

No. 25-735

IN THE
Supreme Court of the United States

FLOYD D. JOHNSON,

Petitioner,

v.

UNITED STATES CONGRESS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In *Johnson v. Robison*, 415 U.S. 361 (1974), this Court held that 38 U.S.C. § 511(a)'s predecessor did not strip district courts of jurisdiction to hear constitutional challenges to statutes affecting veterans' benefits. District courts have been hearing those challenges ever since. As our opening brief showed, they retain jurisdiction to do so. Section 511(a) neither empowers the inferior adjudicators of the Board of Veterans Appeals (BVA) to invalidate federal statutes nor requires veterans to spend years languishing in futile BVA proceedings before presenting their constitutional claims to a court with authority to decide them.

The Government offers no good reason to hold otherwise. To begin with, it cannot square its position with Section 511(a)'s text. The Government proceeds as if Section 511(a) required the BVA to decide, and barred district courts from reviewing, all questions that "bear on a claimant's entitlement to benefits." Gov't Br. 32. But that is not what Section 511(a) says. Instead, it covers only "questions of law and fact *necessary* to a decision by the Secretary *under a law* that affects the provision of benefits." 38 U.S.C. § 511(a) (emphases added).

As our opening brief explained—and as the Government never disputes—a decision "under" a statute is a decision *in accordance with* the statute. In other words, it takes the statute as given. The BVA thus does its job under Section 511(a) by applying a statute as written—it need not resolve challenges to the statute's validity. And we know that resolving such challenges cannot be "necessary" because the BVA has been refusing to resolve them since long before Section 511(a)'s enactment.

The Government also cannot offer a coherent account of the BVA's authority. As our opening brief showed, the necessary implication of the Government's position is that the BVA *must* decide constitutional challenges to statutes—yet the BVA has consistently refused to decide them; a Department of Veterans' Affairs (VA) regulation prohibits the Board from doing so; and granting such authority to inferior adjudicators insulated from the VA's Secretary's review would have departed from settled practice and raised serious constitutional concerns. The Government's response is puzzling—and underscores that its position would create anomalies and thorny problems.

The Government initially asserts, based on a few outlier decisions, that the BVA *does* have a duty to decide constitutional challenges to statutes. *E.g.*, Gov't Br. 20. In the end, though, the Government apparently cannot bring itself to defend that result: It ultimately seems to agree that the BVA itself *cannot* decide a statute's validity. Instead, the Government says only that the BVA could follow a decision by “higher-level VA officials” if they happen to have resolved the constitutional issue already, *id.* at 32—though it identifies no case in which that has actually happened.

That account of Section 511(a) is entirely novel—the Government did not present it below, at the certiorari stage, or at any point outside this litigation. It contradicts the Veterans Judicial Review Act (VJRA), which requires the BVA—not “higher-level officials,” Gov't Br. 32—to render final decisions on questions subject to Section 511(a). 38 U.S.C. § 7104(a). And it also contradicts the VA's long-standing practice: The BVA routinely confronts constitutional challenges to statutes, and the Board simply

refuses to decide them—it does not secure a decision from “higher-level VA officials,” Gov’t Br. 32. The Government neither denies that it is systematically violating its own reading of Section 511(a) nor makes any effort to explain how the VA could bring itself into compliance. That provides yet more confirmation that the Government’s newly minted reading is wrong.

Finally, the Government’s remaining arguments are unpersuasive. Its selective appeal to legislative history provides no reason to depart from Section 511(a)’s text. Its concerns about administrability are refuted by decades of experience under *Robison*. And it appears to disclaim any argument for implied preclusion under *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), instead agreeing that the proper way to resolve this case is to apply Section 511(a) as written. This Court should do so and reverse.

I. Section 511(a) does not strip district courts of jurisdiction to hear constitutional challenges to statutes.

Section 511(a)’s text, structure, and purpose show that it does not include constitutional challenges to statutes. In arguing otherwise, the Government fails to meaningfully grapple with the text. It vacillates between two conflicting accounts of the BVA’s duties, both of which contradict the VJRA and the BVA’s own practice. And it offers no good reason to compel veterans bringing standalone challenges to statutes to endure years of pointless BVA proceedings.

