

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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FLOYD D. JOHNSON,)
 Petitioner,)
 v.) No. 25-735
UNITED STATES CONGRESS,)
 Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (11:55 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 25-735, Johnson against
5 United States Congress.

6 Mr. Chen.

7 ORAL ARGUMENT OF JEFFREY W. CHEN

8 ON BEHALF OF THE PETITIONER

9 MR. CHEN: Mr. Chief Justice, and may
10 it please the Court:

11 Section 511(a) reaches questions
12 necessary to a decision under a law that
13 affects the provision of benefits. Text,
14 context, structure, and the government's own
15 longstanding practice make clear that 511(a)
16 does not reach constitutional challenges to
17 statutes.

18 Start with the text. A decision under
19 a statute is a decision in accordance with the
20 statute. It applies the statute as written.
21 That's how this Court construed the same phrase
22 in Robison. And deciding a statute's validity
23 is not necessary to a decision under the
24 statute. The VA did not need to resolve
25 Section 5313's validity to reduce Mr. Johnson's

1 benefits in accordance with Section 5313.

2 Indeed, a decision to disregard Section 5313 as
3 unconstitutional would obviously not be in
4 accordance with Section 5313.

5 Context reinforces the point. The
6 Board of Veterans Appeals must make the VA's
7 final decisions on all 511(a) matters, and no
8 one in 1988 would have understood deciding the
9 constitutionality of statutes as necessary to
10 the BVA's decisions. The BVA had long
11 disclaimed authority to decide those questions,
12 and the settled understanding was that
13 administrative tribunals couldn't decide them.

14 If Congress meant to depart from those
15 settled views, it would have done so clearly,
16 but it didn't. In fact, the government itself
17 has long understood 511(a) exactly the way we
18 do. The VA responded to 511(a) by prohibiting
19 the BVA from deciding challenges to statutes.
20 And the BVA has continued to disclaim authority
21 over those questions.

22 The government's new reading would
23 spurn decades of BVA practice and raise a host
24 of anomalies and thorny questions. Among other
25 things, it would empower the inferior officers

1 of the BVA to render final decisions for the
2 executive on whether to disregard acts of
3 Congress. That presents serious Article II
4 concerns. And none of the government's
5 proposed workarounds is consistent with the
6 VJRA.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Can applied
9 constitutional challenges be considered under
10 511?

11 MR. CHEN: Can as-applied?

12 JUSTICE THOMAS: As-applied
13 challenges.

14 MR. CHEN: So we have avoid use -- we
15 have tried to avoid using the distinction
16 between facial versus as-applied in our
17 briefing here because that terminology risks
18 confusion, and, ultimately, it's a red herring.
19 So let me explain what our position has always
20 been and how as-applied and facial has been --
21 come into this case.

22 So our position, the line that we have
23 always tried to drawn is -- draw is the line
24 that this Court drew in Robison. On one side
25 of that line is challenges to statutes, and on

1 the other side of the line is challenges to
2 agency action, constitutional and otherwise.

3 And so the reason you see this
4 "facial" versus "as-applied" terminology is
5 because lower courts have used that terminology
6 to describe the two sides of the Robison line.
7 But that's confusing because this Court uses
8 that terminology in a more well-known context,
9 which is the Salerno context, which is, you
10 know, invalid as to all applications versus as
11 to just some.

12 So we -- that's not what lower courts
13 are talking about in this context. And so, to
14 answer your question, as-applied meaning
15 attacks on agency action, even constitutional
16 ones, they must -- our position is that they
17 must go through the VJRA process, they are
18 covered by the text of Section 511(a), whereas
19 attacks on -- on -- or challenges to statutes,
20 those fall outside the scope of Section 511(a).

21 JUSTICE JACKSON: But what a weird --
22 what a weird --

23 JUSTICE THOMAS: I know.

24 JUSTICE JACKSON: -- way to slice it.
25 I mean, I -- I just don't -- I don't understand

1 why your line isn't constitutional claims go to
2 the district court --

3 MR. CHEN: Mm-hmm.

4 JUSTICE JACKSON: -- versus other
5 kinds of claims. And I appreciate that Robison
6 has that language in it.

7 MR. CHEN: Right. Mm-hmm.

8 JUSTICE JACKSON: But it seems odd
9 that you would concede that a due process
10 challenge, for example, would go to the BVA,
11 which I assume would disclaim its ability to
12 review it because it says we don't do
13 constitutional claims, and we'd have all the
14 other problems that you point to as a reason
15 for supporting your view.

16 I just don't know why you would
17 concede that a due process claim, for example,
18 would be covered by 511.

19 MR. CHEN: So a couple points.

20 First, although -- however weird it
21 seems, this distinction actually arises, we
22 think, from both the text and context,
23 longstanding context about the -- what
24 administrative tribunals can and can't do. So,
25 from the text, this -- this distinction comes

1 from the words "decisions under a law." We
2 think that that takes off the table challenges
3 to statutes, but it doesn't take off the table
4 other challenges to agency action.

5 And then, in terms of context, you
6 know, you mentioned Robison. The other context
7 is just this settled understanding at the time
8 this statute was enacted at least that
9 administrative tribunals couldn't decide the
10 constitutionality of statutes. It could not
11 decide the constitutionality of acts of
12 Congress.

13 And so that's where this -- we think
14 this --

15 JUSTICE JACKSON: And that's this
16 case. I appreciate it.

17 MR. CHEN: Yeah.

18 JUSTICE JACKSON: My due process is a
19 hypothetical --

20 MR. CHEN: Right.

21 JUSTICE JACKSON: -- but it just -- it
22 flows from Justice Thomas's question about what
23 remains under 511, and is it all constitutional
24 claims or just the ones that I guess --

25 MR. CHEN: Yeah.

1 JUSTICE JACKSON: -- relate to the
2 statute in this way.

3 MR. CHEN: Yeah. I guess the final
4 point I'd make is that this case is, like you
5 said, only about constitutional challenges to
6 statutes, and all you have to decide is whether
7 that particular kind of constitutional claim
8 falls outside of the statute.

9 We think that there is at least
10 arguable -- within the text, it is arguable
11 whether other constitutional claims fall within
12 it. But, at least with respect to
13 constitutional challenges to statutes, that,
14 again, the text, the "decisions under a law"
15 text takes that off the table.

16 JUSTICE ALITO: Well, I don't
17 understand how your argument can be squared
18 with the -- with the text of 511(a). There are
19 two questions, I think, under 511(a). One is
20 whether the Constitution is a law that affects
21 the provision of benefits. It is -- either it
22 is or it isn't. And I don't know how you draw
23 a distinction when you're interpreting that
24 between as-applied -- between facial and
25 as-applied challenges.

1 The other is whether it is necessary
2 for the Secretary to decide the constitutional
3 question. And, again, I don't know how you
4 draw the line in the -- how you -- how the text
5 supports the distinction that you are drawing.

6 MR. CHEN: So let me take those in
7 order. So the government agrees with us that
8 the law that affects the provision of benefits,
9 that -- that doesn't refer to the Constitution
10 and for good reason. When Congress -- Congress
11 enacts statutes all the time that specifically
12 call out the Constitution. When Congress wants
13 to refer to both statutes and the Constitution,
14 we've cited several jurisdictional examples.

15 JUSTICE ALITO: Okay. But, in a
16 literal sense, the Constitution is a law that
17 affects the provision of benefits.

18 MR. CHEN: Correct, yes. In -- in --

19 JUSTICE ALITO: All right. So, in a
20 literal sense --

21 MR. CHEN: Yeah.

22 JUSTICE ALITO: -- you're saying that,
23 for some reason other than the literal meaning
24 of the text, the law here doesn't mean the
25 Constitution?

1 MR. CHEN: I think what I'm saying is
2 that context dictates a more narrow -- the
3 surrounding context dictates more narrow
4 construction of what "a law that affects the
5 provision of benefits" means here. And that's
6 both, you know, these ordinary -- we know that
7 when Congress wants to, in -- in these
8 jurisdictional statutes, refer to both
9 categories, the statutes and -- and the
10 Constitution, it typically says both.

11 But also just in turning --
12 considering the background context of the
13 predecessor statute and what it said, it --

14 JUSTICE ALITO: Well, I'm still -- I'm
15 starting with the text of the statute that's in
16 effect now. And if the Constitution is not a
17 law that affects the provision of benefits for
18 purposes of facial challenges, I'm struggling
19 to understand how it can be a law that affects
20 the provision of benefits for an as-applied
21 challenge, but you draw that distinction.

22 MR. CHEN: So that distinction rely --
23 actually arises -- the reason that other
24 constitutional challenges, we think, is within
25 the scope of the statute -- and, again, you

1 don't have to decide it -- but we think that
2 comes in from the previous -- or earlier in
3 the statute, it -- it says, "Decide all
4 questions of law and fact necessary to a
5 decision."

6 So that -- we think that the
7 constitutional, for example, due process
8 challenges, that comes from the "all questions
9 of law and fact necessary to a decision."

10 So let me try to explain this -- let
11 me try to back up.

12 In applying the statute as written,
13 the agency is still always under an obligation
14 to confirm that its own actions are comporting
15 with the Constitution.

