what it thinks it means, but I'm not
13 sure that tells me what Congress thought it
14 meant because it never referenced it.

15 Having said all of that, I don't
16 understand how you can claim that clear and
17 unmistakable error in the decision made, in the
18 statute, in the interpretation of the statute,
19 even if it was compelled by the regulation at
20 the time, it's disjunctive, error in the statute
21 or error in the regulation. This isn't error in
22 applying the statute.

23 So why isn't that clear and
24 unmistakable or potentially clear and
25 unmistakable?

1 MR. YANG: Well, there's a lot baked
2 into that question. I can -- let me just try
3 tackling some parts of it.

4 I think you were referring to Look,
5 which had -- you know, you think may favor the
6 other side. Look, remember, was a 1992
7 decision. It was specifically addressed in
8 Precedent Opinion 994. It's never been cited
9 ever in 30 years by a court for its clear and
10 unmistakable error analysis that you think might
11 favor the other side, and that's because it just
12 wasn't presented.

13 We think that the precedent opinion
14 which was cited in Berger basically followed the
15 same type of principle about new interpretations
16 of law by courts don't count. That was what
17 existed.

18 It existed in Veterans Court -- Board
19 decisions follow -- explicitly following the
20 precedent opinion. And there's no indication
21 that Congress was aware of any cases except for
22 Russell and Fugo. It didn't cite all these
23 Veterans Court opinions.

24 There's -- the -- the precedent
25 opinion is -- not only did it exist, its holding

1 is published in the Federal Register. It's at
2 59 Federal Register 27309 expressing that
3 holding.

4 You know, there's no reason to think
5 that Congress, given the high-profile context in
6 which Precedent Opinion 994 arose, including an
7 -- a case in this Court, the one to invalidate
8 an ABA regulation I believe for the first time
9 on -- on judicial review, that Congress would
10 have thought that there was anything but this
11 would apply. Specifically, I mean, there's no
12 reason to think it would have thought Look was a
13 better case than --

14 JUSTICE BREYER: Well, I don't see how
15 they got this. Look, I'm thinking -- maybe I'm
16 the only one thinking if it's the only -- have
17 to address this quickly, but you make two
18 assumptions. Assumption 1, the words are clear,
19 unmistakable. It doesn't say evil. It doesn't
20 say the worst error ever made. It doesn't say
21 confusing. It says clear, unmistakable, okay?

22 Assume a second thing, and the second
23 thing is what I say to groups, which you're
24 lucky if you haven't heard it, but I say I'm not
25 one that pays a lot of attention to the words, I

1 do pay attention to them more than you think.
2 And if it says "carrot," you cannot say that
3 that means a rabbit. A carrot does not mean a
4 rabbit. And you have to follow the statute.

5 Okay. Now that's background. Now why
6 can't I write this opinion? It says clear,
7 unmistakable. Everybody wants this Court to
8 define what's clear and unmistakable. I don't
9 want to define it. I'll just tell you this.
10 This is the most clear and unmistakable error
11 I've seen in 40 years. I can't think of another
12 one.

13 Now what is it like? I've already
14 given you two examples. It's like a statute
15 that says you get a thousand dollars, veteran,
16 if you served in -- in the Philippines in World
17 War II or Korea, and they leave out Korea.

18 Or, to put it in these terms, it says
19 you count as sound -- I'm not saying you are
20 sound, but you count as sound unless A or B. A
21 happens to be that they noted you weren't sound,
22 and they didn't do that here.

23 So let's look at B. And B says you
24 weren't sound, you were sick at the time, but
25 the government has to absolutely prove that the

1 service didn't aggravate it.

2 Boy, that sounds like the Korea part
3 because they left that out, just like they left
4 out Korea, and so why I say this is clear,
5 unmistakable, is the person, whoever did this,
6 just didn't write that into the reg. Very
7 simple. He had no reason for not writing it
8 into the reg.

9 Even the government, with its
10 tremendous resources in the SG department, has
11 not been able to find a reason why they would
12 have left that out. It was an accident. But
13 it's sure clear and it's sure unmistakable.