A. Section 511(a)'s plain text does not include constitutional challenges to statutes.

Section 511(a) encompasses questions that are “necessary to a decision by the Secretary under a law that affects the provision” of benefits. The Government agrees that the reference to a “law” affecting benefits refers to a *statute* affecting benefits. Opening Br. 17; *see* Gov’t Br. 18-19. And although the Government asserts otherwise, we do not suggest that the phrase “decision by the Secretary” includes every “subsidiary legal or factual issue.” Gov’t Br. 18. Instead, it refers to the VA’s “bottom-line determination” (*id.*) about the veteran’s entitlement to benefits “under” the statute. Here, for example, it is common ground that the VA’s decision to reduce Mr. Johnson’s benefits was the relevant “decision by the Secretary” and that it was made “under” 38 U.S.C. § 5313. Opening Br. 17, 20; Gov’t Br. 18-19. The question is whether adjudicating Section 5313’s constitutionality is “necessary” to a decision “under” Section 5313. It is not.

1. Our opening brief explained that something done “under” a statute must be done “in accordance with” the statute. *Pereira v. Sessions*, 585 U.S. 198, 215 (2018). A decision under a statute thus takes the statute as given and applies it to a particular case; it does not inquire into the statute’s validity. Opening Br. 17-18. Here, for example, the VA did not need to adjudicate Section 5313’s constitutionality to decide Mr. Johnson’s entitlement to benefits “under” Section 5313. Mr. Johnson maintains that he is entitled to greater benefits because Section 5313 is invalid, but there is no doubt the VA’s decision to reduce his benefits was made *in accordance with* Section 5313.

The Government does not acknowledge, much less rebut, that ordinary-meaning interpretation of the phrase “under a law.” Nor does the Government offer its own interpretation of that critical phrase. Instead, it rewrites the statute to elide that phrase altogether. It says, for example, that the constitutionality of the relevant statute is covered by Section 511(a) because it “bears on” a benefits claim or is “logically necessary to a determination of the claimant’s actual legal entitlement to benefits.” Gov’t Br. 3, 12, 19 (emphasis omitted). Congress could have used such a broad formulation, as it has in other preclusion statutes. Opening Br. 22. But it did not. Instead, it required the BVA to decide only questions necessary to a decision “under”—that is, in accordance with—the relevant statutes. The BVA fully discharges that duty when it applies those statutes as written.

2. That straightforward reading of Section 511(a)’s current text decides this case. But if there were any doubt, *Robison* would resolve it. This Court interpreted Section 511(a)’s predecessor to exclude “constitutional challenge[s]” to statutes. *Robison*, 415 U.S. at 367. When Congress carried forward equivalent language in Section 511(a), it “adopted also the construction given by this Court.” *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 586 U.S. 123, 131 (2019); see Opening Br. 18-19. Neither of the Government’s responses is persuasive.

First, the Government emphasizes that *Robison* referred to the constitutional question that would have arisen if Section 511(a)’s predecessor had barred all review of constitutional challenges to statutes. Gov’t Br. 3, 26-27. But that discussion was “dictum.” *Prewitt v. McDonough*, 633 F. Supp. 3d 195, 203 (D.D.C. 2022)

(Moss, J.); *see* Opening Br. 32. More importantly, even if *Robison* relied in part on constitutional avoidance, it still established a settled “judicial construction” of the relevant language that Congress presumptively adopted when it preserved that language in Section 511(a). *Helsinn*, 586 U.S. at 131; *see* Opening Br. 32. The Government does not respond to that dispositive point.

Second, the Government quibbles over differences in the wording of Section 511(a) and its predecessor. The predecessor barred review of “decisions of the Administrator on any question of law or fact under any law administered by” the VA. 38 U.S.C. § 211(a) (1982). The Government insists that “under any law” modified “question of law or fact,” not “decision.” Gov’t Br. 27-28. But that is not how *Robison* read Section 211(a). The Court quoted the statute as reaching “*decisions* of the Administrator on any question of law or fact *under* any law administered by the [VA]”—indicating through emphasis that “under” modified “decisions.” *Robison*, 415 U.S. at 367. And the Court’s key textual holding, which the Government ignores, was that “[a] *decision* of law or fact ‘under’ a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts” and thus does not include a “constitutional challenge” to the statute itself. *Id.* (emphasis added).