16 And so, while the "decision under a
17 law" phrase takes constitutional challenges to
18 statutes out of -- off the table, there is
19 still this question of whether it is necessary
20 for the Secretary to confirm that its own --

21 JUSTICE ALITO: Well, let me give you
22 this -- let me give you an example.

23 Suppose that there were a statutory
24 provision that says that the benefits that a
25 veteran would otherwise receive cannot be

1 obtained by any veteran who has said anything
2 that is critical of the military or the
3 Commander in Chief. Okay?

4 Now could the Secretary say: This is
5 blatantly unconstitutional, and, therefore, we
6 are not going to withhold the benefits from
7 this veteran?

8 MR. CHEN: The -- so the Secretary,
9 writ large, if that comes from a -- if that
10 decision comes from a principal officer, then
11 yes.

12 But what we're talking about here is
13 specifically the BVA, because Section 511(a) --

14 JUSTICE ALITO: Well, I mean, look,
15 the statute talks about the Secretary.

16 MR. CHEN: Right.

17 JUSTICE ALITO: It doesn't talk about
18 those to whom the Secretary has chosen to
19 delegate authority.

20 MR. CHEN: Right. But Section 7104(a)
21 specifically says that the final decisions on
22 all matters that fall within Section 511(a)
23 must be made by the Board of Veterans' Appeals.

24 So, when it's referring to the
25 Secretary here, Section 7104(a) makes clear

1 that it means the Board of Veterans' Appeals
2 makes the final decisions.

3 JUSTICE ALITO: So could the -- could
4 the Board say that this is blatantly
5 unconstitutional; we're not going to withhold
6 these benefits?

7 MR. CHEN: We don't think that the
8 Board of Veterans' Appeals can make that call.

9 We think that -- well, most
10 immediately, there is a regulation, 38 C.F.R.
11 20.105, that says that, in its decisions, the
12 BVA is bound by statutes. And so that's one
13 reason why they couldn't.

14 But I think the more general principle
15 is the BVA only has powers that Congress gives
16 to it. And Section 511(a), I think, is the
17 primary, if not the only, statute that gives --

18 JUSTICE GORSUCH: Well, counsel, why
19 do we need to go down that rabbit hole?

20 Now maybe we do, and I'll follow you
21 down it if I have to.

22 But 511's about district court review,
23 right?

24 So say the Secretary or the Board or
25 whoever decides, in their magnanimity, to

1 follow the Constitution of the United States
2 and say the First Amendment is a thing. That
3 would be a good day's work.

4 MR. CHEN: Mm-hmm.

5 JUSTICE GORSUCH: But I don't know why
6 that would affect the scope of district court
7 review for purposes of a challenge to the
8 Secretary's decision.

9 MR. CHEN: So --

10 JUSTICE GORSUCH: Those are two
11 different things in my mind. Am I missing
12 something?

13 MR. CHEN: So I think you're right.
14 The reason that we're talking about --

15 JUSTICE GORSUCH: There's nothing
16 prohibiting the Secretary or the Board from
17 following the Constitution, in other words.

18 MR. CHEN: Sorry. Can you repeat
19 that? I didn't hear the last part.

20 JUSTICE GORSUCH: Goodness hopes that
21 there's nothing that prevents the Secretary or
22 the Board from following the Constitution of
23 the United States if, in their good graces,
24 they so choose.

25 The question we face is whether this

1 statute precludes district court review --

2 MR. CHEN: Right.

3 JUSTICE GORSUCH: -- of a
4 constitutional challenge and channels
5 everything in a different direction.

6 MR. CHEN: Correct. The reason I
7 was -- we were going into what this requires
8 the BVA to decide is just that this is actually
9 a dual provision in that it -- it's not just a
10 preclusion provision. It also imposes a duty
11 on the BVA to decide everything within the
12 scope of that provision.

13 JUSTICE GORSUCH: They've got to
14 do this. They've got to do this, and when
15 they -- when the stuff they've got to do is
16 channeled away from district court. But I
17 don't see how that necessarily precludes them
18 from, if -- if they should happen to choose to
19 follow the Constitution of the United States,
20 that would be okay.

21 MR. CHEN: Right. Right. I think --
22 I think that is right. I think what -- our
23 position is just, even if there were some
24 situations where the BVA could decide
25 constitutional challenges to statutes, that --

1 that's not the issue presented here, I think is
2 what you're saying.

3 The issue presented here is whether
4 the text of Section 511(a) requires the BVA
5 to decide all constitutional challenges to
6 statutes.

7 JUSTICE KAGAN: Well, I think it does,
8 Mr. Chen, or at least I think that there's a
9 pretty clear argument that it does.

10 The Secretary shall decide all
11 questions of law and fact necessary to a
12 secretarial decision under a law affecting the
13 provision of benefits.

14 Now one question that's necessary to
15 that decision by the Secretary is whether the
16 law providing for veterans' benefits is itself
17 constitutional. It's kind of a pre-condition
18 of the Secretary's decision under that law.

19 So this isn't about Justice Alito's
20 back half of the sentence. It's about the
21 front half of the sentence. The Secretary is
22 applying, let's say, a VA law about benefits.

23 But there's been a challenge, a
24 constitutional challenge, raised to that law,
25 and the Secretary can't go merrily along

1 without deciding whether the law itself can be
2 applied.

3 So why isn't that a question of law
4 necessary to the secretarial decision
5 referenced?

6 MR. CHEN: So it's because a
7 decision -- a decision under a law is a
8 decision in accordance with a law. It complies
9 with the law.

10 JUSTICE KAGAN: Yes, it's not the --
11 it's not the back half of the sentence that's
12 troubling me. You're right, the -- the --
13 the -- the decision under -- the Secretary's
14 decision under a law affecting benefits is
15 probably like the benefits statute, some VA
16 statute.

17 But, to get to a decision under that
18 law, the Secretary is being presented with a
19 constitutional challenge. So why isn't
20 deciding that constitutional challenge
21 necessary to the Secretary's decision under
22 that law?

23 MR. CHEN: Right. So I think --

24 JUSTICE KAGAN: It's a precondition --

25 MR. CHEN: Right.

1 JUSTICE KAGAN: -- of applying that
2 law that you decide the constitutional
3 question. Otherwise, you wouldn't go any
4 further.

5 MR. CHEN: Right. So I think -- so
6 a -- the Secretary -- it is not necessary -- as
7 the BVA's longstanding practice shows, it's not
8 logically necessary --

9 JUSTICE KAGAN: Well, forget the --
10 the longstanding practice because, apparently,
11 the government wants to change that practice.
12 And, apparently, the government wants to bring
13 that practice into compliance with what the
14 words actually say --

15 MR. CHEN: Yeah.

16 JUSTICE KAGAN: -- which is that the
17 Secretary has a duty, you know, has to decide
18 questions of law that are necessary to their
19 decisions about benefits.

20 And what would be more necessary to a
21 decision about benefits than deciding whether
22 the benefits statute itself is constitutional?

23 MR. CHEN: I think what we're saying
24 is that it doesn't -- this statute doesn't say
25 "necessary to" -- "to a decision about

1 benefits." The words that they use are
2 "necessary to a decision under a law." So a
3 decision --

4 JUSTICE KAGAN: Yeah, it's necessary
5 to a decision under the veterans' benefits
6 laws.

7 MR. CHEN: Right. So --

8 JUSTICE KAGAN: But -- but the
9 decision to a veterans' benefit law is -- about
10 how much you're entitled to receive in benefits
11 is not going to happen before the Secretary
12 says: Well, first, we have to confront this
13 constitutional claim about whether we can apply
14 this statute at all, whether this statute -- or
15 whether we just have to toss this statute out.

16 So that is necessary to the decision
17 of the Secretary under the VA benefits law.
18 It's not its -- the Constitution is different
19 from the law that the Secretary is making the
20 benefits decision under, but the constitutional
21 question is necessary to that decision.

22 MR. CHEN: If Congress meant to
23 expand the scope of this statute to include
24 constitutional challenges to statutes, then
25 "necessary to" is actually the last words that

1 it would have used because --

2 JUSTICE KAGAN: Well, you're saying,
3 like, if Congress meant to expand, and I take
4 it that that is referencing, like, what the old
5 statute said and then what Robison said.

6 But I'm just looking at the statute as
7 it exists, and the statute as it exists seems
8 to me to favor the government.

9 MR. CHEN: I think that there are many
10 other structural -- construing the statute in
11 that way raises a host of anomalies and
12 problems that you can --

13 JUSTICE JACKSON: But, before you get
14 to those problems, can you just respond to her
15 textual point?

16 I mean, I thought your answer was that
17 when you look at the text of this statute, a
18 decision is not just floating out there. The
19 actual phrase is "a decision by the Secretary
20 under a law."

