

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 dates back to
15 the 1920s. And in this and other regulations,
16 when VA uses the term "clear and unmistakable,"
17 what it means is obvious or manifest.

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

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

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

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

10 JUSTICE THOMAS: So how was --

11 MS. BOSTWICK: -- such as Rivers.

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

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

17 JUSTICE THOMAS: Yes.

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

24 In the Look decision, the veterans
25 court said first there was a clear and

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

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

18 JUSTICE THOMAS: Thank you.

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

21 MS. BOSTWICK: Correct.

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

1 has, right?

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

8 That language appears --

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

12 MS. BOSTWICK: Certainly.

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

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

22 But even if the Court wanted to look
23 at how VA had -- had applied that -- that
24 language, what function that language was
25 serving, it's not the one that the government

1 suggests.

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

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

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

25 And, more importantly, what it's

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

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

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

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

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

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

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

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

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

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

22 JUSTICE KAGAN: I mean, nobody writes
23 this provision in such a way to say change in
24 interpretation is excluded from CUE if that
25 change in interpretation has -- you know, is --

1 is -- is not an error in the first place.

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

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

10 What it says -- and, again, this is at
11 16a, Appendix B to our opening brief -- the
12 provisions of this section apply except where an
13 award was based on an act of commission or
14 omission by the veteran or there is a change in
15 law or Department of Veterans Affairs issue or
16 change in interpretation of law or Department of
17 Veterans Affairs issue, bracket, go see Section
18 3.114, or the evidence establishes that service
19 connection was clearly illegal.

20 And that's not carving those things
21 out of CUE. It's carving them out of
22 Section 3.105 as a whole. It's telling you --
23 it's a cross-reference. It says, if this is the
24 situation you're in, here's where you go look.

25 Now, of course, you still have to

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

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

15 JUSTICE KAVANAUGH: What do you do
16 with the General Counsel opinion from 1994 which
17 seemed to suggest or said decisions of the Court
18 of Veterans Appeals invalidating VA regulations
19 or statutory interpretations do not have
20 retroactive effect in relation to prior final
21 adjudications of claims, which the government
22 cites and the lower court cited as evidence of a
23 common understanding, the Russell case, as well
24 as this and other understandings that they say
25 are incorporated into the statute.

1 So how do you respond to that?

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

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

21 JUSTICE KAVANAUGH: How about the
22 broader context that Justice Thomas was
23 referring to, that what we're talking about here
24 is not direct review but collateral review, and
25 the government says, therefore, the standard for

1 relief should be higher because the implications
2 are going to be dramatic. And the veterans
3 court here, for example, has said that doing
4 this would impose tremendous hardship under --
5 on the agency, and -- and all of that's the
6 reason for the high bar.

7 So how do you respond to all that?

8 MS. BOSTWICK: Certainly. I'll --
9 I'll address the -- the high bar issue first and
10 then -- and then potentially the -- the -- the
11 floodgates problem.

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

17 JUSTICE KAVANAUGH: Can I just stop
18 you there? Because --

19 MS. BOSTWICK: Yes.

20 JUSTICE KAVANAUGH: -- I'm wondering
21 how high a bar you're saying it is. Anytime a
22 regulation is determined to be an impermissible
23 interpretation of the statute, it seems to me
24 you're saying that's clear and unmistakable
25 error. And if it's not, can you tell me what

1 the delta is?

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

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

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

21 MS. BOSTWICK: Yes, absolutely. That
22 is what Congress intended in this -- right,
23 because the -- the point is, under the law,
24 under the statute, the veteran was supposed to
25 receive those benefits all along. And so we go

1 back and we put him close to the position he
2 would have been in. There isn't an interest
3 payment, but --

4 JUSTICE BARRETT: But --

5 JUSTICE KAGAN: But --

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

8 So it's your position that every
9 single time the agency misinterprets a statute,
10 it's always clear and unmistakable?

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

19 Are all misinterpretations of a
20 statute clear?

21 MS. BOSTWICK: So we think they are,
22 but even if the Court thinks that there are some
23 statutory interpretation errors that wouldn't
24 satisfy CUE, this is the paradigmatic example.
25 And I want to address what you brought up about

1 the supposed lack of clarity in the -- the
2 statute and -- and the VA's regulation.

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

15 Congress then codified the presumption
16 of soundness into the statute in 1958, again
17 using that two-part formulation, existed before
18 acceptance and enrollment and was not aggravated
19 by such service.

20 Three years later, VA came back in
21 what was supposed to be simply an administrative
22 repromulgation of its rules, no substantive
23 change -- no -- no explanation, certainly, for
24 any -- any substantive change that might be in
25 there, and they simply deleted the end of the

1 sentence.

2 This is not an interpretation. This
3 is certainly not a considered interpretation.
4 And when Wagner talks about it being somewhat
5 difficult to parse, it doesn't mean that the
6 language is difficult to parse.

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

14 But Wagner also identifies the reason
15 for that, and it was because of this long
16 struggle between the executive and the
17 legislature where the executive was -- was --
18 was -- was playing games, was -- was discharging
19 veterans who had had no conditions noted on
20 their entry to service and then saying, oh, that
21 was a medical issue, and there's also a long
22 history of Cong- -- of -- excuse me, of the VA
23 telling Congress don't include this aggravation
24 piece of -- of the -- the burden and Congress
25 saying no, we want it in there.

1 This was a very intentional act on the
2 part of Congress and no explanation for VA's
3 elimination of that.

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

7 You have a client.

8 MS. BOSTWICK: Correct.

9 JUSTICE BREYER: If your client was
10 sound at the time he enlisted, he's not sound
11 now.

12 MS. BOSTWICK: Correct.

13 JUSTICE BREYER: And so he gets money.

14 MS. BOSTWICK: Correct.

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

22 MS. BOSTWICK: Unless A or B.

23 JUSTICE BREYER: Unless he's not
24 sound.

25 MS. BOSTWICK: Correct.

1 JUSTICE BREYER: He's sound unless
2 he's not sound.

3 MS. BOSTWICK: Correct.

4 JUSTICE BREYER: Now he is not sound
5 if A or B.

6 MS. BOSTWICK: Correct.

7 JUSTICE BREYER: So we look at A. A
8 was he had noted there not sound when he signed
9 up.

10 MS. BOSTWICK: Or that the -- the --
11 the VA examiner had -- had thought.

12 JUSTICE BREYER: Yeah. Had noted it.

13 MS. BOSTWICK: Correct.

14 JUSTICE BREYER: That's not your
15 client.

16 MS. BOSTWICK: Correct.

17 JUSTICE BREYER: So we're not in A.
18 So he's not -- not sound under A.

19 MS. BOSTWICK: Correct.

20 JUSTICE BREYER: Oh, so now we look at
21 B, and B says there has to be really good
22 evidence that he was really sick before he was
23 accepted and the sickness was not aggravated by
24 his being in the service.

25 MS. BOSTWICK: I think I might have

1 misunderstood your -- your -- your A and B. I
2 think I made the --

3 JUSTICE BREYER: I probably --
4 (Laughter.)

5 JUSTICE BREYER: That's why I said it,
6 because I wanted to get this right in my mind,
7 that -- that -- that if he is not sound when he
8 signed up --

9 MS. BOSTWICK: Mm-hmm.

10 JUSTICE BREYER: -- no money.

11 MS. BOSTWICK: No. No, no, no.

12 JUSTICE BREYER: Well, wait. Wait --

13 MS. BOSTWICK: Oh, sorry.

14 JUSTICE BREYER: -- because "not
15 sound" has a special definition. Not sound,
16 there are two situations in which he's not
17 sound. The first says defects, infirmities, or
18 disorder noted at the time of the examination.

19 MS. BOSTWICK: Right.

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

22 MS. BOSTWICK: No.

23 JUSTICE BREYER: Okay. Now there's a
24 second way he's not sound, if he really was very
25 sick when he was accepted but the sickness was

1 aggravated during his service.