Section 511(a) is broader than its predecessor in that it reaches the VA’s decisions “under” any statute “that affects the provision of benefits,” not merely statutes “administered by” the VA. Our interpretation thus recognizes that Congress abrogated *Traynor v. Turnage*, 485 U.S. 535 (1988). Opening Br. 33-34; *but see* Gov’t Br. 28-29. But Congress continued to limit

preclusion to questions necessary to a “decision by the Secretary *under a law*.” 38 U.S.C. § 511(a) (emphasis added). Because *Robison* construed that phrase to *exclude* constitutional challenges to statutes, it is not plausible to maintain that Congress used the very same phrase to *include* such challenges.

3. Finally, the Government has no meaningful answer to the BVA’s longstanding practice of refusing to adjudicate constitutional challenges to statutes, which makes clear that resolving such challenges is not “necessary” to its decisions. The Government does not dispute that when Congress enacted Section 511(a) in 1988, it was on notice that the BVA had “expressly disclaimed” any authority to decide such challenges. *Robison*, 415 U.S. at 368; *see* Opening Br. 20. The Government also does not deny that the settled understanding at the time—which this Court had repeatedly endorsed—was that administrative tribunals like the BVA *could not* decide the constitutionality of a statute. *Id.* at 23-24.¹

The Government objects that “there is no reason to suppose” that Section 511(a) was “intended to freeze in place” the BVA’s existing practices. Gov’t Br. 19. But “[w]hen Congress adopts a new law against the backdrop of a ‘longstanding administrative construc-

¹ The Government asserts that VJRA-era understanding is wrong. Gov’t Br. 33-34. But most of its authorities indicate only that the Executive Branch may decline to implement a statute that the President or the Office of Legal Counsel deems unconstitutional. That does not necessarily mean that inferior administrative tribunals like the BVA can adjudicate a statute’s validity. NCLA Br. 6-9. But this Court need not wade into those separation-of-powers questions here. Opening Br. 24 n.5. The relevant point is simply that the Court should interpret Section 511(a) in light of the understandings that prevailed when it was enacted.

tion,’ this Court generally presumes the new provision should be understood to work in harmony with what has come before.” *Monsalvo v. Bondi*, 604 U.S. 712, 725 (2025) (citation omitted).

Moreover, other provisions of the VJRA show that Congress knew how to require a tribunal to decide constitutional challenges to statutes. Congress expressly directed the Federal Circuit to “decide any challenge to the validity of any statute.” 38 U.S.C. § 7292(c). Had Congress wanted to break from settled practice by requiring the BVA to decide such challenges, it surely would have included an equally explicit directive in Section 511(a). But it did not. Instead, it required the BVA to resolve only questions “necessary” to decisions “under” the relevant statutes. 38 U.S.C. § 511(a). And the fact that the BVA had long been making those decisions *without* resolving challenges to statutes made it abundantly clear that resolving such challenges was not “necessary.”

B. The Government fails to offer a coherent account of the BVA’s authority and duties under Section 511(a).

Our opening brief showed that since Section 511(a)’s enactment, the BVA has adhered to its practice of refusing to decide constitutional challenges to statutes. In fact, the VA responded to Section 511(a) by adopting a regulation specifying that “the Board is bound by applicable statutes.” 38 C.F.R. § 20.105; *see* Opening Br. 20. And the BVA routinely holds that constitutional challenges to statutes are not within its jurisdiction under Section 511(a). Opening Br. 20-22.

That creates two serious problems for the Government. First, the Government cannot maintain that it

is “necessary” for the BVA to do something the Government itself prohibits the BVA from doing. Second, Section 511(a) requires the BVA to decide all questions that fall within its scope—so if Section 511(a) includes challenges to statutes, the BVA has been flouting Section 511(a) for decades. In attempting to avoid those problems, the Government gestures at two contradictory positions. Neither is coherent or consistent with the VJRA.