21 MR. CHEN: Correct.

22 JUSTICE JACKSON: So you begin with:
23 What is that?

24 MR. CHEN: Right.

25 JUSTICE JACKSON: What is a decision

1 by the Secretary under the law? It is --

2 MR. CHEN: It is --

3 JUSTICE JACKSON: -- the particular
4 interstices of the benefits determination once
5 we've identified this law.

6 I thought your point was that a
7 decision by the Secretary under a law takes
8 the law as a given.

9 MR. CHEN: Yes.

10 JUSTICE JACKSON: And then we'd say,
11 based on this law as it is, what are the
12 questions and -- of law and fact that are
13 necessary to applying this given law?

14 MR. CHEN: That's exactly correct.

15 JUSTICE JACKSON: That -- that there
16 is no constitutional question in the framing of
17 the statute in that way --

18 MR. CHEN: That's right.

19 JUSTICE JACKSON: -- because "under a
20 law" just takes whatever the law is, and if
21 there are these other questions about the
22 constitutionality, they might be predecessor
23 questions, but they're not belonging to the
24 Secretary because that's not what this statute
25 says.

1 MR. CHEN: Right.

2 JUSTICE KAGAN: I mean, that's a
3 theory, but it's a theory that does not -- that
4 seems to require adding lots of words to this
5 statute, because we have a decision by the
6 Secretary under the veterans' benefits law, and
7 now we're having to decide what are the
8 questions that are necessary to the Secretary
9 making that decision.

10 And one of those questions is whether
11 there's, like, a first principles precondition
12 that prevents the Secretary from applying that
13 law. And I don't see why that's not, like, not
14 only not -- I mean, that is like the most
15 necessary question to the secretarial decision
16 because he couldn't make the decision in the
17 first place.

18 MR. CHEN: So I think what's happening
19 here is there's one way of reading it that is
20 necessary precondition, and there's another way
21 of reading it as a necessary part. And I think
22 our --

23 JUSTICE KAGAN: A necessary?

24 MR. CHEN: A necessary part of a
25 decision under a law, a necessary part of

1 taking the statute as a given and determining
2 how to apply it. And --

3 JUSTICE JACKSON: And so, in resolving
4 that ambiguity, we go to the context, right?

5 MR. CHEN: Correct.

6 JUSTICE JACKSON: Those were the other
7 points that you made.

8 MR. CHEN: Yes. I think that if --
9 if -- if we have two equally plausible readings
10 of the statute, then I think the context and
11 the structural features that we've raised --

12 JUSTICE KAGAN: So -- so now you're --
13 you're -- you're suggest -- you're saying that
14 my version of the statute is at least equally
15 plausible?

16 MR. CHEN: I -- we --

17 JUSTICE GORSUCH: Be careful, counsel.
18 (Laughter.)

19 MR. CHEN: No, I -- I do not -- I do
20 not think that. I am just saying that if
21 you -- if you -- if you grant that our reading
22 of the -- of the statute is at least equally
23 plausible, then the other --

24 JUSTICE KAGAN: Yeah, I'm not -- I'm
25 not sure it is.

1 MR. CHEN: I -- I -- well, I think
2 that the -- one of the -- construing the
3 statute the way that the government wants
4 would -- first of all, that would be such a
5 drastic departure from the settled
6 understanding of the law at the time this
7 statute was passed.

8 No one -- this Court had repeatedly
9 endorsed the view that administrative --
10 administrative tribunals like the BVA couldn't
11 decide constitutional challenges to statutes.
12 So, if Congress meant to introduce a sea change
13 in administrative practice, Congress would have
14 spoken much more clearly than this language.
15 And --

16 JUSTICE KAGAN: We -- we differ on the
17 use of legislative history, and, usually, I'm a
18 skeptic, but this idea that Congress couldn't
19 have meant that, I mean, the House report says
20 this -- it speaks to this question of why
21 Congress changed the first line of Section
22 511(a).

23 And the House report says "the bill as
24 revised," the first sentence, "imposes a duty
25 upon the administrator to resolve all legal and

1 factual questions which are necessary to a
2 decision in a case. Thus, if a veteran alleges
3 that a statute is unconstitutional, the
4 administrator must take a position with respect
5 to such contention if it is necessary to a
6 decision in a case."

7 So, I mean, I think what the House
8 report at least thinks that they were doing in
9 changing the first part of that sentence, which
10 is different from the second part of the
11 sentence, which was changed in response to
12 Traynor, but the first part of the sentence was
13 changed, according to the House report,
14 specifically for that reason, to saying we're
15 also talking about -- about things that are
16 necessary to -- to -- to making the decision,
17 which includes these constitutional
18 preconditions as to whether you can apply the
19 veterans' statute.

20 MR. CHEN: So, even if you believe
21 that legislative history is a valid tool of
22 statutory interpretation, that there's --

23 JUSTICE KAGAN: I am a skeptic
24 usually. I'm a skeptic --

25 MR. CHEN: Right. Right.

1 JUSTICE KAGAN: -- but it -- it -- it
2 just like -- boy, it's just telling you why the
3 first sentence of Section 211 was changed, and
4 it has to do exactly with constitutional
5 questions.

6 MR. CHEN: So this -- this legislative
7 history is exactly not the legislative history
8 you would use to construe the statute. That
9 legislative history was attached to a House
10 bill that was not enacted and that, more
11 particularly, would have abolished the BVA
12 altogether.

13 We know that what Congress passed
14 ultimately was a bill about the BVA's duties.
15 So a statute or legislative history about a
16 statute about -- that would have gotten rid of
17 the BVA altogether just doesn't shed light on
18 what Congress ultimately imposed the duty on
19 the BVA to decide.

20 Secondly, even in that which -- the
21 excerpt that you read from, it was talking
22 about the administrator and talking about the
23 administrator announcing the position of the
24 agency. Who are those who can announce the
25 position of the agency? It's not the

1 lower-level inferior officers of the BVA. It's
2 someone with principal officer authority to
3 render decisions on behalf of the executive on
4 whether to disregard acts of Congress.

5 JUSTICE GORSUCH: And let's talk about
6 that for a second. How would it work? The
7 government seems to suppose there's some way
8 for the Board to get an opinion from somebody
9 else in the agency on the constitutional
10 question because it seems to acknowledge the
11 Board itself probably shouldn't be deciding
12 constitutional questions.

13 MR. CHEN: Right.

14 JUSTICE GORSUCH: So how would that
15 work?

16 MR. CHEN: So, candidly, I don't -- I
17 don't think it does work in practice. But I
18 think the -- the solution that they've offered
19 is something like the -- the Secretary or the
20 GC of the VA issuing some precedent -- some
21 prospective precedent opinion or guidance or
22 instruction on the constitutionality of a
23 statute.

24 The problem with that is that in the
25 vast majority of circumstances, there will be

1 no prospective guidance on the
2 constitutionality of a statute. The last
3 precedent opinion of the -- of the VA that was
4 issued was in 2019, and that was on any -- that
5 was -- sorry, the last -- go ahead.

6 JUSTICE GORSUCH: 2019?

7 MR. CHEN: 2019, correct.

8 JUSTICE GORSUCH: All right. It's
9 been -- been a minute.

10 MR. CHEN: It's been a minute. And
11 the VA -- so the government doesn't cite any
12 examples of where the BVA has followed a
13 instruction of the agency or the Secretary with
14 respect to the constitutionality of a statute.

15 My point here is that --

16 JUSTICE GORSUCH: So it's never
17 happened?

18 MR. CHEN: So it doesn't happen. And
19 it's impractical to expect that it would happen
20 in a substantial number of cases because it's
21 impractical to think that the VA is monitoring
22 the tens of thousands of cases that -- that are
23 percolating and figuring out which issues it
24 needs to resolve.

25 It's also impractical to expect the VA

1 to identify all the statutes that could
2 feasibly affect the provision of benefits and
3 then determine the constitutionality or render
4 an opinion on the constitutionality of each one
5 of them, right?

6 So the -- the problem here is that in
7 the vast majority of circumstances, you have
8 the BVA acting -- confronting a constitutional
9 challenge to a statute for which there is no
10 prospective guidance. And then what does it
11 do? We know from experience that what it does
12 is it disclaims jurisdiction to decide that
13 question, and then no one from the agency
14 decides the question. And that's -- that
15 violates even the government's reading of
16 Section 511.

17 JUSTICE GORSUCH: That really is a
18 rabbit hole.

19 MR. CHEN: Right. I see my time is
20 up.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Suppose the claim is

1 that the -- the Board's prior interpretation of
2 a statutory provision is unconstitutional. Is
3 that a claim that can be raised in -- in
4 district court?

5 MR. CHEN: I'm sorry, can you repeat
6 the first part?

7 JUSTICE ALITO: The claim is that the
8 Board's prior interpretation of a statutory
9 provision is unconstitutional. Is that a claim
10 that can be raised in district court?

11 MR. CHEN: If it's the Board's
12 interpretation of a statute, I don't think that
13 that can go in district court, and the reason
14 I'm saying that is because that has to do with
15 the -- an agency action that has to do with the
16 Board's interpretation of the statute.

17 So I -- I think, based on the line
18 that Robison drew, I think the -- the
19 government would have a good argument that that
20 can't proceed in district court.