2 MS. BOSTWICK: Correct.

3 JUSTICE BREYER: So let's see if he
4 fits in B, and the answer is we're not sure, but
5 maybe we are, but, regardless, the reg didn't
6 copy the words "and was not aggravated by
7 service."

8 MS. BOSTWICK: Correct.

9 JUSTICE BREYER: Okay.

10 MS. BOSTWICK: And that's --

11 JUSTICE BREYER: And so how did
12 somebody make that mistake? It's there in the
13 statute. They write a reg, and then they don't
14 put in the words "and was not aggravated by that
15 service."

16 MS. BOSTWICK: Exactly.

17 JUSTICE BREYER: Because they're
18 pretending that people were sound at the time
19 they started, but that isn't really true. But
20 we have a pretending, and what it does by
21 pretending is it says, if you were sick as a dog
22 at the time you signed up, we're still going to
23 count you as not sick as a dog if your disease
24 was aggravated by service.

25 So we're going to treat the aggravated

1 people just as if they were really --

2 MS. BOSTWICK: And -- and what's
3 important --

4 JUSTICE BREYER: -- sick as a dog.
5 Wait, wait.

6 MS. BOSTWICK: -- which was --

7 JUSTICE BREYER: See, I can get it
8 mixed up very easy.

9 MS. BOSTWICK: I -- I hear you. I
10 hear you.

11 JUSTICE BREYER: But you have to
12 explain it so clearly that -- that you produce
13 the reaction when I read it the third time,
14 which is how did they ever not copy those last
15 six words?

16 MS. BOSTWICK: I -- I really can't
17 say, Justice Breyer. They did not put any sort
18 of explanation in when they changed the
19 regulation in 1961, but I want to -- this
20 description of --

21 JUSTICE BREYER: Have I said it
22 correctly? Because, if I haven't, you say it
23 correctly.

24 MS. BOSTWICK: I -- I believe you've
25 said it correctly. And -- and --

1 JUSTICE KAGAN: But I think, Ms.
2 Bostwick, that that's kind of not the issue. I
3 mean, the issue is that there was a regulation
4 that said that, and the question is what effect
5 that regulation had.

6 MS. BOSTWICK: Mm-hmm.

7 JUSTICE KAGAN: And, you know, there's
8 a statute that says the Board is bound in its
9 decision by the regulations. Now, actually,
10 even without that statutory provision, that
11 seems like that's just what the Board is
12 supposed to do.

13 Now, here, there's a statute that lays
14 it out. You're bound by the regulations.
15 You're bound regardless whether the regulations
16 are right or whether the regulations are wrong.

17 So, once you're bound by the
18 regulation, how could it be possible -- how can
19 it possibly be error, let alone clear and
20 unmistakable error, for the Board to do what
21 they're commanded to do?

22 MS. BOSTWICK: Because the Board was
23 also commanded to follow the statute. And we're
24 not suggesting that the Board should have
25 violated Section 4004 at the time, now 7104.

1 What we're saying is that the Board -- sure, the
2 Board sitting there with both of those
3 directives, it could not comply with both.

4 And so the question is not was the
5 Board -- was the adjudicator somehow at fault.
6 The question is can the court now look back and
7 say --

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

16 MS. BOSTWICK: So I think you start
17 with the text of the statute. A decision by the
18 Board is subject to revision on the grounds of
19 clear and unmistakable error. That doesn't say
20 that the Board has to have committed an un- --
21 clear and unmistakable error.

22 JUSTICE ALITO: I mean, well, you're
23 --

24 MS. BOSTWICK: It's a --

25 JUSTICE ALITO: There are two

1 possible -- grant me that there are two possible
2 interpretations. You think it's impossible to
3 interpret the term "error" to mean adjudicative
4 error? It's impossible to use the term that
5 way?

6 MS. BOSTWICK: In this context, yes, I
7 would say so.

8 JUSTICE ALITO: What is it about this
9 context that's unique?

10 MS. BOSTWICK: It's the -- the history
11 of how CUE had been understood before Congress
12 codified it. It's the -- the pro- -- the
13 pro-veteran context in which we're in where we
14 understand that Congress intends to legislate
15 for the benefit of veterans.

16 JUSTICE ALITO: I mean, is that a
17 sound -- is that a sound interpretive tool?

18 MS. BOSTWICK: I think it is, but the
19 Court doesn't need to reach it because we think
20 the statute is --

21 JUSTICE ALITO: All right. If we put
22 that aside, then I don't know what you have
23 left.

24 MS. BOSTWICK: We have -- we have
25 Russell. We have -- have the decisions that

1 Congress looked to that says that when statutory
2 or regulatory provisions -- statutory or
3 regulatory provisions, not "and," as the
4 government would have it, extant at the time
5 were incorrectly applied, that's CUE.

6 We have the Fugo decision that's also
7 cited in the legislative history saying that you
8 judge this CUE from the perspective of a -- a
9 later adjudicator looking at it.

10 JUSTICE BREYER: Could you do this? I
11 mean, this is what I think the problem is.
12 There is a -- there is a statute and it says any
13 veteran who served in World War II -- it says a
14 thousand dollar bonus will go to any veteran who
15 served in World War II or in Korea, okay?

16 The reg says any veteran will get the
17 thousand dollars if he served in World War II.
18 They just left out Korea.

19 MS. BOSTWICK: Yeah.

20 JUSTICE BREYER: Well, I don't know
21 how, but they did. And so someone who served in
22 Korea says read the statute. It says Korea. I
23 served in Korea. Don't I get the money?

24 MS. BOSTWICK: Yes.

25 JUSTICE BREYER: And that's the issue.

1 MS. BOSTWICK: That is --

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

6 And you say?

7 MS. BOSTWICK: The -- the fact that
8 they had to follow the reg does not absolve them
9 of -- it does not absolve the decision of being
10 infected with clear and unmistakable error.

11 And this is a natural way of -- of
12 talking about things. When a -- if a jury is --

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

17 But, in the interim, there are, you
18 know, many lower courts that follow our decision
19 because that's what they're supposed to do.
20 Have they made a clear and unmistakable error?

21 MS. BOSTWICK: They've made an error.
22 That's what Agostini says. And they've made an
23 error that's correctible on collateral review.
24 And so it -- remember, there's -- there's --
25 there's sort of two questions: Was there error

1 and what are the consequences?

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

5 JUSTICE GORSUCH: Counsel, can I --
6 can I pick up there --

7 MS. BOSTWICK: Certainly.

8 JUSTICE GORSUCH: -- on -- on the
9 question of remedy or consequences.

10 MS. BOSTWICK: Yes.

11 JUSTICE GORSUCH: Let's just posit for
12 the moment that I -- I agree with you the
13 Federal Circuit read CUE too narrowly. It ---
14 unduly influenced by the regulation. And I
15 apologize, but this will -- this -- my time.
16 Count this against my time.

17 And it unduly read it -- it didn't
18 read the statute as it's now written. It read
19 it influenced by the background regulation and
20 -- and to the point where it said even a
21 judicial opinion doesn't qualify in these
22 circumstances. Let's say we agree with you
23 that, yes, that's a clear and unmistakable
24 error. Wagner was one. All right. Fine.

25 MS. BOSTWICK: Mm-hmm.

1 JUSTICE GORSUCH: Do we have to reach
2 the question of remedy, or can we -- could we
3 remand it at that point back for the Federal
4 Circuit to decide what the appropriate remedy
5 would be?

6 MS. BOSTWICK: The remedy in this
7 case, Justice Gorsuch?

8 JUSTICE GORSUCH: Yeah.

9 MS. BOSTWICK: Yes. No, we -- we're
10 not asking the Court to -- to reach that
11 question. It certainly could. And I'm -- I'm
12 happy to -- to address it if the Court is
13 interested.

14 JUSTICE GORSUCH: But we could say --

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

16 JUSTICE GORSUCH: -- we could say
17 we're not sure if it's a clear and unmistakable
18 error, but we're -- one thing we're sure about
19 is that the Federal Circuit analyzed the
20 question incorrectly.