1. Initially, the Government appears to bite the bullet and argue that the BVA must decide constitutional challenges to statutes. It recognizes that the implication of its position is that “the Secretary,” through the BVA, “‘shall decide’ a constitutional challenge if a claimant presents that challenge.” Gov’t Br. 20 (citation omitted). And it asserts that we are “incorrect” to say that the BVA “cannot adjudicate constitutional challenges to statutes.” *Id.* at 3; *see id.* at 14.

But the Government offers scant support for that assertion. It cites just four BVA decisions that purportedly decided constitutional challenges to statutes. Gov’t Br. 33. The most recent is 15 years old, and none of them attempted to reconcile such a claim of authority with Section 511(a) or the regulation mandating that the BVA is bound by statutes. Instead, two of the Government’s decisions note that the BVA “is free to express an opinion” on a constitutional challenge without actually deciding it. Bd. Vet. App. 1126713, at *2 (July 18, 2011) (citation omitted); *see* Bd. Vet. App. 1103047, at *11 (Jan. 24, 2011); *see also* Opening Br. 20. The other two decisions may likewise reflect optional and non-binding expressions of opinion. Or they may simply be outliers issued by a

tribunal that has been justifiably criticized for its errors and inconsistencies. MVA Br. 30-31.²

In any event, the Government cannot deny that there is a far larger, more recent, and better-reasoned body of BVA decisions that disclaim authority to decide constitutional challenges to statutes—and, in so doing, read Section 511(a), the relevant regulation, and *Robison* exactly the same way we do. Our opening brief cited eight examples; there are many others. On the day the Government filed its certiorari-stage brief, for instance, the BVA held that it “lack[ed] jurisdiction to adjudicate [a] constitutional challenge” because it is “bound in its decisions by applicable statutes.” Bd. Vet. App. A26020630, at *3 (Mar. 6, 2026) (citing *Robison* and 38 C.F.R. § 20.105).³ If the Government really believed that the BVA has a duty to decide constitutional challenges to statutes, it presumably would have assured this Court that it is taking steps to bring the BVA into compliance with its new view. *Cf.* Br. in Opp. at 17-18, *Feliciano v. DOT*, 605 U.S. 38 (2025) (No. 23-861). But the Government says nothing of the sort.

² The Government only proves our point by citing *Saunders v. Brown*, 4 Vet. App. 320 (1993), which expressly recognized that the BVA is “not required to adjudicate the constitutionality” of statutes. *Id.* at 326; *see* Gov’t Br. 33.

³ *See also, e.g.*, Bd. Vet. App. A25057586, at *2 (July 3, 2025); Bd. Vet. App. 22071305, at *5-6 (Dec. 22, 2022); Bd. Vet. App. 21043798, at *5 (July 19, 2021); Bd. Vet. App. 20021803, at *1-2 (Mar. 27, 2020); Bd. Vet. App. 1320396, at *3 (June 25, 2013); Bd. Vet. App. 1312191, at *3 (Apr. 12, 2013); Bd. Vet. App. 1304239, at *12 (Feb. 6, 2013); Bd. Vet. App. 1131905, at *4-5 (Aug. 30, 2011); Bd. Vet. App. 1118967, at *4 (May 17, 2011).

The Government also does not seriously grapple with the anomalies that would follow if the BVA had to decide constitutional challenges to statutes. First, the BVA's nonadversarial proceedings would be an exceedingly awkward fit for litigating such challenges and developing the necessary factual record. Opening Br. 26-27. Second, the Secretary cannot appeal adverse BVA decisions, and it would have been bizarre to bar the Executive Branch from appealing decisions holding statutes unconstitutional. *Id.* at 27; *see* FCBA Br. 11-12. Third, it would raise serious constitutional questions if the 100 inferior officers on the BVA were empowered to render final decisions for the Executive Branch on whether to disregard acts of Congress. Opening Br. 27-28; *see United States v. Arthrex, Inc.*, 594 U.S. 1, 20-21 (2021).