21 JUSTICE ALITO: Suppose the claim is
22 that this provision is not unconstitutional on
23 its face because it's constitutional as applied
24 to, let's say, veterans who are serving a term
25 of life imprisonment without parole, and for

1 them, there isn't the same need for the
2 benefits that is experienced by a veteran who
3 is living in the outside world, but that the
4 provision is unconstitutional as applied to
5 someone who has a sentence of 61 days.

6 MR. CHEN: Mm-hmm.

7 JUSTICE ALITO: Can that go to -- can
8 that be raised in district court?

9 MR. CHEN: I believe so because that
10 attacks the inherent characteristics of the
11 statute. That is the formulation that you,
12 Justice Alito, used in -- in the Elgin dissent.
13 But it also is -- it is an attack on statutory
14 validity rather than misused agency discretion.

15 And so I think that goes -- that's --
16 that is still a challenge to a statute. That
17 is still a challenge to what Congress -- a
18 decision that Congress made. And so I think
19 that goes -- that can proceed in federal
20 district court.

21 JUSTICE ALITO: Okay. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: Going back --
25 going back to what Justice Kagan was referring

1 to, that House report, was creating a totally
2 different, new system, correct?

3 MR. CHEN: Yes. Correct.

4 JUSTICE SOTOMAYOR: It was creating a
5 court of veterans appeal?

6 MR. CHEN: Yes.

7 JUSTICE SOTOMAYOR: And that court was
8 going to operate like a regular court?

9 MR. CHEN: I believe so. It would
10 have been much more expanded than what it is
11 now.

12 JUSTICE SOTOMAYOR: So the
13 administrator would make his or her decision
14 and they have to go to that court to litigate
15 things. So it made much more sense.

16 MR. CHEN: I think that's right, yes.

17 JUSTICE SOTOMAYOR: All right. With
18 respect to this system, there's a regulation in
19 place that says the BVA cannot address
20 constitutional questions and, if the BVA did,
21 could the government appeal? If it said -- the
22 BVA said something was unconstitutional --

23 MR. CHEN: Mm-hmm.

24 JUSTICE SOTOMAYOR: -- could the
25 government appeal?

1 MR. CHEN: It could not. Seven --
2 Section 7252 precludes the government.

3 JUSTICE SOTOMAYOR: So we have to take
4 the system as it exists?

5 MR. CHEN: Right.

6 JUSTICE SOTOMAYOR: And that's a very
7 odd system, isn't it?

8 MR. CHEN: That is not just odd. That
9 is -- that raises very serious questions under
10 Article II and -- and the Appointments Clause.

11 JUSTICE SOTOMAYOR: It leads to the --
12 your conclusion, which is keep what Robison
13 said --

14 MR. CHEN: Yes.

15 JUSTICE SOTOMAYOR: -- which is let
16 constitutional questions go to the court
17 because that's where the government would have
18 a right to defend the law, correct?

19 MR. CHEN: That's exactly right.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?
21 Justice Gorsuch?
22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Just -- just one.
24 In thinking about the precedent, our precedent
25 from 1974, what's the relevance of the Federal

1 Circuit now being part of the process in the
2 statute that's passed subsequently?

3 MR. CHEN: Yeah. So the relevance is
4 that the Federal Circuit and -- and the CAVC,
5 right now, our position is that the -- the
6 veteran has basically a choice. We -- we think
7 that 511(a) does not strip district courts of
8 jurisdiction to decide these challenges, but if
9 the veteran wants to, for example, if the
10 veteran has something more than just a
11 standalone constitutional challenge to a
12 statute, it can bring it within the VJRA
13 scheme. The BVA disclaims jurisdiction, but
14 then the CAVC and the Federal Circuit get to
15 decide it.

16 And I think the -- the relevance is
17 that that language of the Federal -- I think
18 it's 7292 that expressly allows the Federal
19 Circuit to decide these questions is just
20 making clear that even though the BVA doesn't
21 decide it, the Federal Circuit can.

22 And, in fact, you know, Congress's
23 creation of this scheme actually, I think,
24 confirms that Section 511(a) does not include
25 constitutional challenges to statutes because

1 Congress, in creating the scheme, was very --
2 used very specific words to delineate the scope
3 of review at each level of the scheme.

4 So, in 7292, it explicitly directed
5 the Federal Circuit to decide any challenge to
6 the validity of any statute. That's very
7 explicit text.

8 In Section 7261, Congress directed the
9 CAVC to set aside BVA decisions that are
10 contrary to constitutional right, so not as
11 explicit as 7292 but still mentions the
12 Constitution at least.

13 Congress included no similar language
14 in Section 511(a), which is the only provision
15 that could strip district courts of
16 jurisdiction. And so, when Congress uses
17 particular language in some sections of the
18 statute but not others, we presume that to be
19 intentional.

20 JUSTICE KAVANAUGH: One might think
21 that the problem undergirding the decision in
22 1974 was the lack of any meaningful judicial
23 review and that was solved by the Federal
24 Circuit. But I take your response. Thank you.

25 MR. CHEN: Yeah.

1 JUSTICE BARRETT: I just want to be
2 sure I understand how this might work. Let's
3 imagine that your client filed a claim for
4 benefits, didn't know about the statute, and
5 then was denied the benefits because of being
6 in jail.

7 MR. CHEN: Mm-hmm.

8 JUSTICE BARRETT: In that circumstance
9 then, could he then later up the chain, say,
10 before the Federal Circuit, press his
11 constitutional claim even though it's facial,
12 inherent in the statute itself, whatever we
13 want to say?

14 MR. CHEN: Yes. We -- we believe so.
15 Yes. It could raise it in the CAVC first
16 probably and then the Federal Circuit.

17 JUSTICE BARRETT: So he has a route?

18 MR. CHEN: He -- he has a route. It's
19 just that that route doesn't -- the BVA will
20 not decide it. But then subsequent --

21 JUSTICE BARRETT: Okay. But he has a
22 route. He still has a way of pressing the
23 constitutional claim?

24 MR. CHEN: If he wanted to, yes.

25 JUSTICE BARRETT: Yes.

1 MR. CHEN: Yes.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 JUSTICE JACKSON: He has a way of
5 pressing it, but just to be clear, as Justice
6 Sotomayor mentioned, the government, if it
7 lost, could not appeal, right?

8 MR. CHEN: Correct. If the government
9 lost at the BVA, 7252 prohibits or precludes
10 the government from appealing that decision.

11 JUSTICE JACKSON: And can you just
12 give us the quick version of your response to
13 the argument that Robison applied to a
14 different statute and that it was a
15 constitutional avoidance decision? Why isn't
16 that right?

17 MR. CHEN: So I think, even if Robison
18 relied in part on constitutional avoidance, it
19 still rendered a judicial construction of the
20 very phrase that Congress chose to reenact,
21 which is decisions under a law. So there is at
22 least still a presumption that Congress also
23 adopted Robison's construction of that phrase.

24 And I think our other point is just
25 that even -- even if -- again, even if Robison

1 had relied in part on constitutional avoidance,
2 it's not like constitutional avoidance isn't
3 relevant here. This -- the government's
4 reading presents a constitutional problem of
5 its own. It's different from the one in
6 Robison, but it is still very serious under the
7 Article II -- under Article II and the
8 Appointments Clause.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Barber.

13 ORAL ARGUMENT OF KEVIN J. BARBER
14 ON BEHALF OF THE RESPONDENT

15 MR. BARBER: Mr. Chief Justice, and
16 may it please the Court:

17 The law entitles Petitioner to
18 judicial review, just not in district court.
19 Under Section 511(a), Petitioner's challenge to
20 the validity of Section 5313 is a question of
21 law that is necessary to a decision under the
22 benefits laws because the answer to that
23 question dictates whether his benefits under
24 Section 1131 must be reduced. 511(a) therefore
25 channels his claim to the Veterans Court and

1 the Federal Circuit.

2 Indeed, those courts have already
3 decided the very same constitutional claims.
4 If Petitioner concedes that as-applied claims
5 are covered by 511(a), then there's no basis
6 for treating facial claims differently.

7 Petitioner resists that
8 straightforward analysis with two main
9 theories. The first is that the VJRA
10 incorporated this Court's holding in Johnson
11 against Robison, but the VJRA fundamentally
12 changed the statutory scheme. It amended
13 511(a) to establish that the relevant question
14 of law need not arise under a benefits statute
15 to be covered.

16 And it enacted Chapter 72, which
17 obviates Robison's constitutional concerns and
18 explicitly contemplates that challenges to VA
19 benefit statutes are channeled into the
20 exclusive review scheme. It's the current
21 statute that matters.

22 The second theory is that the VA can't
23 decide constitutional challenges to statutes,
24 so 511(a) can't apply to such claims. But the
25 premise is mistaken. True, the Board of

1 Veterans Appeals in the past has been
2 inconsistent on its authority, sometimes
3 deciding such claims and sometimes not. But,
4 as we see it, the Board can and must decide
5 veterans' constitutional claims subject to the
6 supervision of agency leadership.

7 Petitioner's contrary view would
8 conflict with the statutory text and deprive
9 veterans of their ability to bring such claims
10 to the agency. It would even compel the VA to
11 enforce a hypothetical benefits statute that
12 was blatantly unconstitutional.