21 MS. BOSTWICK: Certainly. You could
22 say that when you have a -- a regulation that
23 contradicts a plain statute, that can be CUE. I
24 think that it would also be natural for the
25 Court to go on to say: And that's what we have

1 here. The question whether that was, for
2 example, outcome-determinative in Mr. George's
3 case could be addressed on remand.

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

11 I can't think of a case like that, but
12 there may be one, in which case how the Supreme
13 Court would behave would be quite relevant
14 because usually, you know, there is sort of two
15 sides to the argument. But I don't know of an
16 error that clear that I can think of.

17 MS. BOSTWICK: I'm not aware of one,
18 Justice Breyer, that fits that exact scenario,
19 but --

20 JUSTICE BREYER: The other side might
21 be.

22 MS. BOSTWICK: But -- but, certainly,
23 you know, it -- it is clear in this Court's
24 cases going back to Manhattan General Equipment,
25 to Dixon, that when the agency's regulation

1 contradicts the statute, that clearly it is a
2 legal nullity.

3 JUSTICE SOTOMAYOR: Counsel, can we go
4 back to your point that this statute is not
5 about adjudicator error, it's about error in the
6 decision, and that's the language of the
7 statute?

8 MS. BOSTWICK: Yes.

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

11 MS. BOSTWICK: Correct, Your Honor.

12 JUSTICE SOTOMAYOR: All right. Am I
13 correct that the -- that the veterans -- that
14 the regulations say that there is -- if there is
15 a material new fact that wasn't before the
16 adjudicator, that that could be grounds for a
17 CUE?

18 MS. BOSTWICK: No, Your Honor.

19 JUSTICE SOTOMAYOR: Ah.

20 MS. BOSTWICK: That is a separate type
21 of revision.

22 JUSTICE SOTOMAYOR: Right.

23 MS. BOSTWICK: It's a -- it's a -- a
24 separate type of claim. That's not clear and
25 unmistakable error precisely because the Board

1 didn't have those facts before it at the time.

2 JUSTICE SOTOMAYOR: But that can
3 reopen a decision?

4 MS. BOSTWICK: It can reopen a
5 decision. You -- you get prospective benefits
6 --

7 JUSTICE SOTOMAYOR: So, if a new
8 material fact can reopen a decision, what you're
9 saying is a new, not interpretation of the
10 statute, but a new -- a -- a -- a decision that
11 a statute says what it says is no different than
12 a new material fact, correct?

13 MS. BOSTWICK: It's different in -- in
14 the consequences. When you have a new and
15 material fact, you bring a supplemental claim.
16 That's not available when you have what we have
17 here. Mr. George can't file a supplemental
18 claim --

19 JUSTICE SOTOMAYOR: Got it.

20 MS. BOSTWICK: -- and say, oh, there's
21 this other provision.

22 JUSTICE SOTOMAYOR: Now let's go back
23 to the question of clarity. Your position is
24 very easy at Chevron step 2. If there's a
25 change in interpretation or a new law, then you

1 agree there's no CUE, correct?

2 MS. BOSTWICK: A change from one
3 legitimate interpretation to another? Yes.
4 Yes, Your Honor.

5 JUSTICE SOTOMAYOR: Or a permissible
6 interpretation. Let's not use the word
7 legitimate.

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

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

19 So what do we do with that? This goes
20 back to what Justice Gorsuch raised, which is I
21 can genuinely see some situations where the
22 error's not clear and unmistakable even under
23 step 1.

24 MS. BOSTWICK: So I would say the
25 relevant time period is after that decision

1 issues. Certainly, notwithstanding the
2 reasonableness of -- of your view of how the
3 case should have been decided, once it was
4 decided, if a lower court said, I don't like
5 that, I'm going to follow the dissent instead,
6 that would be a clear and unmistakable error.
7 And that's what we have here.

8 But moreover, even if some of those
9 errors you think would not be sufficiently clear
10 or unmistakable, that -- that's not the -- the
11 case that's before the Court. We don't have any
12 disagreement. We have the agency -- the
13 government confessing error and saying please
14 invalidate our regulation, it's wrong, and --

15 JUSTICE SOTOMAYOR: So this goes back
16 to Justice Gorsuch's point, which is, if we say
17 some errors can -- some situations can be clear
18 and unmistakable, you decide why this wasn't, or
19 tell us why it wasn't. That would be enough for
20 you?

21 MS. BOSTWICK: That would certainly be
22 a -- a helpful decision. We are asking the
23 Court to go further, but, no, that would be
24 favorable.

25 JUSTICE SOTOMAYOR: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas, anything further?

4 Justice Breyer, anything?

5 JUSTICE KAVANAUGH: Oh.

6 JUSTICE BARRETT: Is it to me?

7 JUSTICE KAVANAUGH: Yeah, I'm sorry.

8 I had --

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: Yeah, I have a
12 couple.

13 Back to the structure of how this
14 works out, the government relies on the
15 regulatory text before 1997 and says that was
16 incorporated into the statutory text and say the
17 long-standing regulatory text to describe the
18 scope of clear and unmistakable error review by
19 reference to the legal understandings that
20 existed when the prior decision was rendered.

21 And I assume your response to that is
22 the regulatory text is not lifted word for word
23 into the statutory text, or am I miss --
24 misunderstanding?

25 MS. BOSTWICK: That's part one of my

1 answer, is that it wasn't lifted into the
2 statutory text. Part two of my answer is, even
3 if it had been, it did not function as an
4 exclusion of things that otherwise would have
5 been CUE and -- and say these are no longer CUE.
6 It instead pointed to a different remedy.

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

10 MS. BOSTWICK: The 1994 one? Yes,
11 correct.

12 JUSTICE KAVANAUGH: Okay.

13 MS. BOSTWICK: And also that Congress
14 did not demonstrate any awareness of it.

15 JUSTICE KAVANAUGH: Okay. On the
16 Congress awareness point, is there evidence
17 anywhere that Congress thought any clear and
18 unmistakable errors would trigger retroactive
19 award of benefits back to the original time?

20 MS. BOSTWICK: Yes, it's in -- it's in
21 both CUE statutes that that's the -- the remedy.

22 JUSTICE KAVANAUGH: And then, on the
23 floodgates issue, you got cut off before you
24 issued the question -- you answered the question
25 about the veterans court saying this would

1 impose a pretty substantial strain on a system
2 that is already extraordinarily strained.

3 Your response to that?

4 MS. BOSTWICK: Yes. Another two-part
5 answer, Justice Kavanaugh.

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

14 But, regardless, these are benefits
15 that Congress wanted these people to have all
16 the time -- like, from -- from the outset,
17 right? These -- these are payments that
18 Congress accounted for and said this is what we
19 want these veterans to have.

20 And so the fact that, you know, if it
21 creates an administrative difficulty for them to
22 now come back to the agency and -- and right the
23 wrong that was done to them, we don't think
24 that's a -- a problem under Congress's statute.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

15 In other words, there's a -- you know,
16 there's a change about -- you know, from a
17 non-error to a non-error. There's also a change
18 from something that turns out to be an error to
19 a non-error.

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

24 MS. BOSTWICK: It's -- it's not a
25 change -- it may be a change in the abstract,

1 but that's not the relevant question, right?
2 You have to look at it in context. It talks
3 about changes in law or changes in
4 interpretation thereof, both of those things
5 together.

6 Certainly, when there's a change in
7 law, that's not something that --

8 JUSTICE KAGAN: Well, focusing on the
9 change in interpretation, you have a rule that
10 interprets the law. It was wrong. But, you
11 know, they changed it. So that's a change in
12 interpretation.

13 MS. BOSTWICK: But I think --

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

16 MS. BOSTWICK: -- I think the pairing
17 with change in law -- in law matters, right,
18 because the government's reading of this whole
19 preamble, both parts of it, is that it -- it --
20 it functions to -- to identify some less serious
21 errors that were not going to -- that we're --
22 we're -- we're not going to call CUE. That's
23 not what it's doing.