14 Now what's wrong with that opinion?

15 MR. YANG: I've got four things to
16 discuss. I mean, you've talked about the
17 standard, and then you've talked about the
18 specific application --

19 JUSTICE BREYER: Well, talk about it
20 as you wish and as briefly as you wish. I don't
21 -- I don't mind.

22 MR. YANG: The application here I
23 think we addressed in our brief, and I'll --
24 I'll basically leave it there, but I think --
25 don't think this is at all a clear resolution of

1 -- of the question. There are two statutes that
2 involved aggravation. This statute itself was
3 internally self-contradictory. You don't look
4 to whether you were in sound condition at the
5 time of entry by whether, assuming that you
6 weren't, there was aggravation after.

7 So there's a second statute involving
8 aggravation. They construed the two at the same
9 time. You know, we now conclude that the better
10 interpretation is the one that we currently
11 have, but I don't think that it's anywhere clear
12 because oftentimes, when you find statutes that
13 don't make any sense --

14 JUSTICE KAGAN: Well, Mr. Yang --

15 MR. YANG: -- you need to look more
16 broadly.

17 JUSTICE KAGAN: -- just assume with
18 Justice Breyer and just assume that the
19 regulation was clearly and unmistakably wrong.
20 The regulation was clearly and unmistakably
21 wrong.

22 Now the question is, is the decision
23 --

24 MR. YANG: Yeah.

25 JUSTICE KAGAN: -- based on that

1 regulation clearly and unmistakably wrong? And
2 the premise of Justice Breyer's question is that
3 once you answer the first, you answer the second
4 as well.

5 I think the premise of your argument
6 is that there's a leap from the first to the
7 second, but you have to justify that leap. So
8 how would you justify it?

9 MR. YANG: There's -- I think we look
10 at the text of 7111(a). We look at the way that
11 it had been interpreted in Russell, which
12 focuses on the adjudicatory error.

13 And so let me start with that. 7111
14 talks about a decision by the Board is subject
15 to revision for clear and unmistakable error.
16 It's the decision that's the focus.

17 The next sentence says, if there's
18 such an error --

19 JUSTICE KAGAN: The decision as
20 opposed to the regulation?

21 MR. YANG: Exactly. It's an
22 adjudicatory. The -- the prior decision, that
23 is, the adjudicatory decision, shall be
24 reversed -- reversed or revised. It's not the
25 regulation. That's a separate thing done by a

1 separate entity.

2 Secondly, Russell explained that the
3 CUE review is --

4 JUSTICE KAGAN: Why is it important
5 that it's done by a separate entity? I mean,
6 you're suggesting the Board did nothing wrong
7 here. And that's right. The Board did nothing
8 wrong here. But the VA as a whole, let's assume
9 with Justice Breyer, did do something wrong.

10 MR. YANG: Right. Right.

11 JUSTICE KAGAN: Why is the focus on
12 the Board's decision rather than the VA
13 decision-making as a whole?

14 MR. YANG: Well, I think that, you
15 know, why Congress would have wanted that,
16 the -- the focus has always been on the Board.
17 If you look at Russell, Russell talks about CUE
18 -- CUE being reasonable minds could only
19 conclude that the original decision was fatally
20 flawed at the time it was made.

21 You look to the regulations and
22 statutes extant at the time to decide that, and
23 the error must be in the prior adjudication such
24 that the prior decision is revised.

25 JUSTICE GORSUCH: All that's

1 interesting. But the statute speaks about the
2 Secretary making a clear and unmistakable error,
3 right? I mean the statute. It's -- it's a
4 small thing, but --

5 MR. YANG: That's a different statute.
6 That -- there's two provisions at issue here --

7 JUSTICE GORSUCH: Yeah, but --

8 MR. YANG: -- right? 5109(a) I
9 believe is what you're talking about.

10 JUSTICE GORSUCH: Yeah.

11 MR. YANG: That says the decision by
12 the Secretary under this chapter --

13 JUSTICE GORSUCH: Yeah.

14 MR. YANG: -- right? That -- even the
15 other side, if you look at their brief, pages 5
16 to 6, they explain that that is the regional
17 office because that is a delegated decision to
18 the regional office, not the Secretary itself.