The Government has no response to the first anomaly. As to the others, it asserts that the Secretary could “order reconsideration” if the Board “issued a constitutional decision with which the Secretary disagreed.” Gov’t Br. 37. But as *Arthrex* recognized, the BVA’s decisions are reviewable only by the CAVC, not the Secretary. 594 U.S. at 20. Only the BVA Chairman, not the Secretary, can order reconsideration. 38 U.S.C. § 7103(b). The Chairman can be removed only for cause (and only by the President), and no statute authorizes the Secretary to direct his actions in a particular case. *Id.* § 7101(b)(2). And even if the Chairman ordered reconsideration, the Secretary would have no way to direct the outcome of the reconsideration proceeding, which must take place before a “panel of the Board.” *Id.* § 7103(b). In *Arthrex*, this Court emphatically rejected a similar attempt by the Government to contrive a way for an agency head to supervise inferior adjudicators by manipulating a

rehearing process to “indirectly influence” their decisions. 594 U.S. at 16. The Government’s current attempt fares no better.⁴

2. In the end, the Government is apparently unwilling to defend a regime in which the BVA is required to decide constitutional challenges to statutes. In a sharp departure from the statements quoted above, it ultimately seems to *agree* that the BVA cannot “make benefits decisions based on [its] own perception of the applicable constitutional rules.” Gov’t Br. 32. Instead, the Government suggests that the BVA can decide a constitutional challenge to a statute only if “higher-level VA officials” have already opined on the issue. *Id.* Only in those circumstances, for example, does the Government suggest that the BVA could disregard a statute without violating 38 C.F.R. § 20.105. *Id.* at 36. And the Government tries to square that view with Section 511(a) by reading the statute to mean that “the agency writ large”—not the

⁴ The Government notes that the BVA is bound by “the instructions of the Secretary.” 38 U.S.C. § 7104(c); *see* Gov’t Br. 37. If the Government means to imply that the Secretary could tell the independent adjudicators on the BVA how to decide a specific case, it cites nothing to support that startling assertion. The VJRA—including the directive that the Secretary “may not seek review” of an adverse BVA decision, 38 U.S.C. § 7252(a)—makes clear that although the Board is bound by VA regulations and general policies, the Secretary cannot direct its adjudication of particular cases. Consistent with that view, the VA itself has long taken the position that the phrase “instructions of the Secretary” in Section 7104(c) is “a term of art” that includes only “published documents providing instructions for implementation of newly enacted legislation prior to issuance of regulations.” VA Gen. Counsel Op. 07-92, 1992 WL 12600482, at *2 (Mar. 17, 1992).

BVA specifically—“must decide any constitutional issues.” *Id.* at 32.

That maneuvering runs headlong into the VJRA’s text. Congress directed that “[a]ll questions in a matter which under section 511(a) of this title is subject to decision by the Secretary” are subject to “one review on appeal” and that “[f]inal decisions on such appeals shall be made by the Board.” 38 U.S.C. § 7104(a); *see Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (“The Board is a body within the VA that makes the agency’s final decision in cases appealed to it.”). If Section 511(a) included constitutional challenges to statutes, they would have to be resolved *by the Board*—not “the agency writ large,” Gov’t Br. 32.

Even setting aside that problem, the Government never explains how its new reading of Section 511(a) is supposed to work. It asserts that “important mechanisms exist” by which the VA can ensure that the BVA decides constitutional challenges in accordance with the views of “higher-level VA officials.” Gov’t Br. 32. But the Government identifies only one mechanism: the VA’s General Counsel, or perhaps the Secretary, could issue “a precedent opinion stating his view as to the proper resolution of a recurring constitutional issue.” *Id.* at 36. That mechanism appears to be largely or entirely hypothetical. The General Counsel has not issued a precedent opinion on any subject since 2019. VA, Office of General Counsel, *Precedent Opinions*, <https://perma.cc/95J4-9DD3>. And the Government does not cite *any* case where the BVA followed an opinion of the General Counsel or the Secretary on the constitutionality of a statute.

So what happens if—as will always or almost always be the case—there is no opinion of the General

Counsel or the Secretary on point? The Government does not say. But we know from experience: The BVA will refuse to decide the veteran’s constitutional challenge to a statute—which means that the “agency writ large” (Gov’t Br. 32) will dispose of the veteran’s claim without *anyone* addressing that challenge. *See supra* at 10 & n.3. That violates even the Government’s reading of Section 511(a). Yet the Government does not acknowledge the problem—much less explain how the VA could bring itself into compliance.