24 And one of the ways we know that's not
25 what it's doing is, when there is a change in

1 law, nobody would say that the original decision
2 was erroneous. This simply isn't taking errors
3 and carving them out. It's identifying things
4 that were never errors to begin with. That's
5 how this language was used in the regulations
6 dating back to the 1920s.

7 And when Congress codified this
8 concept -- this is -- I believe it's at page 7
9 of our opening brief. When Congress put this
10 into the effective date statutes, 3 -- Section
11 3010, it referred to a change in an act or a
12 change in VA issue. And so it's making clear
13 that when it's talking about changes in
14 interpretation, it's at the regulatory level,
15 not a judicial decision.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 Thank you, counsel.

19 Mr. Yang.

20 ORAL ARGUMENT OF ANTHONY A. YANG
21 ON BEHALF OF THE RESPONDENT

22 MR. YANG: Mr. Chief Justice -- sorry.
23 Mr. Chief Justice, and may it please the Court:

24 Clear and unmistakable error is not a
25 mere error. Congress separately provided for

1 direct judicial review under an appropriately
2 timed appeal to correct errors like that here.

3 This is quite different. Clear and
4 unmistakable error serves the function of
5 allowing for correction on collateral review
6 with no time limits, and it's a very specific
7 type of error based on the legal context that
8 existed at the time of the original decision, an
9 error that no one from that framework could
10 reasonably dispute.

11 The Board's application of a
12 regulation that Congress itself had required the
13 Board to apply does not qualify. The phrase
14 "clear and unmistakable error" standing alone
15 suggests a highly unusual error, more egregious
16 than just clear error, and an adjudicator is not
17 naturally said to commit clear and unmistakable
18 error by doing something it's required to do.

19 When Congress enacted Section 7111
20 using that term, it was already a term of art
21 with an established regulatory meaning. For
22 nearly 60 years now, the regulation governing
23 clear and unmistakable error provided that such
24 error cannot be based on a change in
25 interpretation of the law.

1 And that's exactly what we have here.
2 The interpretation of Section 111 and the VA's
3 regulation changed when the VA and then the
4 Federal Circuit reinterpreted that provision to
5 require more than the regulation did.

6 General Counsel Precedent Opinion 994
7 specifically held that the invalidation of a
8 regulation is a change in legal interpretation
9 that cannot constitute clear and unmistakable
10 error. That opinion was applied almost a dozen
11 times before Congress codified CUE in 1997.

12 And what Petitioner is suggesting is a
13 real radical change here. Notwithstanding the
14 text that eliminated changes in interpretation,
15 they think changes in interpretation is fair
16 game even though the Board was required by
17 Congress to apply that.

18 We believe that's incorrect and that
19 the tradition going back now almost 60 years
20 supports our position.

21 JUSTICE THOMAS: Mr. Yang, you seem to
22 suggest or argue that Congress codified the
23 prior understanding of the CUE, the regulatory
24 understanding, and there seemed to be some
25 disagreement between you and -- and counsel on

1 the other side about that.

2 But how can we be sure that Congress
3 codified your understanding, whatever that is,
4 of CUE?

5 MR. YANG: Well, I think you have two
6 principles -- I guess maybe two or three
7 principles. One, this is a highly unusual term,
8 right? This is not a term that exists
9 elsewhere, "clear and unmistakable error." But
10 it had existed in the regulations for 35 years
11 before 1997.

12 And when Congress adopts such a very
13 unusual term -- this -- this is a term of art
14 from a regulatory context -- this Court has
15 repeatedly recognized that it intends to take
16 the old soil up with that term of art.

17 The term had been understood in '97,
18 as Precedent Opinion 994 suggests, as well as
19 the Berger decision, which cites that precedent
20 opinion and says that a new rule of law from a
21 later statutory construction case cannot
22 possibly be the basis for CUE because CUE is
23 only concerned with the law as it existed at the
24 time.

25 Russell, for instance, which is cited

1 in the legislative history, if you use that, but
2 it was also kind of the en banc decision that --
3 that -- on this -- on this subject said that CUE
4 is where reasonable minds could only conclude
5 that the original decision was fatally flawed at
6 the time it was made. It must be an error in
7 the prior adjudication.

8 And then the relevant error is that
9 statutory/regulatory provisions extant at the
10 time were incorrectly applied. I think all of
11 that points very strongly in one direction.

12 And, you know, I think precedent
13 opinion is -- is -- is a nice way to highlight
14 that. That precedent opinion directly addressed
15 this issue here, and it arose in a very
16 high-profile context. This Court in *Brown*
17 versus *Gardner* invalidated a VA regulation
18 concerning liability when an injury is incurred
19 through treatment at a VA facility. It did so
20 just as the Federal Circuit had done so, just as
21 the veterans court had done so.

22 While cert was pending in *Gardner*, the
23 VA issued this precedent opinion because it had
24 to address how do we deal with invalidations of
25 regulations, and it concluded this is a change

1 in interpretation of law, consistent with the
2 reg.

3 The veteran in Gardner, in their
4 brief, cited Precedent Opinion 994 to the court
5 as a reason why that their opinion was right,
6 saying, hey, the VA says this won't apply
7 retrospectively, so, you know, don't worry about
8 it, it's just prospective.

9 Berger, the -- the Board applied
10 Precedent Opinion 994 about a dozen times before
11 1997 in various contexts, half of which --

12 JUSTICE GORSUCH: Counsel, I -- I --

13 MR. YANG: -- involved invalidation of
14 regs. I mean, this is --

15 JUSTICE GORSUCH: If I -- if I --

16 MR. YANG: -- this is something that
17 was --

18 JUSTICE GORSUCH: If I might?

19 MR. YANG: -- well under -- well
20 entrenched in the system.

21 JUSTICE GORSUCH: If I might, counsel?

22 MR. YANG: Sure.

23 JUSTICE GORSUCH: The premise of your
24 argument, I think, is a two-step. First, we
25 have to assume that Congress adopted words from

1 a regulation that it didn't choose to adopt. It
2 took some but not all, and we have to take your
3 presumption that that was just shorthand and all
4 the rest came with it.

5 And then, second, we have to, I think,
6 understand the regulation about changes in
7 interpretation of law or changes in law to
8 encompass judicial interpretations.

9 And what do we do with Professor
10 Mascott's amicus brief, for example, in which he
11 quite rightly points out that we don't normally
12 think of judicial interpretations as changes in
13 the law? In fact, in *Rivers*, we said it's not
14 accurate to say that a change in the law -- that
15 a judicial interpretation of Congress's statute
16 amounts to a change in the law that previously
17 prevailed? What do we do with that?

18 MR. YANG: Yeah, I think that just
19 misunderstands the question. We're not
20 saying --

21 JUSTICE GORSUCH: Professor Mascott
22 just misunderstands the question?

23 MR. YANG: The -- the reframing of it
24 is incorrect. We're not saying the law has
25 changed. The law has meant what it always

1 meant.

2 JUSTICE GORSUCH: Mm-hmm.

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

5 JUSTICE GORSUCH: Well, there
6 certainly was --

7 MR. YANG: -- and that interpretation
8 --

9 JUSTICE GORSUCH: -- by the agency,
10 but there hadn't yet been by any court of law.
11 And I guess that takes me to my second question,
12 is, okay, if -- if an agency interpretation --
13 and I assume that would mean not just a
14 regulation but maybe a litigation position. I
15 don't know. Maybe you can clarify that one.

16 MR. YANG: No.

17 JUSTICE GORSUCH: That wouldn't --
18 that wouldn't count. No, no, no. Okay. So it
19 has to be --

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

21 JUSTICE GORSUCH: -- a regulation.

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

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

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

25 --

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

3 MR. YANG: Okay.

4 JUSTICE GORSUCH: We have a
5 regulation. It's clearly wrong, okay? You --
6 you think this one may or may not qualify. I
7 don't know. Maybe the Federal Circuit will or
8 will -- won't think it will be. It may never
9 get there. We'll find out.

10 But let's say the -- the regulation,
11 since you want a regulation, says that -- that a
12 certain standard for disability applies in -- in
13 a segregated Army differently based on race.
14 That couldn't qualify as a clear and
15 unmistakable error?