13 The judgment of the court of appeals
14 should be affirmed.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: How would you respond
17 to Petitioner's point that if the government
18 lost a constitutional claim before the Board,
19 it had no right to appeal it?

20 MR. BARBER: So that would be a very
21 easy situation to deal with. We wouldn't need
22 to appeal to the Veterans Court. First of all,
23 the Board makes the Secretary's decision, so it
24 is the VA's decision.

25 I think we're in a world in which a

1 member of the Board sort of goes rogue and
2 declares a federal statute unconstitutional in
3 a scenario where the agency leadership
4 disagrees with that.

5 That would be easily dealt with
6 through the reconsideration process. The
7 Board's chairman has plenary authority to order
8 reconsideration of cases before the Board. By
9 the time that step was taken, the VA leadership
10 could have used the mechanisms that my friend,
11 Mr. Chen, was discussing to dictate the Board's
12 resolution of that constitutional claim, so
13 instructions of the Secretary, a precedential
14 legal opinion of the agency's GC.

15 This is a very hypothetical scenario
16 because the Board, although it has decided
17 facial constitutional challenges to statutes on
18 numerous occasions, it has never struck down a
19 federal --

20 JUSTICE KAVANAUGH: If it -- if it --

21 MR. BARBER: -- benefits statute.

22 JUSTICE KAVANAUGH: -- did, the -- the
23 suit would be a government agency against a
24 government agency, correct?

25 MR. BARBER: No, because there

1 wouldn't be this appeal. If there were
2 theoretically an appeal by the VA of the VA's
3 own decision, that would be very strange, but
4 that wouldn't --

5 JUSTICE KAVANAUGH: Because that would
6 be government against government?

7 MR. BARBER: Yes. That would be
8 absurd.

9 JUSTICE KAVANAUGH: And I, at least in
10 the old days, I said that should be tossed.
11 Figure it out yourselves.

12 (Laughter.)

13 MR. BARBER: Yes.

14 JUSTICE BARRETT: But, you know --

15 JUSTICE SOTOMAYOR: In the sense of
16 independence of an agency decision of a BVA
17 decision, and that's what you're suggesting.

18 Tell me something. Robinson -- are
19 you challenging whether Robinson was correctly
20 decided?

21 MR. BARBER: No.

22 JUSTICE SOTOMAYOR: All right. So you
23 accept it as the law at the time?

24 MR. BARBER: Yes, under a different
25 statute.

1 JUSTICE SOTOMAYOR: And so, when
2 Congress was amending or creating 511, that was
3 the state of the law, correct?

4 MR. BARBER: Yes.

5 JUSTICE SOTOMAYOR: It's very clear
6 that when Congress wants to include
7 constitutional law issues within agency
8 consideration, it's very clear about it. It
9 did it with the Court of Appeals for Veterans
10 Claims and said there that -- that VA actions
11 that are, "contrary to constitutional right,
12 power, privilege, or immunity," that that court
13 could decide that, correct?

14 MR. BARBER: Yes. I mean, this is one
15 of the real oddities with Petitioner's position
16 because Chapter 72, 7261, 7292, make
17 crystal-clear in their text that among the
18 issues that the Veterans Court and the Federal
19 Circuit must decide are constitutional
20 challenges to statutes.

21 JUSTICE SOTOMAYOR: But that's a very
22 different independent consideration than what
23 the BVA looks at because, by regulation, the
24 BVA does not consider --

25 MR. BARBER: Well, first of all, I --

1 JUSTICE SOTOMAYOR: -- constitutional
2 questions, correct?

3 MR. BARBER: My -- my point was just
4 that it would be very strange to have those
5 statutory provisions in Chapter 72 when --

6 JUSTICE SOTOMAYOR: Why?

7 MR. BARBER: -- when --

8 JUSTICE SOTOMAYOR: Congress is always
9 solicitous of veterans to make sure that they
10 get full rights in whatever avenue they pursue,
11 correct? And so, if they pursue a claim
12 through the system and fail, they can still
13 present it to the V -- to the -- to the court
14 of appeals for veterans, but that doesn't
15 preclude them from challenging it under
16 Robinson in a district court as well.

17 MR. BARBER: It does by virtue of
18 511(a). The point I was going to make is it
19 would be very strange if the Veterans Court and
20 the Federal Circuit explicitly could and had to
21 decide these questions, and yet those questions
22 were not channeled to those courts by 511(a).
23 That would be very strange.

24 We think Congress did show solicitude
25 for veterans by commanding the VA to decide

1 their constitutional challenges.

2 JUSTICE GORSUCH: Just a few questions
3 on that --

4 MR. BARBER: Yes.

5 JUSTICE GORSUCH: -- just so I
6 understand the state of play as -- on the
7 ground. You tell us on page 33 of your brief
8 that the Veterans Court opinion is that the
9 Board can but is not required to address
10 constitutional questions. You understand that
11 to be the present state of play in the Veterans
12 Court, right?

13 MR. BARBER: Yes.

14 JUSTICE GORSUCH: Okay. And a year
15 ago, in *Pereida*, the government took the
16 position that even the Veterans Court couldn't
17 consider constitutional questions, right?

18 MR. BARBER: That was erroneous, but,
19 yes, we did say that in our brief.

20 JUSTICE GORSUCH: Yes, you did.

21 MR. BARBER: Yes.

22 JUSTICE GORSUCH: Okay. And then just
23 to be clear about the Thunder Basin point, you
24 acknowledged that when dealing with an express
25 provision like we have here, this Court

1 generally determines the scope of preclusion
2 simply by interpreting the words Congress has
3 chosen, right?

4 MR. BARBER: Yes.

5 JUSTICE GORSUCH: Thank you.

6 JUSTICE BARRETT: Mr. Barber, do you
7 want to address the Article II problem that
8 your friend on the other side says that your
9 interpretation poses?

10 MR. BARBER: Yes. So, as a general
11 matter, we know from Arthrex, page 20 of that
12 decision, that the veterans' general scheme
13 complies with the Appointments Clause. Arthrex
14 did not address this issue of the VA's
15 inability to appeal decisions from the VA
16 itself to the Veterans Court. We think that
17 makes sense given the statutory structure and
18 all the mechanisms that I was discussing
19 earlier for the VA leadership to control the
20 decisions of the Board.

21 I think the upshot of Petitioner's
22 position would have to be that this supposed
23 constitutional problem means that the Board is
24 entirely unconstitutional because it wouldn't
25 just be Board decisions on constitutional

1 questions that would be problematic under his
2 view. It would be the Board issuing final
3 decisions about individual veterans'
4 entitlements to benefits that would be the
5 problem.

6 So we don't think that there is any
7 sort of constitutional avoidance basis for
8 reading out just these facial constitutional
9 claims from the statutory scheme.

10 That broader constitutional theory is
11 not presented in this case, and I don't think
12 you need to go down that road. I think you can
13 just apply the text of Section 511(a) as it's
14 written. And as Justice Kagan was interpreting
15 it earlier, we agree with that interpretation.

16 The other thing I wanted to just
17 mention before I forget, Justice Sotomayor, you
18 suggested that there's a regulation prohibiting
19 the Board of Veterans Appeals from deciding
20 these kinds of claims. That's not correct.
21 The regulation refers to the Board being bound
22 by applicable statutes. We don't think that an
23 unconstitutional statute could be deemed
24 applicable. And we don't think that in the
25 four decisions that we've cited at page 33 of

1 our brief, where the Board did decide facial
2 constitutional challenges -- I could have cited
3 12 more -- we don't think in those cases that
4 the Board was violating that regulation, and we
5 also don't think that the Board was somehow
6 exceeding its jurisdiction under Section
7 511(a).

8 The other thing I wanted to circle
9 back to, Justice Gorsuch suggested that the
10 Board could decline to enforce or apply a
11 blatantly unconstitutional statute even if it
12 wasn't channeled, even if that claim was not
13 channeled, to --

14 JUSTICE GORSUCH: Well, isn't that --
15 isn't that your position, that it can, but it
16 doesn't have to decide constitutional
17 questions?

18 MR. BARBER: No. We think that --

19 JUSTICE GORSUCH: Well, I thought
20 that's exactly what I read to you earlier.

21 MR. BARBER: -- it only can if it
22 must. I'm sorry.

23 JUSTICE GORSUCH: I thought -- I
24 thought that's exactly what I read earlier, was
25 that the Board -- the Veterans Court has stated

1 the Board can but is not required to decide
2 constitutional questions.

3 MR. BARBER: We -- we disagree with
4 the Veterans Court.

5 JUSTICE GORSUCH: You disagree with
6 the Veterans Court as well?

7 MR. BARBER: Insofar as it
8 suggested --

9 JUSTICE GORSUCH: So you disagree with
10 what you said last year and you disagree with
11 the Veterans Court?

12 MR. BARBER: We disagree with an
13 aspect of that decades-old precedent of the
14 Veterans Court. We think that the Board can
15 and must decide these constitutional claims.
16 If that were not the case, under the text of
17 511(a), I don't see how the Board could decline
18 to enforce a blatantly unconstitutional
19 benefits statute.