19 JUSTICE GORSUCH: Fair enough.

20 MR. YANG: But the second sentence of
21 that is, if the evidence established the error,
22 the prior decision shall be reversed. That's
23 the decision to get --

24 JUSTICE GORSUCH: The decision,
25 though, is of the Secretary throughout this

1 whole -- whole section.

2 MR. YANG: The only decision --

3 JUSTICE GORSUCH: Right?

4 MR. YANG: The only decision that we
5 have --

6 JUSTICE GORSUCH: Decision by the
7 Secretary, Section A.

8 MR. YANG: But -- yes, although that's
9 true with the Board. The Board issues the
10 decision for the Secretary.

11 JUSTICE GORSUCH: It's all delegated
12 authority from the Secretary, though, right?
13 The Board exercises delegated authority, I
14 assume, from the Secretary?

15 MR. YANG: Well, it's statutory
16 authority, but -- but, yes. So, I mean, the
17 Board --

18 JUSTICE GORSUCH: Okay, all right.
19 I -- I guess I'm -- I'm still stuck where
20 Justice Kagan is, and I'm not sure I understand
21 why it makes a difference.

22 It may be that the Board's decision
23 was justified in some sense. It wasn't, you
24 know, extralegal. It tried to comply with the
25 regulation. It had two competing statutory

1 commands, one of which it obeyed, one of which
2 it disobeyed, however.

3 I mean, it -- it -- it clearly and
4 unmistakably erred on the -- on the application
5 of veterans benefits, but it sought to abide by
6 the rule that it has to follow its regulations.
7 It had two competing statutory claims on it and
8 it did its best job, I don't doubt it, in some
9 sense justified, but its decision, we would
10 still say, as we do with lower courts, I think,
11 who are trying and struggling to interpret a
12 statute but get it wrong, we would say that's
13 clearly and unmistakably wrong.

14 MR. YANG: Well, that's the
15 conclusion. I mean, the question is, what is
16 clear and unmistakable error, right? And clear
17 and unmistakable error --

18 JUSTICE GORSUCH: I thought -- I
19 thought we had agreed for the purposes of this
20 line of questioning that we were -- we're taking
21 as given that the -- that the -- the -- the
22 interpretation -- the regulation was clearly and
23 unmistakably wrong. But, if you want to make
24 that argument, go ahead.

25 MR. YANG: Oh, no, no. I mean, I

1 didn't understand your -- there's a distinction,
2 though, between the regulation and the
3 adjudication, right? And the -- the decision
4 that's relevant is the adjudicatory decision.

5 JUSTICE GORSUCH: I understand that.
6 My question, though, was, counsel, the
7 adjudicatory body has two options. One, follow
8 a law that's pretty clear on its face it's
9 inconsistent with the regulation, all right?
10 Another law that says follow the regulations,
11 okay? It has to choose. I -- I don't fault it.
12 It -- it -- it chose one rather than the other,
13 okay?

14 It might in some sense be
15 understandable, justified maybe even, but why
16 can't that be fairly described as clear and
17 unmistakable error to the extent it rests on,
18 its analysis depends upon, a clear
19 misinterpretation of the statute, as Justice
20 Breyer outlined?

21 We would, for example, say with
22 respect to lower courts, if this came through
23 the judicial system, say we know our friends on
24 the Tenth Circuit were trying their best. We
25 know they did their absolute level best, but we

1 interpret the statute to plainly mean something
2 very different. Their error was clear and
3 unmistakable.

4 MR. YANG: I don't think that would be
5 a natural way to say it. You would say that
6 there was error, right?

7 JUSTICE GORSUCH: Well, we say all the
8 time at what is sometimes called Chevron step 1
9 that the plain language of the statute forbids
10 the lower court's opinion --

11 MR. YANG: Right, but --

12 JUSTICE GORSUCH: -- clearly and
13 unmistakably. I'm -- I'm sure I can find those
14 words.

15 MR. YANG: Justice Gorsuch, I think,
16 you know, talking about Chevron step 1, let me
17 give you an example. The Court has recently
18 decided a case called Babcock. It involved dual
19 status military technicians. You were the lone
20 dissenter on the statutory construction case.