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

18 JUSTICE GORSUCH: Oh, within the
19 timeline, but -- but Congress couldn't later
20 authorize and didn't later authorize a court of
21 law to -- to correct that -- that -- that clear
22 and unmistakable error? Two different standards
23 of disability based on race.

24 MR. YANG: If you're talking about
25 what existed in 1997 when Congress enacted CUE,

1 Petitioners argue -- this is at page 43 of their
2 brief -- that Congress did so knowing that
3 there's direct judicial review to correct error,
4 right?

5 JUSTICE GORSUCH: I understand that.

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

7 JUSTICE GORSUCH: That's not my
8 question, though, and you know it's not my
9 question.

10 MR. YANG: Well, no, but I -- I guess
11 --

12 JUSTICE GORSUCH: My question is,
13 could a later court correct that or not? And I
14 think, on your interpretation, the answer has to
15 be no.

16 MR. YANG: No. It could do so in a
17 prospective way. The difference here for
18 collateral review, as opposed to filing a
19 supplemental claim, which allows for --

20 JUSTICE GORSUCH: I'm talking about on
21 collateral review.

22 MR. YANG: Well -- well, no, but
23 that's because --

24 JUSTICE GORSUCH: Okay.

25 MR. YANG: -- there's multiple

1 pathways for this correction, error correction,
2 to be done. Congress --

3 JUSTICE GORSUCH: Okay. Last -- last
4 question then is -- so we agree that that --
5 that error could not be corrected, I think.
6 That would not qualify as a clear and
7 unmistakable error on your account. It's a
8 remarkable claim, but okay.

9 Last question is, do you agree we
10 should apply the veterans canon?

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

13 First of all --

14 JUSTICE GORSUCH: Do you think it's a
15 sound canon?

16 MR. YANG: We're not challenging -- I
17 would talk about the origin if we'd like to. I
18 had this experience at my last argument with the
19 Court. I am prepared to talk about the origin
20 of the veterans canon this time, and we could
21 talk about it. We're not challenging the
22 veterans canon here, but I -- we think it just
23 -- just accepting it as is, it doesn't apply for
24 -- for three general reasons.

25 JUSTICE GORSUCH: But just so I got

1 you square on the record, the government doesn't
2 contest it's applicable -- that it's a sound
3 canon and -- and -- and could apply?

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

8 One, Congress used a preexisting term
9 with a meaning, and the fact that that term in
10 the abstract might be capable of some different
11 meaning really doesn't speak to what Congress's
12 intent was here, which was to take up the body
13 of existing regulatory law.

14 Second, clear and unmistakable error
15 can cut against veterans sometimes. It has the
16 potential to. It's not just errors that always
17 correct in favor of the veteran. It's errors
18 that can cut against the veteran. And if you
19 look at the regulation that existed at the
20 time -- and this is in Petitioner's brief; they
21 reproduce it back at 17a -- severance of service
22 connection applies the same clear and
23 unmistakable error standard. Now it's
24 different, and there are some more protections,
25 but the basic standard cuts both ways.

1 So there are some contexts where some
2 veterans might be on the opposite end of a clear
3 and unmistakable error case. And Congress --
4 when you have that kind of one set of veterans
5 and another, it doesn't make sense to apply the
6 veterans canon.

7 Third, this is a reticulated scheme
8 where there's a balance of policy interests with
9 the different avenues that Congress provided.
10 Congress provided for direct review. That's a
11 generous 120-day appeal period. But it also
12 provided that if you don't appeal, there's
13 finality in the Board's decision, quite --

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

17 MR. YANG: This is one of them.

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

20 We know that Congress writes statutes
21 giving exemptions that it doesn't give in other
22 areas because it does favor veterans. And
23 whether you believe the veterans canon applies
24 or not, the one thing it can -- one can say is
25 you read it the way Congress wrote it, and if it

1 wrote it in favor of veterans, you don't look
2 for reasons to exempt veterans from the coverage
3 it gives.

4 So going back to Justice Thomas's
5 question, I've read all the cases that you've
6 given me, whether it's Berger, Wagner, Love. I
7 do know that Love is a little bit unclear, but
8 it favors Petitioner's side more than it favors
9 yours.

10 The veterans court there said there
11 were two CUEs. It ended up deciding that the
12 second CUE was more the ground for its decision,
13 but it read it contrary to what you're saying it
14 said.

15 None of those other cases you've cited
16 dealt with a situation identical to this one.
17 They dealt with situations in which there were
18 changes in law or changes in permissible
19 regulatory interpretation.

20 The only thing that favors you is what
21 Justice Kavanaugh pointed to, which was that
22 veteran -- the counsel's decision, but there is
23 no evidence that Congress knew that when it --
24 when it adopted this CUE standard. And that
25 veterans' counsel's decision admits that there

1 are some disputes about what this means.

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

6 Having said all of that, I don't
7 understand how you can claim that clear and
8 unmistakable error in the decision made, in the
9 statute, in the interpretation of the statute,
10 even if it was compelled by the regulation at
11 the time, it's disjunctive, error in the statute
12 or error in the regulation. This isn't error in
13 applying the statute.

14 So why isn't that clear and
15 unmistakable or potentially clear and
16 unmistakable?

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

20 I think you were referring to Look,
21 which had -- you know, you think may favor the
22 other side. Look, remember, was a 1992
23 decision. It was specifically addressed in
24 Precedent Opinion 994. It's never been cited
25 ever in 30 years by a court for its clear and

1 unmistakable error analysis that you think might
2 favor the other side, and that's because it just
3 wasn't presented.

4 We think that the precedent opinion
5 which was cited in Berger basically followed the
6 same type of principle about new interpretations
7 of law by courts don't count. That was what
8 existed.

9 It existed in veterans court -- Board
10 decisions following -- explicitly following the
11 precedent opinion. And there's no indication
12 that Congress was aware of any cases except for
13 Russell and Fugo. It didn't cite all these
14 veterans court opinions.

15 There's -- the -- the precedent
16 opinion is -- not only did it exist, its holding
17 is published in the Federal Register. It's at
18 59 Federal Register 27309 expressing that
19 holding.

20 You know, there's no reason to think
21 that Congress, given the high-profile context in
22 which Precedent Opinion 994 arose, including an
23 opinion -- a case in this Court, the one to
24 invalidate an ABA regulation I believe for the
25 first time on -- on judicial review, that

1 Congress would have thought that there was
2 anything but this would apply. Specifically, I
3 mean, there's no reason to think it would have
4 thought Look was a better case than --

5 JUSTICE BREYER: Well, I don't see how
6 they got this. Look, I'm thinking -- maybe I'm
7 the only one thinking if it's the only -- have
8 to address this quickly, but you make two
9 assumptions. Assumption 1, the words are clear,
10 unmistakable. It doesn't say evil. It doesn't
11 say the worst error ever made. It doesn't say
12 confusing. It says clear, unmistakable, okay?

13 Assume a second thing, and the second
14 thing is what I say to groups, which you're
15 lucky if you haven't heard it, but I say I'm not
16 one that pays a lot of attention to the words, I
17 do pay attention to them more than you think.
18 And if it says carrot, you cannot say that that
19 means a rabbit. A carrot does not mean a
20 rabbit. And you have to follow the statute.

21 Okay. Now that's background. Now why
22 can't I write this opinion? It says clear,
23 unmistakable. Everybody wants this Court to
24 define what's clear and unmistakable. I don't
25 want to define it. I'll just tell you this.

1 This is the most clear and unmistakable error
2 I've seen in 40 years. I can't think of another
3 one.

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

9 Or, to put it in these terms, it says
10 you count as sound -- I'm not saying you are
11 sound, but you count as sound unless A or B. A
12 happens to be that they noted you weren't sound,
13 and they didn't do that here.

14 So let's look at B. And B says you
15 weren't sound, you were sick at the time, but
16 the government has to absolutely prove that the
17 service didn't aggravate it.