20 That would be the final decision of
21 the agency, and so then all veterans would have
22 to go to the Veterans Court and the Federal
23 Circuit to get relief on those kinds of claims.
24 We don't think that's the scheme that Congress
25 designed.

1 Again, going back to what Justice
2 Sotomayor was discussing about Robison --

3 JUSTICE GORSUCH: How is it supposed
4 to do that? The Board doesn't have much
5 competence in questions of constitutional -- or
6 it tells us in a lot of cases, and I could cite
7 you a dozen of those. And you say, well, we've
8 got maybe some process we can create with the
9 General Counsel.

10 But we're told the last time the
11 General Counsel came up with a binding
12 prospective opinion was -- was 2019, which was
13 a minute ago. And many of these constitutional
14 questions won't even be sufficiently obvious
15 that there's prospective guidance available to
16 give the Board. So it does seem like a bit of
17 a rabbit hole.

18 MR. BARBER: Well, first of all, I
19 think --

20 JUSTICE GORSUCH: Plus, this will
21 decide constitutional questions even though the
22 court that reviews the Board says they can't,
23 and -- and we don't know what the issues are,
24 and we're not going to provide any guidance.

25 So isn't it really saying -- isn't the

1 upshot of the government's position is the
2 Board's never going to decide a constitutional
3 question?

4 MR. BARBER: The Board has done so.
5 Again --

6 JUSTICE GORSUCH: Oh, yeah, no,
7 it'll -- it'll do so once in a while, and God
8 bless it when it does. I mean, it's great when
9 somebody follows the Constitution. But just as
10 often and more likely than not, the veteran is
11 likely to find a decision saying, ah, yeah,
12 it's a nice constitutional argument you have
13 here; I don't know anything about that; I see
14 nothing, I know nothing, I hear nothing.

15 MR. BARBER: I think, Justice Gorsuch,
16 particularly if this Court agrees with us on
17 the proper interpretation of 511(a), the Board
18 is going to take very seriously its obligation
19 to decide these claims going forward.

20 There has been uncertainty in the
21 past, I think probably as a result of this
22 notion that administrative agencies are often
23 thought not to have jurisdiction to decide
24 these claims.

25 JUSTICE GORSUCH: Why can't they just

1 continue to do what they've always done, which
2 is say we can, but -- sometimes, and -- and --
3 and we won't most of the time?

4 MR. BARBER: That would be --

5 JUSTICE GORSUCH: What's to stop them
6 from doing that?

7 MR. BARBER: That would be a violation
8 of their statutory duty, which they take very
9 seriously, and we do too.

10 JUSTICE JACKSON: Well, but only if --

11 JUSTICE GORSUCH: Well, except for
12 you've never done it.

13 JUSTICE JACKSON: Only if we interpret
14 it that way. I mean, is it -- is it your
15 position that this case could actually be
16 monumental in this regard? Because, as I take
17 your argument, we would be holding that it
18 would be necessary for the Board to address
19 constitutional questions as a precursor to its
20 determination, so then we pretty much are
21 saying that, in every case, even though the
22 Board has previously disclaimed this
23 responsibility, they would have to from now on.

24 MR. BARBER: Yes. Absolutely. But I
25 don't think --

1 JUSTICE JACKSON: So it's a big case.
2 I mean, that's a big deal. They have not been
3 doing this for decades.

4 MR. BARBER: Well, they -- they have
5 on numerous occasions, which we've discussed,
6 and then they haven't done it on other
7 occasions. And so what this Court would be
8 saying is the Board was right in the first set
9 of cases and not the second.

10 JUSTICE JACKSON: Is there a
11 regulation --

12 JUSTICE SOTOMAYOR: But what's the --
13 I'm sorry.

14 JUSTICE JACKSON: I -- I thought there
15 was a -- is there a regulation where they say
16 they're not going to do it or they -- this is
17 just as a matter of practice?

18 MR. BARBER: That's the regulation I
19 was discussing with Justice Sotomayor. We
20 don't think that that prohibits the Board at
21 all from deciding constitutional challenges.
22 It basically just means that in cases
23 particularly where there's no colorable
24 constitutional challenge at all, the Board does
25 need to attend to the statutory requirements

1 for benefits. By referring to applicable
2 statutes, that regulation makes quite clear
3 that the Board is not duty-bound to apply, say,
4 the base -- the blatantly unconstitutional
5 benefits statute that Justice Alito was
6 mentioning.

7 JUSTICE JACKSON: I understand, but I
8 guess I'm just trying to reconcile the position
9 you -- going forward, that the government is
10 taking, with what has been happening. We have
11 many cases in which the Board has said we don't
12 have particular competency in this area; we are
13 not going to answer this constitutional
14 question. They bracket it and they deal with
15 the application in terms of just figuring out
16 the benefits, which is what they understand
17 their duties, or have traditionally understood
18 their duties, to be.

19 So is it the government's position
20 that, from now on, under your view, as a result
21 of this case, the -- the Board can no longer do
22 that? They would have to answer the
23 constitutional question?

24 MR. BARBER: They do. And I don't see
25 why that's so strange when everybody agrees

1 they have to decide the as-applied --

2 JUSTICE GORSUCH: Well, here's --
3 here's what's strange about it.

4 JUSTICE JACKSON: Well, the -- the
5 strangeness, I --

6 JUSTICE GORSUCH: Here's what's
7 strange about it. I'm sorry.

8 JUSTICE JACKSON: That's okay. Go
9 ahead.

10 JUSTICE GORSUCH: What's strange is we
11 normally interpret statutes as they were
12 understood by the public, ordinary readers, at
13 the time they were enacted. And at the time
14 this statute was enacted, we had Robison, and
15 the understanding was, hey, these guys in the
16 Board, they're technical experts, they know a
17 lot about veterans' benefit laws and all the
18 intricacies, and we leave that to them.

19 But the Constitution of the United
20 States is different, and that goes to federal
21 district court and -- where the competent
22 experts reside, we hope, right? And that's how
23 everybody worked.

24 Now you can point me to some examples
25 where the Board may have, in its good graces,

1 decided to do otherwise. But the dominant
2 practice from the time this statute was
3 enacted, before it was enacted, up until, oh,
4 today, because a year ago the government had
5 the opposite position about how all this
6 worked, the understanding, the dominant
7 understanding of the public meaning of this
8 statute was these are experts who decide things
9 that are necessary under the statute, not under
10 the Constitution.

11 What's wrong with that?

12 MR. BARBER: I think, with respect,
13 it glosses over the fundamental changes to the
14 statutory scheme that Congress made in the
15 VJRA.

16 It edited the text of 511(a) in a
17 pretty significant way, making clear that the
18 question of law does not need to arise under
19 a benefits statute to be covered. And then it
20 created Chapter 72, and it made clear that
21 those courts, the Veterans Court and the
22 Federal Circuit, are going to decide
23 constitutional challenges to the validity of
24 statutes.

25 What sense would it make to make the

1 Federal Circuit the exclusive circuit --

2 JUSTICE GORSUCH: It's a perfect --

3 MR. BARBER: -- under 7292(c)?

4 JUSTICE GORSUCH: -- it's a perfectly
5 sensible reading except for the government
6 itself hasn't understood the law that way --

7 MR. BARBER: Well --

8 JUSTICE GORSUCH: -- up until today.

9 MR. BARBER: -- there is a line about
10 wisdom coming too late --

11 JUSTICE GORSUCH: Yeah, maybe it is
12 too late.

13 MR. BARBER: -- that's escaping me
14 right now. But I don't think it is too late
15 in this case. I think the Court could accept
16 everything.

17 JUSTICE SOTOMAYOR: What sense is
18 there in your system?

19 This is a pure challenge to --
20 constitutional challenge to a -- a provision.
21 The veteran has to go through this elaborate
22 administrative process where, now you're saying
23 the Board has to look at it, but before, he
24 didn't understand that. He had to go through
25 that and wait to have the constitutional

1 challenge decided. Why?

2 MR. BARBER: Well, under the view
3 we're advancing today, that shouldn't be the
4 case. He should be able to get a decision by
5 the Board of Veterans' Appeals and then --

6 JUSTICE SOTOMAYOR: Well, you're --
7 you're trying to go and change what the
8 understanding had been at the time of the law
9 to create a new understanding. We have to go
10 there with you.

11 But even assuming, what's the sense of
12 it?

13 MR. BARBER: Well, one important point
14 I want to make, Justice Sotomayor, is that one
15 of the impressions that Petitioner has left
16 is that you can have kind of a standalone
17 constitutional claim that doesn't have any
18 other issues accompanying it. That will never
19 be the case. Every veteran's benefits dispute
20 involves case-specific, fact-specific
21 determinations that need to be made.

22 Is the person a veteran? Do they have
23 a disability? Is the disability related to
24 their service? So you're always going to have,
25 under his view, dual-track litigation going on

1 both in the VA and then in federal district
2 courts around the country.

3 It makes a lot more sense, and I think
4 Congress agreed with us when it enacted the
5 VJRA, to consolidate all of those issues
6 together and to send them to the Federal
7 Circuit.