21 JUSTICE GORSUCH: I must have been
22 wrong.

23 MR. YANG: I don't think you were
24 clearly and unmistakably wrong. You found
25 persuasive the Eighth Circuit's decision in a

1 case called Peterson, which was a Chevron step 1
2 decision. It came before all the other courts
3 that had decided against it. And then, in that
4 context, the Social Security Administration had
5 to decide, like, what do we do with Peterson
6 before the Court reversed or abrogated Peterson?

7 They have a -- there's a case called
8 Michael versus -- or Mitchael versus Colvin, 809
9 F.3d 1050, where the Eighth Circuit says no, no,
10 you know, you have a provision about change in
11 interpretation of law, you didn't have to apply
12 our decision in Peterson retroactively with
13 respect to closed SSA claims. Prospectively,
14 you do it, but not retroactively.

15 This is the same type of thing here.
16 There are remedies. The remedies are
17 multitudinous. You can appeal. If you don't
18 appeal -- and -- and if you appeal, then you can
19 get, you know, back to the date of your
20 application. If you don't do that, there's a
21 very low bar for a supplemental application. It
22 just has to be new and relevant evidence. It
23 can be cumulative. Just some evidence that's
24 relevant, right? You get a new adjudication
25 under the new understanding. If all else fails,

1 you could seek secretarial relief for an
2 administrative error.

3 But what we're talking about here is
4 something very different, collateral review
5 going back -- here, it's back to 1977, right --
6 where the provision had existed for 25 years
7 before anyone had any problems because the
8 provision is an unusual provision.

9 So did Congress intend to add an
10 entirely new claim to dig up decades' worth of
11 claims? The VA estimates that there right now
12 are about 16 million finally denied claims for
13 living veterans.

14 Now each veteran can have more than
15 one claim because they could have their knee,
16 they could have their -- you know, the back,
17 they could have PTSD. But there's about 16
18 million of these claims. If you start saying,
19 well, we're going to go back -- and there's been
20 a number of -- of regulations that have been
21 invalidated over time -- we're going to go back
22 indefinitely, where the VA is already
23 adjudicating 1.4 million claims a year, you're
24 going to add a new claim. Now maybe they can
25 bring prospective claims, but retrospective

1 claims on top of that?

2 Congress had reason to be cautious
3 here because, when you add to the system, you
4 add new claims that didn't exist before in the
5 regulatory scheme, you threaten the timing of
6 everything else.

7 So we think that our interpretation --
8 I mean, first of all, if there's not a binding
9 interpretation, our view is you need to have a
10 binding agency interpretation that's changed.
11 Board decisions aren't anything. They're not
12 precedent. They don't decide -- you know,
13 they're not binding. We can't appeal them.

14 But, if you have a regulation, if you
15 have a regulation that Congress required the
16 Board to be -- apply in its adjudication so the
17 decision of the Board is the same decision that
18 we're talking about on review, the decision of
19 the Board is bound by the regulation, in that
20 context, we -- you know, it may well be error.
21 You can correct it on direct review. We don't
22 think it's clear and unmistakable error on
23 collateral review with an unlimited timeline.

24 JUSTICE KAVANAUGH: On your argument
25 about what Congress thought as opposed to the

1 structure -- and I understand your structural
2 argument about collateral review and that's
3 different and this language is transplanted.
4 Just want to make sure -- I think I asked this
5 question imprecisely to Ms. Bostwick -- but was
6 there any congressional suggestion that this
7 situation, in other words, a reg that had been
8 in existence before is later declared invalid,
9 would itself be the trigger for retroactive
10 benefits? Are you aware of anything one way or
11 the other?

12 MR. YANG: Neither way. All I --

13 JUSTICE KAVANAUGH: Okay.

14 MR. YANG: We simply are inferring
15 from the state of play that existed in -- in --
16 in November of '97 when Congress enacted the
17 statute.

18 JUSTICE KAVANAUGH: And don't you
19 think that's odd? I mean, I -- we can't figure
20 that out now, but wouldn't this have been a big
21 issue? Boy, this is going to a big hit for the
22 reasons you say?