* * *

A straightforward reading of Section 511(a) avoids the need for all of the Government’s gymnastics. Congress tasked the BVA with interpreting and applying statutes to the facts of particular cases, not deciding their validity. We do not deny that if the VA General Counsel concluded that a statute was unconstitutional, he could direct VA officials—including the BVA—not to apply it going forward. 38 U.S.C. § 7104(c). Our reading is thus consistent with the Government’s view that Article II allows the Executive Branch to decline to implement statutes it deems unconstitutional. Gov’t Br. 34. But the critical point is that Section 511(a) does not *require* the BVA to decide constitutional challenges to statutes—and thus does not bar veterans from presenting those challenges to Article III district courts.

C. The Government offers no reason to force standalone constitutional challenges to statutes into the VJRA’s review scheme.

Section 511(a) text, context, and structure resolve this case. But to the extent the Court looks to purpose, it points in the same direction: The Government offers no good reason why Congress would have forced

standalone constitutional challenges to statutes into the VJRA’s administrative review scheme, and it fails to rebut the powerful reasons to conclude that the VJRA scheme is profoundly unsuited to deciding them.

1. The Government emphasizes that Congress enacted the VJRA to “facilitate uniform resolution of recurring legal issues” and to allow specialized tribunals “to accumulate expertise.” Gov’t Br. 23. We agree. Opening Br. 29. But constitutional challenges to statutes “obviously” do not implicate those concerns because they do not “involve technical considerations of [VA] policy” or any other special expertise. *Robison*, 415 U.S. at 373; *see* Opening Br. 29-30.

The Government’s concerns about uniformity are particularly misplaced for the narrow set of claims at issue here. The Government ordinarily seeks further review of any decision holding a federal statute unconstitutional. *Cf.* 28 U.S.C. § 530D(a)(1). And this Court applies “a strong presumption in favor of granting writs of certiorari” to review such decisions, even absent a circuit split. *Maricopa County v. Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (Thomas, J., respecting denial of stay). There is thus no risk that reaffirming *Robison*—which district courts have been following for decades—will threaten the “uniform resolution of recurring legal issues.” Gov’t Br. 23.

2. The Government also suggests that it could be difficult to distinguish claims challenging the validity of statutes (which some courts have called “facial” challenges) from claims challenging the VA’s actions (which some courts have called “as-applied” challenges). Gov’t Br. 2-3, 24-25. We have already explained that the “facial” terminology risks confusion, and nothing in our argument turns on it. Opening Br.

16 n.3. Semantics aside, the line we have urged throughout this litigation is exactly the same line this Court drew in *Robison*: Section 511(a) applies to challenges, including constitutional challenges, to actions by the VA, but it does not apply to “constitutional challenges to veterans’ benefits legislation” enacted by Congress. 415 U.S. at 373.⁵

The Government invokes *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), which declined to draw a distinction between challenges to statutes and challenges to administrative actions in the context of an implied-preclusion analysis. *Id.* at 16 & n.5. Here, however, the Court is tasked with interpreting an express-preclusion clause. And in Section 511(a), *Congress* drew a distinction between constitutional challenges to statutes and other challenges—and did so against the backdrop of *Robison*, which drew the same line based on materially identical language. The Government’s administrability concerns provide no basis for refusing to give effect to Congress’s choice.

Regardless, those concerns are misplaced. Congress often adopts special rules for constitutional challenges to statutes. *See, e.g.*, 28 U.S.C. §§ 255(a), 1257(a), 2403(a), 3904(a). Courts, too, are perfectly capable of distinguishing between constitutional claims that allege “misused agency discretion” and those that challenge “statutory validity.” *Jones Bros., Inc. v. Sec’y of Lab.*, 898 F.3d 669, 675 (6th Cir. 2018) (Sutton, J.). And experience confirms that the line

⁵ *Robison* did not rely on any distinction between facial and as-applied challenges. And *Robison*’s holding plainly was not limited to “facial” challenges in the *Salerno* sense, because the plaintiff did not allege that the challenged statutes were invalid in all of the circumstances where they applied. 415 U.S. at 362-63.

drawn in *Robison* is administrable: “district courts have policed this line for decades and it has proven to be limited and manageable.” FCBA Br. 14.