18 Boy, that sounds like the Korea part
19 because they left that out, just like they left
20 out Korea, and so why I say this is clear,
21 unmistakable, is the person, whoever did this,
22 just didn't write that into the reg. Very
23 simple. He had no reason for not writing it
24 into the reg.

25 Even the government, with its

1 tremendous resources in the SG department, has
2 not been able to find a reason why they would
3 have left that out. It was an accident. But
4 it's sure clear and it's sure unmistakable.

5 Now what's wrong with that opinion?

6 MR. YANG: I've got four things to
7 discuss. I mean, you've talked about the
8 standard, and then you've talked about the
9 specific --

10 JUSTICE BREYER: Well, talk about it
11 as you wish and as briefly as you wish. I don't
12 -- I don't mind.

13 MR. YANG: The application here I
14 think we addressed in our brief, and I'll --
15 I'll basically leave it there, but I think --
16 don't think this is at all a clear resolution of
17 -- of the question. There are two statutes that
18 involve aggravation. This statute itself was
19 internally self-contradictory. You don't look
20 to whether you were in sound condition at the
21 time of entry by whether, assuming that you
22 weren't, there was aggravation after.

23 So there's a second statute involving
24 aggravation. They construed the two at the same
25 time. You know, we now conclude that the better

1 interpretation is the one that we currently
2 have, but I don't think that it's anywhere clear
3 because oftentimes, when you find statutes that
4 don't make any sense --

5 JUSTICE KAGAN: Well, Mr. Yang --

6 MR. YANG: -- you need to look more
7 broadly.

8 JUSTICE KAGAN: -- just assume with
9 Justice Breyer and just assume that the
10 regulation was clearly and unmistakably wrong.
11 The regulation was clearly and unmistakably
12 wrong.

13 Now the question is, is the decision
14 --

15 MR. YANG: Yeah.

16 JUSTICE KAGAN: -- based on that
17 regulation clearly and unmistakably wrong? And
18 the premise of Justice Breyer's question is that
19 once you answer the first, you answer the second
20 as well.

21 I think the premise of your argument
22 is that there's a leap from the first to the
23 second, but you have to justify that leap. So
24 how would you justify it?

25 MR. YANG: There's -- I think we look

1 at the text of 7111(a). We look at the way that
2 it had been interpreted in Russell, which
3 focuses on the adjudicatory error.

4 And so let me start with that. 7111
5 talks about a decision by the Board is subject
6 to revision for clear and unmistakable error.
7 It's the decision that's the focus.

8 The next sentence says, if there's
9 such an error --

10 JUSTICE KAGAN: The decision as
11 opposed to the regulation?

12 MR. YANG: Exactly. It's an
13 adjudicatory. The -- the prior decision, that
14 is, the adjudicatory decision, shall be
15 reversed -- reversed or revised. It's not the
16 regulation. That's a separate thing done by a
17 separate entity.

18 Secondly, Russell explained that the
19 CUE review is --

20 JUSTICE KAGAN: Why is it important
21 that it's done by a separate entity? I mean,
22 you're suggesting the Board did nothing wrong
23 here. And that's right. The Board did nothing
24 wrong here. But the VA as a whole, let's assume
25 with Justice Breyer, did do something wrong.

1 MR. YANG: Right. Right.

2 JUSTICE KAGAN: Why is the focus on
3 the Board's decision rather than the VA
4 decision-making as a whole?

5 MR. YANG: Well, I think that, you
6 know, why Congress would have wanted that,
7 the -- the focus has always been on the Board.
8 If you look at Russell, Russell talks about CUE
9 -- CUE being reasonable minds could only
10 conclude that the original decision was fatally
11 flawed at the time it was made.

12 You look to the regulations and
13 statutes extant at the time to decide that, and
14 the error must be in the prior adjudication such
15 that the prior decision is revised.

16 JUSTICE GORSUCH: All that's
17 interesting. But the statute speaks about the
18 Secretary making a clear and unmistakable error,
19 right? I mean the statute. It's -- it's a
20 small thing, but --

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

23 JUSTICE GORSUCH: Yeah.

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

1 JUSTICE GORSUCH: Yeah.

2 MR. YANG: That says the decision by
3 the Secretary under this chapter --

4 JUSTICE GORSUCH: Yeah.

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

10 JUSTICE GORSUCH: Fair enough.

11 MR. YANG: But the second sentence of
12 that is, if the evidence established the error,
13 the prior decision shall be reversed. That's
14 the decision to get --

15 JUSTICE GORSUCH: The decision,
16 though, is of the Secretary throughout this
17 whole -- whole section.

18 MR. YANG: The only decision --

19 JUSTICE GORSUCH: Right?

20 MR. YANG: The only decision that we
21 have --

22 JUSTICE GORSUCH: Decision by the
23 Secretary, Section A.

24 MR. YANG: But -- yes, although that's
25 true with the Board. The Board issues the

1 decision for the Secretary.

2 JUSTICE GORSUCH: It's all delegated
3 authority from the Secretary, though, right?
4 The Board exercises delegated authority, I
5 assume, from the Secretary?

6 MR. YANG: Well, it's statutory
7 authority, but -- but, yes. So, I mean, the
8 Board --

9 JUSTICE GORSUCH: Okay, all right.
10 I -- I guess I'm -- I'm still stuck where
11 Justice Kagan is, and I'm not sure I understand
12 why it makes a difference.

13 It may be that the Board's decision
14 was justified in some sense. It wasn't, you
15 know, extra legal. It tried to comply with the
16 regulation. It had two competing statutory
17 commands, one of which it obeyed, one of which
18 it disobeyed, however.

19 I mean, it -- it -- it clearly and
20 unmistakably erred on the -- on the application
21 of veterans benefits, but it sought to abide by
22 the rule that it has to follow its regulations.
23 It had two competing statutory claims on it and
24 it did its best job, I don't doubt it, in some
25 sense justified, but its decision, we would

1 still say, as we do with lower courts, I think,
2 who are trying and struggling to interpret a
3 statute but get it wrong, we would say that's
4 clearly and unmistakably wrong.

5 MR. YANG: Well, that's a conclusion.
6 I mean, the question is, what is clear and
7 unmistakable error, right? And clear and
8 unmistakable error --

9 JUSTICE GORSUCH: I thought -- I
10 thought we had agreed for the purposes of this
11 line of questioning that we were -- we're taking
12 as given that the -- that the -- the -- the
13 interpretation -- the regulation was clearly and
14 unmistakably wrong. But, if you want to make
15 that argument, go ahead.

16 MR. YANG: Oh, no, no. I mean, I
17 didn't understand your -- there's a distinction,
18 though, between the regulation and the
19 adjudication, right? And the -- the decision
20 that's relevant is the adjudicatory decision.

21 JUSTICE GORSUCH: I understand that.
22 My question, though, was, counsel, the
23 adjudicatory body has two options. One, follow
24 a law that's pretty clear on its face it's
25 inconsistent with the regulation, all right?

1 Another law that says follow the regulations,
2 okay? It has to choose. I -- I don't fault it.
3 It -- it -- it chose one rather than the other,
4 okay?

5 It might in some sense be
6 understandable, justified maybe even, but why
7 can't that be fairly described as clear and
8 unmistakable error to the extent it rests on,
9 its analysis depends upon, a clear
10 misinterpretation of the statute, as Justice
11 Breyer outlined?

12 We would, for example, say with
13 respect to lower courts, if this came through
14 the judicial system, say we know our friends on
15 the Tenth Circuit were trying their best. We
16 know they did their absolute level best, but we
17 interpret the statute to plainly mean something
18 very different. Their error was clear and
19 unmistakable.

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

23 JUSTICE GORSUCH: Well, we say all the
24 time at what is sometimes called Chevron step 1
25 that the plain language of the statute forbids

1 the lower court's opinion --

2 MR. YANG: Right, but --

3 JUSTICE GORSUCH: -- clearly and
4 unmistakably. I'm sure I can find those words.

5 MR. YANG: Justice Gorsuch, I think,
6 you know, talking about Chevron step 1, let me
7 give you an example. The Court has recently
8 decided a case called Babcock. It involved dual
9 status military technicians. You were the lone
10 dissenter on the statutory construction case.