23 MR. YANG: It seems like it would have
24 been. I mean, you know, we can't point to
25 something, and Congress often is very terse and

1 some members of the Court don't even look to
2 legislative history. But, you know, what I can
3 say is the context in which this issue arose in
4 -- in Opinion 994 was a significant one. It was
5 while cert was pending in Brown versus Gardner,
6 which is the first, you know, Court -- decision
7 of this Court, I believe, on -- on direct review
8 to invalidate a reg of the VA as inconsistent
9 with the statute. And --

10 JUSTICE KAVANAUGH: Ms. Bostwick said
11 you didn't really play that up so much in your
12 brief.

13 MR. YANG: Well, we didn't. We -- we
14 cited it as being followed by Berger --

15 JUSTICE KAVANAUGH: Mm-hmm.

16 MR. YANG: -- and we made a -- you
17 know, certainly, the court of appeals relied on
18 it, and we relied on it earlier. You know, we
19 had to make some judgments about what to argue,
20 what to fit in the brief, and things have
21 evolved.

22 JUSTICE KAVANAUGH: So I guess you're
23 saying, just to summarize what you're saying, I
24 think, is, if Congress had wanted the
25 retroactive benefits for this kind of situation,

1 we would expect to -- some -- some indication
2 somewhere, or is that a wrong --

3 MR. YANG: You know, I don't know.
4 I'm not sure that you'd need a clear statement.
5 I think what the presumption is, is when
6 Congress takes this novel term, "clear and
7 unmistakable error," that doesn't exist
8 elsewhere, and exists in the very context that
9 Congress is codifying it, that it is presumed to
10 take the old soil with it.

11 And it doesn't require that Congress
12 said, "oh, yeah, we want -- we like this bit of
13 grass and we like this bit of soil." You just
14 take the whole thing writ large.

15 JUSTICE KAVANAUGH: Well, she -- Ms.
16 Bostwick says the old soil is, you know, not --
17 not all in your favor, I guess.

18 MR. YANG: Well, I think --

19 JUSTICE KAVANAUGH: And, therefore,
20 you know, you go back to trying to parse the
21 terms rather than just taking the phrase as a
22 whole and picking up what comes with it.

23 MR. YANG: I think the only thing that
24 they have for that is the Look decision --

25 JUSTICE KAVANAUGH: Right.

1 MR. YANG: -- which Justice Sotomayor
2 was discussing earlier.

3 JUSTICE KAVANAUGH: So you say General
4 Counsel opinion, Russell --

5 MR. YANG: In general -- both of --
6 General Counsel decision was after Look.

7 JUSTICE KAVANAUGH: Yeah.

8 MR. YANG: Right? Look has never been
9 cited ever since it was issued 30 years ago for
10 its clear and unmistakable error principle.

11 If you thought that there was some
12 tension between the -- the -- the precedent
13 opinion and Look, someone would have brought it
14 up, right? But Look never had occasion to
15 decide if it would be clear and unmistakable
16 error if the agency was bound by a regulation
17 that it applied faithfully because, in that
18 case, the agency didn't apply the regulation
19 properly. And the -- the Court said, well, the
20 Board is not free to ignore the -- the
21 regulations and, therefore, the error existed
22 under the correct application of the law as it
23 previously existed at the time.

24 Look just doesn't resolve, I think,
25 the answer for Petitioners. And when you look

1 broad -- more broadly, look at 994, you look at
2 the Board decisions following 994, I think
3 Congress can be assumed to have brought that
4 soil up with the term.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Yang.

7 Justice Thomas, anything further?

8 Justice Breyer?

9 Justice Kagan?

10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: Yeah, two
12 questions.

13 So you mentioned a third path.
14 There's direct review, which gets you
15 prospective benefits. There's the collateral
16 review that, if it applies, can get you
17 retroactive benefits. You say it doesn't apply
18 here. And then you said Secretary review?