3. On the other side of the ledger, the Government has little to say in response to our showing—echoed by a chorus of experienced amici—that the VJRA process is profoundly unsuited to deciding standalone constitutional challenges to statutes. Opening Br. 30-31. Most obviously, the notorious delays and inefficiencies in the VJRA process mean that “[o]nly after years of ricocheting between initial VA adjudication, internal appeals, and the Veterans Court may a veteran’s constitutional challenge reach an Article III court—if he has managed to preserve it through repeated cycles of review and remand.” MVA Br. 21; *see* Clinic Consortium Br. 3-13; NVLSP Br. 19-25. Because the BVA refuses to decide constitutional challenges to statutes, the years spent waiting for a BVA decision serve no purpose. And because the Government’s reading of Section 511(a) encompasses structural constitutional challenges to the BVA itself, it would force veterans raising such challenges to litigate before the very tribunal they contend is unconstitutional. Opening Br. 31; *see* PLF Br. 5-26.

The Government’s only response is the unexplained assertion that years-long BVA delays “reflect temporary changes to the Board’s docket rather than long-term trends.” Gov’t Br. 39. With respect, that is hard to take seriously. The BVA process has been “plagued by delays and inaction” for years—as Congress, advocates, and Federal Circuit judges have long recognized. *Martin v. O’Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring); *see, e.g.*, NVLSP Br. 21-22. The current delays are in no sense

a new phenomenon; instead, they are confirmation that Congress’s modest 2017 reforms failed to solve a longstanding problem. Opening Br. 30.

D. The Government’s appeal to legislative history provides no reason to depart from Section 511(a)’s text.

Unable to justify its position based on Section 511(a)’s text, structure, or purpose, the Government relies heavily on legislative history—or, more specifically, on a single committee report. Gov’t Br. 23-24, 30-31, 35. That report provides no basis for departing from Section 511(a)’s text.

The Government does not invoke the report “to see how [its] authors used the words on which this case turns.” *FS Credit Opportunities Corp. v. Saba Cap. Master Fund, Ltd.*, 146 S. Ct. 1546, 1557 (2026). Instead, it seeks to “divin[e] how Congress would have wanted courts to resolve the question presented in this case.” *Id.* That argument “depends on the fictional premise that hundreds of legislators (not to mention the President) shared a unified private view of how the statute should apply.” *Id.* “Worse, it violates the fundamental precept that ‘we are governed by laws, not by the intentions of legislators.’” *Id.* (brackets and citation omitted).

In any event, the report on which the Government relies addressed a different bill that would have “replace[d] the existing [BVA] with a new Court of Veterans Appeals.” H.R. Rep. No. 963, 100th Cong., 2d Sess. 29 (1988); *see* Opening Br. 35-36. A report on a bill that would have abolished the BVA altogether sheds little light on what issues Congress ultimately required the BVA to decide. And that is especially true

because Congress also amended the bill's version of the provision that ultimately became Section 511(a). Opening Br. 36.

The Government insists that the changes to Section 511(a) were “insignificant.” Gov’t Br. 24 n.1. But the drafters disagreed. They explained that the final version of Section 511(a) was a “compromise” that “amend[ed]” the House version “to clarify that the requirement to make decisions and the general preclusion of judicial review apply *only* to a decision by the Administrator under a law that affects the provision of benefits.” 134 Cong. Rec. 31,474 (1988) (emphasis added). That confirms that the drafters regarded Section 511(a) as materially narrower than the version on which the Government relies.

Finally, a more complete review of the legislative history “does not reveal any congressional intent to abrogate *Robison*.” NVLSP Br. 15; *see id.* at 11-19. That further undermines the Government’s reliance on a single report discussing an unenacted bill.⁶

⁶ To the extent there is any ambiguity in Section 511(a), it should be resolved not by legislative history but instead by the canon providing that ambiguities in veterans’ benefits statutes must be resolved in favor of veterans. Opening Br. 37. Congress’s “commitment to assisting veterans” (Gov’t Br. 37) provides even more reason to adhere to that canon because it is more likely to be reliable guide to Congress’s intent. And the Government’s suggestion that ours is not the “pro-veteran interpretation” (*id.* at 38) is refuted by both the uniform position of the veterans’ amici and common sense. The Government’s reading forces veterans to present constitutional challenges to statutes through the cumbersome VJRA process; ours gives them the option of going directly to an Article III district court. Opening Br. 15-16.