11 JUSTICE GORSUCH: I must have been
12 wrong.

13 MR. YANG: I don't think you were
14 clearly and unmistakably wrong. You found
15 persuasive the Eighth Circuit's decision in a
16 case called Peterson, which was a Chevron step 1
17 decision. It came before all the other courts
18 that had decided against it. And then, in that
19 context, the Social Security Administration had
20 to decide, like, what do we do with Peterson
21 before the Court reversed or abrogated Peterson?

22 They have a -- there's a case called
23 Michael versus -- or Mitchael versus Colvin, 809
24 F.3d 1050, where the Eighth Circuit says no, no,
25 you know, you have a provision about change in

1 interpretation of law, you didn't have to apply
2 our decision in Peterson retroactively with
3 respect to closed SSA claims. Prospectively,
4 you do it, but not retroactively.

5 This is the same type of thing here.
6 There are remedies. The remedies are
7 multitudinous. You can appeal. If you don't
8 appeal -- and -- and if you appeal, then you can
9 get, you know, back to the date of your
10 application. If you don't do that, there's a
11 very low bar for a supplemental application. It
12 just has to be new and relevant evidence. It
13 can be cumulative. Just some evidence that's
14 relevant, right? You get a new adjudication
15 under the new understanding. If all else fails,
16 you could seek secretarial relief for an
17 administrative error.

18 But what we're talking about here is
19 something very different, collateral review
20 going back -- here, it's back to 1977, right --
21 where the provision had existed for 25 years
22 before anyone had any problems because the
23 provision is an unusual provision.

24 So did Congress intend to add an
25 entirely new claim to dig up decades' worth of

1 claims? The VA estimates that there right now
2 are about 16 million finally denied claims for
3 living veterans.

4 Now each veteran can have more than
5 one claim because they could have their knee,
6 they could have their -- you know, the back,
7 they could have PTSD. But there's about 16
8 million of these claims. If you start saying,
9 well, we're going to go back -- and there's been
10 a number of -- of regulations that have been
11 invalidated over time -- we're going to go back
12 indefinitely, where the VA is already
13 adjudicating 1.4 million claims a year, you're
14 going to add a new claim. Now maybe they can
15 bring prospective claims, but retrospective
16 claims on top of that?

17 Congress had reason to be cautious
18 here because, when you add to the system, you
19 add new claims that didn't exist before in the
20 regulatory scheme, you threaten the timing of
21 everything else.

22 So we think that our interpretation --
23 I mean, first of all, if there's not a binding
24 interpretation, our view is you need to have a
25 binding agency interpretation that's changed.

1 Board decisions aren't anything. They're not
2 precedent. They don't decide -- you know,
3 they're not binding. We can't appeal them.

4 But, if you have a regulation, if you
5 have a regulation that Congress required the
6 Board to be -- apply in its adjudication so the
7 decision of the Board is the same decision that
8 we're talking about on review, the decision of
9 the Board is bound by the regulation, in that
10 context, we -- you know, it may well be error.
11 You can correct it on direct review. We don't
12 think it's clear and unmistakable error on
13 collateral review with an unlimited timeline.

14 JUSTICE KAVANAUGH: On your argument
15 about what Congress thought as opposed to the
16 structure -- and I understand your structural
17 argument about collateral review and that's
18 different and this language is transplanted.
19 Just want to make sure -- I think I asked this
20 question imprecisely to Ms. Bostwick -- but was
21 there any congressional suggestion that this
22 situation, in other words, a reg that had been
23 in existence before is later declared invalid,
24 would itself be the trigger for retroactive
25 benefits? Are you aware of anything one way or

1 the other?

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

3 JUSTICE KAVANAUGH: Okay.

4 MR. YANG: We simply are inferring
5 from the state of play that existed in -- in --
6 in November '97 when Congress enacted the
7 statute.

8 JUSTICE KAVANAUGH: And don't you
9 think that's odd? I mean, I -- we can't figure
10 that out now, but wouldn't this have been a big
11 issue? Boy, this is going to a big hit for the
12 reasons you say?

13 MR. YANG: It seems like it would have
14 been. I mean, you know, we can't point to
15 something, and Congress often is very terse and
16 some members of the Court don't even look to
17 legislative history. But, you know, what I can
18 say is the context in which this issue arose in
19 -- in Opinion 994 was a significant one. It was
20 while cert was pending in Brown versus Gardner,
21 which is the first, you know, Court -- decision
22 of this Court, I believe, on -- on direct review
23 to invalidate a reg of the VA as inconsistent
24 with the statute. And --

25 JUSTICE KAVANAUGH: Ms. Bostwick said

1 you didn't really play that up so much in your
2 brief.

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

5 JUSTICE KAVANAUGH: Mm-hmm.

6 MR. YANG: -- and we made a -- you
7 know, certainly, the court of appeals relied on
8 it, and we relied on it earlier. You know, we
9 had to make some judgments about what to argue,
10 what to fit in the brief, and things have
11 evolved.

12 JUSTICE KAVANAUGH: So I guess you're
13 saying, just to summarize what you're saying, I
14 think, is, if Congress had wanted the
15 retroactive benefits for this kind of situation,
16 we would expect some -- some indication
17 somewhere, or is that a wrong --

18 MR. YANG: You know, I don't know.
19 I'm not sure that you'd need a clear statement.
20 I think what the presumption is, is when
21 Congress takes this novel term, "clear and
22 unmistakable error," that doesn't exist
23 elsewhere, it exists in the very context that
24 Congress is codifying it, that it is presumed to
25 take the old soil with it.

1 And it doesn't require that Congress
2 said, oh, yeah, we want -- we like this bit of
3 grass and we like this bit of soil. You just
4 take the whole thing writ large.

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

8 MR. YANG: Well, I think --

9 JUSTICE KAVANAUGH: And, therefore,
10 you know, you go back to trying to parse the
11 terms rather than just taking the phrase as a
12 whole and picking up what comes with it.

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

15 JUSTICE KAVANAUGH: Right.

16 MR. YANG: -- which Justice Sotomayor
17 was discussing earlier.

18 JUSTICE KAVANAUGH: So you say General
19 Counsel opinion, Russell --

20 MR. YANG: In general -- both of --
21 General Counsel decision was after Look.

22 JUSTICE KAVANAUGH: Yeah.

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

1 If you thought that there was some
2 tension between the -- the -- the precedent
3 opinion and Look, someone would have brought it
4 up, right? But Look never had occasion to
5 decide if it would be clear and unmistakable
6 error if the agency was bound by a regulation
7 that it applied faithfully because, in that
8 case, the agency didn't apply the regulation
9 properly. And the -- the Court said, well, an
10 -- the Board is not free to ignore the -- the
11 regulations and, therefore, the error existed
12 under the correct application of the law as it
13 previously existed at the time.

14 Look just doesn't resolve, I think,
15 the answer for Petitioner. And when you look
16 broad -- more broadly, look at 994, you look at
17 the Board decisions following 994, I think
18 Congress can be assumed to have brought that
19 soil up with the term.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Yang.

22 Justice Thomas, anything further?

23 Justice Breyer?

24 Justice Kagan?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: Yeah, two
2 questions.

3 So you mentioned a third path.
4 There's direct review, which gets you
5 prospective benefits. There's the collateral
6 review that, if it applies, can get you
7 retroactive benefits. You say it doesn't apply
8 here. And then you said Secretary review.