19 MR. YANG: Well, there's actually four
20 types of things.

21 JUSTICE KAVANAUGH: Okay.

22 MR. YANG: Direct appeal gets you
23 benefits all the way --

24 JUSTICE KAVANAUGH: I -- I meant the
25 --

1 MR. YANG: -- from the beginning.

2 JUSTICE KAVANAUGH: -- I meant the
3 supplemental claim.

4 MR. YANG: Right. Supplemental
5 claim --

6 JUSTICE KAVANAUGH: Yeah.

7 MR. YANG: -- right, with a very low
8 bar of just new relevant evidence.

9 JUSTICE KAVANAUGH: Right. That gets
10 you --

11 MR. YANG: That's prospective.

12 JUSTICE KAVANAUGH: -- prospective.

13 MR. YANG: Sometimes it's
14 retrospective up to a year if there's a new
15 law --

16 JUSTICE KAVANAUGH: Okay, but --

17 MR. YANG: -- but -- but not -- it's
18 limited in its retrospectivity.

19 JUSTICE KAVANAUGH: My question is
20 really about the Secretary review. Is that a
21 real thing?

22 MR. YANG: It doesn't come up a lot.
23 It's --

24 JUSTICE KAVANAUGH: Okay. I'll take
25 that as not really.

1 MR. YANG: -- it's left in the
2 Secretary's discretion. So the Secretary, you
3 know, could simply decide not to act on -- on
4 the request.

5 JUSTICE KAVANAUGH: And then, on the
6 hardship question, you know, it's tough for us
7 to figure out this, and this happened yesterday
8 too, how much of a hardship will this really be
9 in the Veterans Administration, veterans system.
10 So, you know, to the extent you can document
11 this in 30 seconds to 60 seconds, I would
12 appreciate hearing what -- what you think would
13 happen.

14 MR. YANG: Well, it's hard for us to
15 document it too, but I'll -- I'll give you a few
16 hints, what we think the might -- the issues
17 might be. There's no time limit on this. The
18 veteran or survivors are alive, you know, goes
19 back indefinitely.

20 You're looking also to past now
21 decisions. Remember, this was a 2003, 2004 that
22 was only raised in 2014. Past decisions that
23 invalidate regs, we haven't done a comprehensive
24 search, but we've identified about 14 or 16
25 decisions that invalidate regs in various

1 contexts. That can have a cascading effect when
2 we're talking about 16 million finally
3 adjudicated denied claims. We don't know what
4 subset that is, but it's -- it's -- it could be
5 substantial.

6 And you're looking prospectively,
7 right? You're looking prospectively at what
8 might happen in the future with respect to
9 future decisions and future regs. And what
10 we're -- our point is is that Congress, when it
11 sat and it looked at this in 1997, it already
12 had before it direct review, right?

13 This -- you would expect if there are
14 errors like this, that like a systemic error,
15 that someone's going to bring it up on review.
16 Congress provided for that. And if you don't --
17 if you forfeit your rights, Congress provided
18 for finality in VA Board decisions with a very
19 narrow exception that piggybacked on top of a
20 very narrow application of the section through
21 the regulations.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett? No?

25 Thank you, counsel.

1 JUSTICE SOTOMAYOR: Just one last --
2 of those 14 cases, counsel, of those 14 regs
3 that were invalidated, how many were on step 1
4 and how many on step 2?

5 MR. YANG: I'm sorry, I -- I just -- I
6 don't know, but I -- I will -- I will tell you
7 that I don't think that there is a -- much of a
8 distinction here because the theory that they
9 have for Chevron step 1 is it's ambiguous,
10 therefore, you could not reasonably conclude
11 otherwise.

12 But the theory on Chevron step 2 is
13 that the agency did not reasonably construe the
14 ambiguity. So, if you're on -- if you lose on
15 step 2, it's also because you've acted
16 unreasonably under their theory. So I don't
17 think there's really any real distinction.

18 Their theory, I think, as my friend
19 suggested, it covers all errors, all
20 interpretive statutory errors, all invalidations
21 of regs, and that is a -- a sea change for a
22 statute that has existed in its present form for
23 almost 60 years. Or -- or -- sorry, regulations
24 and then the statute for almost 60 years.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Rebuttal, Ms. Bostwick?

3 REBUTTAL ARGUMENT OF MELANIE L. BOSTWICK

4 ON BEHALF OF THE PETITIONER

5 MS. BOSTWICK: Thank you, Your Honor.

6 I have a few brief points I'd like to
7 make in rebuttal, but, first, I would like to
8 correct a -- a handful of mischaracterizations
9 from the government.

10 First, my friend on the other side
11 spoke a great deal about the availability of
12 direct review. Of course, direct review was not
13 available to Mr. George nor to any veteran until
14 1988. There are many veterans who received
15 clearly erroneous decisions and did not have the
16 ability to challenge those at the time.