II. The Government appears to agree that the Court should not conduct an implied-preclusion inquiry under *Thunder Basin*.

1. Our opening brief explained that the Eleventh Circuit erred by invoking *Elgin*, a decision applying the three-factor implied-preclusion test set forth in *Thunder Basin*. Whatever the merits of the *Thunder Basin* approach when Congress has *not* addressed the issue, there is no basis for extending it to a statute where Congress has expressly defined and limited the scope of preclusion. As in any other context, courts may not go beyond Section 511(a)’s “actual text” based on “speculation as to Congress’ intent.” *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) (citation omitted); *see* Opening Br. 38-41.

The Government appears to agree. It acknowledges that “[w]hen dealing with an express preclusion clause,’ this Court generally ‘determines the scope of preclusion simply by interpreting the words Congress has chosen.’” Gov’t Br. 16 (citation omitted). And it does not ask the Court to conduct a *Thunder Basin* inquiry, even in the alternative—instead, it discusses the *Thunder Basin* factors only conditionally, “[t]o the extent they are relevant.” *Id.* at 39.⁷

⁷ Although the Government does not ask the Court to apply the *Thunder Basin* factors, it asserts in passing that “the Court has sometimes consulted those factors” in “applying express preclusion provisions.” Gov’t Br. 38. But neither of the cases the Government cites even mentioned *Thunder Basin*. Instead, they reasoned that courts should hesitate to adopt an interpretation that would preclude “meaningful judicial review.” *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 492, 496 (1991); *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991). That

2. We will not respond at length to arguments that both parties agree are legally irrelevant. But the Government can claim support from the *Thunder Basin* factors only by stretching them well beyond the bounds set by this Court’s precedents.

First, the Government maintains that the VJRA provides meaningful judicial review because veterans may ultimately present constitutional challenges to statutes to the CAVC and the Federal Circuit. Gov’t Br. 39-40.⁸ But that ignores the years of delay in the BVA and the serious risk that unrepresented veterans will fail to preserve their constitutional claims. “The VA system, as applied to constitutional challenges, does not merely defer review”; instead, “[i]t so attenuates and delays it as to cross from permissible delay into functional foreclosure.” MVA Br. 23.

Second, the Government insists that constitutional challenges to statutes are not collateral to the VJRA process because their ultimate goal is to secure benefits. Gov’t Br. 40-41. But that is not the test. Instead, a challenge is collateral if it has “nothing to do with” the matters that the agency “regularly adjudicate[s].” *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 193 (2023) (brackets and citation omitted). The BVA does not “regularly adjudicate” challenges to statutes.

simply reflects the familiar “presumption of judicial review.” *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.*, 606 U.S. 146, 155 (2025). It does not justify using *Thunder Basin* to supplement an express-preclusion provision.

⁸ The Government’s assertion that the CAVC can hear such claims is new: Just last year, the Government took exactly the opposite position in the Federal Circuit. Opening Br. 25 n.6. The Government does not acknowledge or explain that reversal.

Finally, the Government concedes that the BVA's members "are not typically experts in constitutional law." Gov't Br. 42. Instead, it asserts that they may have expertise in *other* matters, such as the interpretation of the relevant statutes. *Id.* But the same thing could have been said in *Axon*. Opening Br. 44. And even more to the point, the BVA would have no occasion to bring any such expertise to bear because it refuses to consider constitutional challenges to statutes at all. *Id.*; *see supra* at 10 & n.3.

* * *

All told, the Government offers no good reason to depart from the natural reading of Section 511(a)'s text and nearly 40 years of the BVA's own practice. The vast majority of challenges to the VA's benefits decisions take issue with the agency's interpretation or application of a statute to a particular set of facts, and all of those challenges must be brought through the BVA. But where, as here, a veteran has no quarrel with anything the VA has done and challenges only the constitutionality of a statute enacted by Congress, the cumbersome BVA process would be pointless at best and profoundly harmful at worst. This Court should apply Section 511(a) as written and reaffirm that Congress did not mandate such a futile exercise.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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