9 MR. YANG: Well, there's actually four
10 types of things.

11 JUSTICE KAVANAUGH: Okay.

12 MR. YANG: Direct appeal gets you
13 benefits all the way --

14 JUSTICE KAVANAUGH: I meant the
15 supplement --

16 MR. YANG: -- from the beginning.

17 JUSTICE KAVANAUGH: -- I meant the
18 supplemental claim.

19 MR. YANG: Right. Supplemental
20 claim --

21 JUSTICE KAVANAUGH: Yeah.

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

24 JUSTICE KAVANAUGH: Right. That gets
25 you --

1 MR. YANG: That's prospective.

2 JUSTICE KAVANAUGH: -- prospective.

3 MR. YANG: Sometimes it's
4 retrospective up to a year if there's a new
5 law --

6 JUSTICE KAVANAUGH: Okay, but --

7 MR. YANG: -- but -- but not -- it's
8 limited in its retrospectivity.

9 JUSTICE KAVANAUGH: My question is
10 really about the Secretary review. Is that a
11 real thing?

12 MR. YANG: It doesn't come up a lot.
13 It's --

14 JUSTICE KAVANAUGH: Okay. I'll take
15 that as not really.

16 MR. YANG: -- it's left in the
17 Secretary's discretion. So the Secretary, you
18 know, could simply decide not to act on -- on
19 the request.

20 JUSTICE KAVANAUGH: And then, on the
21 hardship question, you know, it's tough for us
22 to figure out this, and this happened yesterday
23 too, how much of a hardship will this really be
24 in the Veterans Administration, veterans system.
25 So, you know, to the extent you can document

1 this in 30 seconds to 60 seconds, I would
2 appreciate hearing what -- what you think would
3 happen.

4 MR. YANG: Well, it's hard for us to
5 document it too, but I'll -- I'll give you a few
6 hints, what we think the might -- the issues
7 might be. There's no time limit on this. The
8 veteran or survivors are alive, you know, goes
9 back indefinitely.

10 You're looking also to past now
11 decisions. Remember, this was a 2003, 2004 that
12 was only raised in 2014. Past decisions that
13 invalidate regs, we haven't done a comprehensive
14 search, but we've identified about 14 or 16
15 decisions that invalidate regs in various
16 contexts. That can have a cascading effect when
17 we're talking about 16 million finally
18 adjudicated denied claims. We don't know what
19 subset that is, but it's -- it's -- it could be
20 substantial.

21 And you're looking prospectively,
22 right? You're looking prospectively at what
23 might happen in the future with respect to
24 future decisions and future regs. And what
25 we're -- our point is is that Congress, when it

1 sat and it looked at this in 1997, it already
2 had before it direct review, right?

3 This -- you would expect if there are
4 errors like this, that like a systemic error,
5 that someone's going to bring it up on review.
6 Congress provided for that. And if you don't --
7 if you forfeit your rights, Congress provided
8 for finality in VA Board decisions with a very
9 narrow exception that piggybacked on top of a
10 very narrow application of the section through
11 the regulations.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett? No?

15 Thank you, counsel.

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

20 MR. YANG: I'm sorry, I -- I just -- I
21 don't know, but I -- I will -- I will tell you
22 that I don't think that there is a -- much of a
23 distinction here because the theory that they
24 have for Chevron step 1 is it's ambiguous,
25 therefore, you could not reasonably conclude

1 otherwise.

2 But the theory on Chevron step 2 is
3 that the agency did not reasonably construe the
4 ambiguity. So, if you're on -- if you lose on
5 step 2, it's also because you've acted
6 unreasonably under their theory. So I don't
7 think there's really any real distinction.

8 Their theory, I think, as my friend
9 suggested, it covers all errors, all
10 interpretive statutory errors, all invalidations
11 of regs, and that is a -- a sea change for a
12 statute that has existed in its present form for
13 almost 60 years. Or -- or -- sorry, a
14 regulation and then the statute for almost 60
15 years.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Rebuttal, Ms. Bostwick?

19 REBUTTAL ARGUMENT OF MELANIE L. BOSTWICK
20 ON BEHALF OF THE PETITIONER

21 MS. BOSTWICK: Thank you, Your Honor.

22 I have a few brief points I'd like to
23 make in rebuttal, but, first, I would like to
24 correct a -- a handful of mischaracterizations
25 from the government.

1 First, my friend on the other side
2 spoke a great deal about the availability of
3 direct review. Of course, direct review was not
4 available to Mr. George nor to any veteran until
5 1988. There are many veterans who received
6 clearly erroneous decisions and did not have the
7 ability to challenge those at the time.

8 Second, in speaking about supplemental
9 claims, there was a suggestion that one could
10 bring such a claim with cumulative evidence or
11 with a legal error. Neither of those is
12 correct. It is available only for new and
13 relevant evidence, formally known as new and
14 material evidence. So -- so I think that's just
15 a mischaracterization of that form of relief.

16 And, third, in the -- the Mitchell
17 case that my friend on the other side referred
18 to, the primary holding there was that mandamus
19 was unavailable because reopening in the Social
20 Security context is a discretionary remedy, and,
21 of course, mandamus is not available to -- to
22 order relief that is not mandatory.

23 The -- the reference in that decision
24 to the change in interpretation language is
25 extremely obscure and sheds no light on what

1 that court was thinking, let alone what Congress
2 thought in 1997, long before that decision
3 issued when it looked to the Social Security
4 context as an analogue.

5 There was a reference to clear and
6 unmistakable error as a -- as a highly unusual
7 term. I -- I don't think that's correct. It's
8 a term that's used, as Your Honors might have
9 noticed, in multiple contexts in veterans
10 regulations, for example, in the other
11 regulation that's at issue in this case that
12 talks about clear and unmistakable evidence.

13 And VA, in that clear and unmistakable
14 evidence regulation in 1956 -- this is
15 Section 3.63(d) -- had a -- had an explicit
16 definition, "clear and unmistakable" means
17 obvious or manifest.

18 That's exactly what we argue it means
19 in the clear and unmistakable error context as
20 well, an obvious or manifest error that's
21 consistent with all of the precodification case
22 law, including Russell, which talked about
23 errors of statutory or regulatory application.

24 But it's also consistent with how
25 this -- this standard is -- is understood in

1 other contexts, in other demanding standards,
2 for example, the clear error standard.

3 When you have an error of statutory
4 interpretation, that is a clear error. That --
5 that suffices. Likewise, in the mandamus
6 context, the first prong of the mandamus test is
7 that a -- a petitioner must have a clear and
8 undisputable right to the writ, and an error of
9 statutory interpretation counts among other
10 places. You can see that in this Court's
11 decision in TC Heartland.

12 Likewise, abuse of discretion review
13 violating a statute is -- is an error of law
14 that counts as an abuse of discretion, and law
15 of the case also uses the clearly erroneous
16 formulation and includes statutory error, as we
17 see in the Christianson case.

18 So even though this does have an
19 established meaning in the veterans context,
20 it's a meaning that's consistent with other
21 demanding standards of -- of review.

22 On the reference to the change in
23 interpretation, even if we think that it's --
24 it's relevant here and that it -- it was somehow
25 brought into the statute, they haven't

1 identified any instance of calling what we have
2 here, namely, a judicial ruling saying this
3 regulation was plainly invalid or even anything
4 that came before was plainly invalid, calling
5 that a change in interpretation.

6 In fact, this Court in Monell, when it
7 overruled Monroe and found stare decisis met,
8 referred to the prior decision as an error.
9 There was a -- a -- a quote to the earlier
10 Jeroward decision, which likewise involved
11 overruling three of this Court's prior
12 precedents, and it deemed those precedents not a
13 correct statement of the law.

14 So we think it is actually quite
15 natural to understand this kind of change as
16 identification and correction of an error and
17 not merely a change in interpretation.

18 I want to address also the -- the
19 binding argument, this idea that -- that there's
20 something special about a regulation because a
21 regulation binds the Board. That's not quite
22 accurate either.

23 If you look at Section 7104(c), which
24 is the provision they -- they rely on, the Board
25 is not just bound by regulations and by

1 statutes. It's also bound by, for example,
2 precedential General Counsel opinions.

3 And so the effect of the government's
4 argument is that if the General Counsel issues a
5 precedential opinion that is contrary to a
6 statute and the Board relies on that
7 precedential opinion in denying benefits, that
8 can't be CUE.

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

14 And there's no reason for this
15 categorical exclusion.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:16 a.m., the case
19 was submitted.)

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