17 Second, in speaking about supplemental
18 claims, there was a suggestion that one could
19 bring such a claim with cumulative evidence or
20 with a legal error. Neither of those is
21 correct. It is available only for new and
22 relevant evidence, formally known as new and
23 material evidence. So -- so I think that's just
24 a mischaracterization of that form of relief.

25 And, third, in the -- the Mitchael

1 case that my friend on the other side referred
2 to, the primary holding there was that mandamus
3 was unavailable because reopening in the Social
4 Security context is a discretionary remedy, and,
5 of course, mandamus is not available to -- to
6 order relief that is not mandatory.

7 The -- the reference in that decision
8 to the change in interpretation language is
9 extremely obscure and -- and sheds no light on
10 -- on what that court was thinking, let alone
11 what Congress thought in 1997, long before that
12 decision issued when it looked to the Social
13 Security context as an analogue.

14 There was a reference to "clear and
15 unmistakable error" as a -- as a highly unusual
16 term. I -- I don't think that's correct. It's
17 a term that's used, as Your Honors might have
18 noticed, in multiple contexts in veterans
19 regulations, for example, in the other
20 regulation that's at issue in this case that
21 talks about clear and unmistakable evidence.

22 And VA, in that clear and unmistakable
23 evidence regulation in 1956 -- this is
24 Section 3.63(d) -- had a -- had an explicit
25 definition, "clear and unmistakable" means

1 obvious or manifest.

2 That's exactly what we argue it means
3 in the clear and unmistakable error context as
4 well, an obvious or manifest error that's
5 consistent with all of the precodification case
6 law, including Russell, which talked about
7 errors of statutory or regulatory application.

8 But it's also consistent with how
9 this -- this standard is -- is understood in
10 other contexts, in other demanding standards,
11 for example, the clear error standard.

12 When you have an error of statutory
13 interpretation, that is a clear error. That --
14 that suffices. Likewise, in the mandamus
15 context, the first prong of the mandamus test is
16 that a -- a petitioner must have a clear and
17 indisputable right to the writ, and an error of
18 statutory interpretation counts among other
19 places. You can see that in this Court's
20 decision in TC Heartland.

21 Likewise, abuse of discretion review
22 violating a statute is -- is an error of law
23 that counts as an abuse of discretion, and law
24 of the case also uses the clearly erroneous
25 formulation and includes statutory error, as we

1 see in the Christianson case.

2 So even though this does have an
3 established meaning in the veterans context,
4 it's a meaning that's consistent with other
5 demanding standards of -- of review.

6 The -- on the reference to -- to
7 change in interpretation, even if we think that
8 it's -- it's relevant here and that it -- it was
9 somehow brought into the statute, they haven't
10 identified any instance of calling what we have
11 here, namely, a judicial ruling saying this
12 regulation was plainly invalid or even anything
13 that came before was plainly invalid, calling
14 that a change in interpretation.

15 In fact, this Court in Monell, when it
16 overruled Monroe and found stare decisis met,
17 referred to the prior decision as an error.
18 There was a -- a -- a quote to the earlier
19 Girouard decision, which likewise involved
20 overruling three of this Court's prior
21 precedents, and it deemed those precedents not a
22 correct statement of the law.

23 So we think it is actually quite
24 natural to understand this kind of change as
25 identification and correction of an error and

1 not merely a change in interpretation.

2 I want to address also the -- the
3 binding argument, this idea that -- that there's
4 something special about a regulation because a
5 regulation binds the Board. That's not quite
6 accurate either.

7 If you look at Section 7104(c), which
8 is the provision they -- they rely on, the Board
9 is not just bound by regulations and by
10 statutes. It's also bound by, for example,
11 precedential General Counsel opinions.

12 And so the effect of the government's
13 argument is that if the General Counsel issues a
14 precedential opinion that is contrary to a
15 statute and the Board relies on that
16 precedential opinion in denying benefits, that
17 can't be CUE.

18 It can't ever be CUE. And I think
19 that's also an important thing to understand,
20 right? The government's position would exclude
21 all decisions that are based on regulations no
22 matter how wrong they were from CUE.

23 And there's no reason for this
24 categorical exclusion.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:16 a.m., the case
3 was submitted.)

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