8 If Petitioner is right --

9 JUSTICE SOTOMAYOR: Well, you're still
10 not -- because you're -- those -- all of the
11 issues you're talking about are as-applied
12 challenges.

13 We're talking about a pure, he's
14 saying, only pure facial challenge. It doesn't
15 matter how extensive the disability is. Those
16 questions are all going to be decided by the
17 Board. This is a pure constitutional question.

18 MR. BARBER: Yet another problem with
19 Petitioner's view is that it's not always going
20 to be clear, the nature of the claim.

21 So, if you look at the complaint --

22 JUSTICE SOTOMAYOR: Well, that --

23 MR. BARBER: -- that was filed in this
24 case --

25 JUSTICE SOTOMAYOR: -- that -- you

1 run -- you always run that risk anyway in
2 as-applied or facial challenges.

3 MR. BARBER: Well, right. But I think
4 it's pretty important that the jurisdictional
5 analysis here would hinge on facial versus
6 as-applied.

7 If you look at the complaint that
8 Petitioner filed when he was pro se, as many
9 veterans will be, there's nothing about facial
10 versus as-applied. It just says: 5313 is
11 unconstitutional. I want my full benefits.
12 That's the relief I'm demanding. So --

13 JUSTICE KAVANAUGH: Can I --

14 JUSTICE ALITO: Well, let me ask you
15 a -- what would be, from your perspective, a
16 damage-control question.

17 Suppose the Court were to hold that a
18 claim that does not implicate any -- does not
19 seriously implicate any factual issues can be
20 brought in district court.

21 Is there a way to draw a distinction
22 between that kind of constitutional claim and
23 other constitutional claims? For example, one
24 that challenges the constitutionality of the
25 interpretation of the statute or some other --

1 or an as-applied challenge?

2 MR. BARBER: I think that approach --

3 JUSTICE ALITO: Is there a way for us
4 to write an opinion that does that?

5 MR. BARBER: I think you could
6 certainly write an opinion like that in theory.
7 I think it would break down very quickly in
8 practice.

9 This is why the Court said in Elgin
10 that the distinction between facial and
11 as-applied claims are very amorphous, hard to
12 get your hands around. And so it's a bad basis
13 to distinguish between claims that must be
14 channeled through an administrative and
15 judicial review scheme and claims that should
16 not be.

17 So we don't think that that is
18 tenable. And we also just don't think that
19 there is any basis in the text or structure of
20 Section 511(a) to distinguish these kinds of
21 claims.

22 A facial claim is certainly necessary
23 to a decision in just the same way that an
24 as-applied claim would be. And, frankly, we
25 think that the kind of uniformity concerns that

1 Congress often has in mind when it enacts a
2 channeling provision are even more serious for
3 facial claims because, if you have as-applied
4 claims turning on the particular circumstances
5 of individual veterans, maybe it's not as big a
6 deal that you're going to have district --
7 different district courts around the country
8 issuing different types of decisions on that
9 basis --

10 JUSTICE KAVANAUGH: Can I --

11 MR. BARBER: -- with respect to the
12 facial validity.

13 JUSTICE ALITO: All right. Well, you
14 know, thank you. Perhaps Mr. Chen will choose
15 to take another shot at answering that question
16 in rebuttal.

17 JUSTICE KAVANAUGH: Can I ask,
18 following up on Justice Gorsuch's questions,
19 if it's a close call in the statutory
20 interpretation, why upset the longstanding
21 practice?

22 MR. BARBER: Well, first of all, there
23 is no consistent longstanding practice. As
24 I've said multiple times, the Board has
25 repeatedly decided these kinds of claims, and

1 so we're going to have consistency one way or
2 another going forward.

3 We think that the statutory --

4 JUSTICE KAVANAUGH: They haven't had
5 to decide them, right?

6 MR. BARBER: We think that they do
7 have to decide them, yes. And I don't think
8 there's anything anomalous about that. I mean,
9 if you imagine a Board of Veterans' Appeals
10 decision in this case if the Board had been
11 given an opportunity to do so, it's not that
12 hard to have a section at the end of the
13 opinion saying: There's an equal protection
14 challenge, we've overturned your challenge,
15 it's rejected for these reasons.

16 JUSTICE KAVANAUGH: And then what's
17 the harm the government -- from the current
18 state of play?

19 MR. BARBER: I think it's a few
20 different fronts from our --

21 JUSTICE KAVANAUGH: Other than you
22 want to get the law right. I get that one, but
23 is there --

24 MR. BARBER: Obviously, we want to get
25 the law right.

1 JUSTICE KAVANAUGH: But, apart from
2 that, is there something going on that's
3 problematic from the government's perspective?

4 MR. BARBER: Well, it would definitely
5 be problematic to make the VA start litigating
6 these kinds of claims all around the country.
7 The VA is incredibly burdened as it is, and
8 I think that would be a significant problem.

9 As I said before, you would have
10 dual-track litigation going on in every single
11 case because the veteran always needs to have a
12 claim with the VA, and that's always going to
13 raise some fact- and case-specific matters. So
14 you're always going to have a process that
15 needs to go on at the VA.

16 You have the disuniformity concerns,
17 but I really do think the main thing is the
18 litigation burden.

19 At the time of Robison, the Court said
20 that, you know, these kinds of constitutional
21 challenges to statutes are pretty uncommon,
22 it's not a big deal to make the VA have to
23 litigate them all around the country.

24 JUSTICE KAVANAUGH: So how common are
25 they now?

1 MR. BARBER: They are much more
2 common. I think that --

3 JUSTICE KAVANAUGH: How successful are
4 they?

5 MR. BARBER: They are never
6 successful. I'm not aware of a benefits
7 statute ever having been held unconstitutional
8 since, like, Hayburn's Case maybe.

9 JUSTICE JACKSON: So then why is there
10 a burden? I'm so confused. I'm trying to
11 understand what you mean, the litigation
12 burden.

13 You -- you -- you also seem to say
14 these are easily disposed of, that you want to
15 channel them into the veterans' scheme
16 precisely because you can get a higher-up to
17 come and say, oh, this was a rogue -- a -- a --
18 a Board of Veterans' Appeals person who thought
19 it might be unconstitutional, but we're going
20 to squelch that.

21 So what is the litigation burden?

22 MR. BARBER: Having to defend against
23 meritless claims is still a great burden on the
24 agency, particularly if -- if they have to do
25 it all around the country from district courts

1 and then up to all the regional courts of
2 appeals.

3 A point I wanted to just tie off that
4 I was going to make earlier was that Section
5 7292(c) goes out of its way to say the Federal
6 Circuit shall have exclusive jurisdiction to
7 decide challenges to the validity of statutes.

8 If Petitioner is correct, then that is
9 essentially a nullity because anybody can go to
10 any district court around the country and then
11 take that claim up to any court of appeals.

12 JUSTICE BARRETT: Is that what they're
13 doing now?

14 MR. BARBER: That's what --

15 JUSTICE BARRETT: I mean, since this
16 has been the prevailing system and you told
17 Justice Kavanaugh that the problem for the
18 government is the litigation burden of being
19 all around the country, but given the
20 government's position to this point, is that
21 what's happening now?

22 MR. BARBER: Well, it hasn't been a
23 huge deal yet because there are only two
24 circuits, I think, that have adopted
25 Petitioner's view.

1 JUSTICE GORSUCH: It wasn't a problem
2 up until last year when you took the opposite
3 position in *Pereida*, right?

4 MR. BARBER: If -- if the Court --

5 JUSTICE GORSUCH: It's a real new
6 problem.

7 MR. BARBER: -- if the Court were to
8 adopt Petitioner's view and open the doors of
9 all the district courts around the country to
10 these claims, we think it would be a serious
11 problem because, again, as the Board decisions
12 that we've cited in the briefs addressing these
13 kinds of facial constitutional challenges show,
14 these claims are a lot more common than they
15 were back in the '70s when *Robison* was decided.
16 So we don't think that that concern can be
17 dismissed.

18 We're totally in policy land at this
19 point. We think that the statutory text
20 resolves this case completely.

21 These claims are --

22 JUSTICE KAGAN: On that, Mr. Barber,
23 I mean, I suggested before that if all I do is
24 look at 511 alone, I think you have the better
25 of the argument.

1 But Mr. Chen was right to point out
2 that 511 is kind of Version 2 of the statute,
3 and Version 1 went his way. And then you look
4 at the differences.

5 I think that those -- the differences
6 in terminology, you know, point your way, no
7 doubt. But, on the other hand, a -- a -- a
8 court that was -- a Congress that was really
9 set on reversing the Robison rule, it seems
10 very strange that it would do that by virtue of
11 making the changes in that sentence.

12 MR. BARBER: I respectfully disagree
13 with that. And I think a good example of this
14 is the Traynor versus Turnage angle because
15 Petitioner accepts that one of Congress's
16 purposes in enacting the VJRA was to abrogate
17 this Court's decision in Traynor.

18 It also did that in a relatively
19 subtle way. It changed that second clause --

20 JUSTICE KAGAN: I mean, subtle --

21 MR. BARBER: -- of the first
22 sentence --

23 JUSTICE KAGAN: -- but pretty darn
24 clear.

25 MR. BARBER: Well, we --

1 JUSTICE KAGAN: I think that the first
2 part of the sentence, you know, you -- you --
3 you have to struggle a good deal more to
4 understand how that changes the issue.

5 MR. BARBER: We think this is also
6 pretty darn clear moving that "question of law"
7 clause away from the "under any law affecting
8 the provision of benefits" clause. We think
9 that's clear. And that's just looking at
10 511(a) in isolation, which you would never do.
11 You would also want to look at Chapter 72. And
12 we think that that statutory context really
13 eliminates any doubt.

14 Another case I would point you to is
15 Weinberger. It was decided the year after
16 Robison. That case had an express preclusion
17 clause referring to claims arising under Title
18 II of the Social Security Act. You said that
19 that clause applied to constitutional
20 challenges to the Act even though it's pretty
21 unnatural to say that such a claim arises under
22 the Act. If that clause covered constitutional
23 claims, we don't see how this one couldn't.

24 JUSTICE KAVANAUGH: If it goes to
25 district courts, where does the appeal go? Do

1 all the appeals go to the Federal Circuit
2 still?

3 MR. BARBER: No. No, we don't think
4 that would work that way at all, which is why
5 the 7292(c) --

6 JUSTICE KAVANAUGH: Well, that's --

7 MR. BARBER: -- would be defeated.

8 JUSTICE KAVANAUGH: -- what do we do
9 with -- this is, I guess, a helpful question
10 for you. That says exclusive jurisdiction. So
11 what do we do with that?

12 MR. BARBER: It says exclusive
13 jurisdiction in cases brought under this
14 section, I think. And so what that means is
15 that you can't go from the Veterans Court to
16 any court of appeals besides the Federal
17 Circuit.

18 JUSTICE KAVANAUGH: Mm-hmm.

19 MR. BARBER: But, by its terms, that
20 provision would not prevent you, assuming you
21 could file these claims in district court --

22 JUSTICE KAVANAUGH: It says,
23 "exclusive jurisdiction to decide any challenge
24 to the validity of any statute or regulation."
25 I guess you're saying brought under this

1 section. I was wondering, you know.

2 MR. BARBER: Yeah. It's the "under
3 this section" language that is problematic.

4 JUSTICE KAVANAUGH: Yeah. Got it.
5 Thank you.

6 JUSTICE JACKSON: Let me go back to
7 your exchange with -- with Justice Kagan. I --
8 I -- I guess one might expect for Congress, if
9 it was targeting Robison, to say all questions
10 of law and fact, including constitutional
11 issues or something, given that this Court had
12 said questions of law and fact under a law does
13 not include constitutional questions.

14 So can you say a little bit more about
15 why you think that, looking at 511 after 211,
16 the changes are enough to indicate Congress's
17 intent to move away from Robison?

18 MR. BARBER: Sure. I mean, I think we
19 have to look at the actual statutory text, not
20 hypothetically hyper-clear statutory text. We
21 think that the statutory text is quite clear
22 here, particularly in conjunction with Chapter
23 72, which --

24 JUSTICE JACKSON: How is -- how is 211
25 different than 511 in a way that matters?

1 MR. BARBER: I think the key
2 difference in this case is separating -- so the
3 "question of law" clause from the "under a law"
4 clause. The previous version of the statute
5 said decisions of the administrator on any
6 question of law or fact under any law
7 administered by the VA.

8 That was at least plausibly read,
9 particularly in light of the Court's
10 constitutional concerns in Robison, as
11 referring to questions of law arising under the
12 statute itself relating to its interpretation
13 or application.

14 By saying "all questions of law and
15 fact necessary to a decision by the Secretary,"
16 that naturally invites the inclusion of
17 constitutional challenges to the statute
18 because, as Justice Kagan was explaining, it's
19 obviously necessary to a decision under or in
20 accordance with the statute if you define it
21 that way to determine whether the statute is
22 constitutional in the first place.

23 JUSTICE JACKSON: Okay. I'm going to
24 have to look because I'm looking at 211 that
25 says, "the administrator shall decide all

1 questions of law and fact necessary to a
2 decision by the administrator under a law,"
3 which seems like it's the same --

4 MR. BARBER: That's the current
5 version.

6 JUSTICE JACKSON: That's the current
7 version? Okay.

8 MR. BARBER: Yeah. That's not the
9 Robison version.

10 JUSTICE JACKSON: All right. Got it.
11 Thank you.

12 MR. BARBER: Yep.

13 I don't have anything more to add, so
14 we can proceed to seriatim.

15 CHIEF JUSTICE ROBERTS: Okay. Justice
16 Thomas?

17 Justice Alito?

18 Justice Gorsuch?

19 Justice Kagan? I can't quite see you
20 there.

21 Justice Barrett, anything further?

22 Justice Kavanaugh, anything further?

23 Thank you, counsel.

24 MR. BARBER: Thank you.

25 CHIEF JUSTICE ROBERTS: Rebuttal,

1 Mr. Chen?

2 REBUTTAL ARGUMENT OF JEFFREY W. CHEN

3 ON BEHALF OF THE PETITIONER

4 MR. CHEN: Thank you, Mr. Chief
5 Justice.

6 So, on the distinction between attacks
7 on statutes on one hand, which, in this
8 context, has been called facial, versus attacks
9 on agency action, that line is -- has proven to
10 be quite -- lower courts have at least been
11 able to -- have been able to draw that line
12 perfectly adequately. We have decades of
13 experience from Robison, from 1974, where lower
14 courts have developed these simple tests to
15 figure out whether a challenge is actually to a
16 statute versus whether it's -- whether it
17 attacks the inherent characteristics of a
18 statute versus whether it attacks agency
19 action.

20 And we also know that this is both
21 before and after the VJRA was passed in 1988,
22 because, after 1988, most lower courts have --
23 most lower courts have adhered to the line that
24 Robison drew. Not only that, the BVA has
25 continued to draw that line perfectly

1 adequately. They have to identify -- they
2 consistently identify what challenges they can
3 and cannot decide.

4 So I want to talk about this idea
5 of -- so I want to address the government's
6 other proposed solutions to this Article II
7 problem. The government says that the
8 Secretary could order reconsideration of a
9 BVA's -- the BVA's decisions.

10 That's not right. The -- the
11 Secretary can't do that. The -- only the BVA
12 chairman can order reconsideration of a BVA
13 proceeding. But even if, even if the
14 government was correct that the Secretary could
15 order the BVA to keep on ordering
16 reconsiderations until the Secretary's
17 outcome -- preferred outcome was reached, that
18 is the exact kind of back-channel jury-rigging
19 that this court in *Arthrex* held was
20 insufficient for purposes of the Appointments
21 Clause.

22 So, even -- even -- even granting the
23 government all those things, it still doesn't
24 work under the Appointments Clause.

25 I think the government also alluded to

1 this sort of instruction power about how
2 somehow the government, the Secretary could
3 dictate the outcomes of individual BVA
4 proceedings using its instruction powers
5 retrospectively or -- I think that not even --
6 not even the VA has construed the instruction
7 power that broadly because it is quite
8 startling.

9 And the reason it's startling is
10 because Congress was very detailed in setting
11 out the BVA's procedures. Congress made --
12 directed that the BVA has to make the agency's
13 final decisions on all 511(a) matters. It
14 precluded the Secretary from appealing them.
15 It said that only the BVA chairman can order
16 reconsideration.

17 And there is no provision that
18 establishes direct review by the Secretary of
19 the BVA's decisions. All of those provisions
20 would be meaningless if the -- the -- if the
21 Secretary could, whenever it wanted to,
22 retrospectively -- retrospectively dictate the
23 outcome of individual BVA proceedings.

24 And, in fact, the VA, in its own GC
25 opinion from 1992, says that the instruction

1 power is just a term of art that refers to
2 guidance documents published for newly
3 enacted -- or guiding newly enacted legislation
4 prior to the issuance of reg -- issuance of
5 regulations. And so not even the government
6 thinks that the instruction power is -- is as
7 broad as they are saying right now.

8 I want to talk about the asymmetric
9 review provision. The bottom line is that any
10 problems -- any constitutional problem that
11 arises out of the asymmetric review provision
12 is so much more serious on the government's
13 reading of the statute because only the
14 government's reading of the statute opens the
15 category of unreviewable BVA decisions to
16 include decisions about whether to disregard an
17 Act of Congress. And that is a particularly
18 weighty and significant exercise of -- of
19 executive power.

20 And then one thing I'd like to address
21 is the -- my -- my friend directed you to the
22 case Weinberger, which did have -- did consider
23 language about "claim arising under" the
24 statute. But what he didn't tell you is that
25 Weinberger explicitly distinguished Robison and

1 said that the language in Robison, the
2 decision -- the "decision under the law"
3 language in Robison was "quite different" from
4 the "claim arising under" -- "under a statute"
5 language such that only the latter includes --
6 can include constitutional challenges to
7 statutes.

8 I think that is all I have or want to
9 address. So I don't want to keep us from
10 lunch and --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 The case is submitted.

14 (Whereupon, at 1:02 p.m., the case was
15 submitted.)

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