

**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, 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 says, "Decide all questions of
4 law and fact necessary to a decision."

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

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

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

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

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

22 Suppose that there were a statutory
23 provision that says that the benefits that a
24 veteran would otherwise receive cannot be
25 obtained by any veteran who has said anything

1 that is critical of the military or the
2 Commander in Chief. Okay?

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

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

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

13 JUSTICE ALITO: Well, look, the
14 statute talks about the Secretary.

15 MR. CHEN: Right.

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

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

23 So, when it's referring to the
24 Secretary here, Section 7104(a) makes clear
25 that it means the Board of Veterans' Appeals

1 makes the final decisions.

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

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

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

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

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

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

21 But 511 is about district court
22 review, right?

23 So say the Secretary or the Board or
24 whoever decides, in their magnanimity, to
25 follow the Constitution of the United States

1 and say the First Amendment is a thing. That
2 would be a good day's work.

3 MR. CHEN: Mm-hmm.

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

8 MR. CHEN: So --

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

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

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

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

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

24 The question we face is whether this
25 statute precludes district court review --

1 MR. CHEN: Right.

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

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

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

20 MR. CHEN: Right. Right. I think --
21 I think that is right. I think what -- our
22 position is just, even if there were some
23 situations where the BVA could decide
24 constitutional challenges to statutes, that's
25 not the issue presented here, I think is what

1 you're saying.

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

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

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

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

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

22 But there's been a challenge, a
23 constitutional challenge, raised to that law,
24 and the Secretary can't go merrily along
25 without deciding whether the law itself can be

1 applied.

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

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

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

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

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

23 JUSTICE KAGAN: It's a precondition --

24 MR. CHEN: Right.

25 JUSTICE KAGAN: -- of applying that

1 law that you decide the constitutional
2 question. Otherwise, you wouldn't go any
3 further.

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

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

14 MR. CHEN: Yeah.

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

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

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

1 "necessary to a decision under a law." So a
2 decision --

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

6 MR. CHEN: Right. So --

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

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

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

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

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

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

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

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

20 MR. CHEN: Correct.

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

23 MR. CHEN: Right.

24 JUSTICE JACKSON: What is a decision
25 by the Secretary under the law? It is --

1 MR. CHEN: It is --

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

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

8 MR. CHEN: Yes.

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

13 MR. CHEN: That's exactly correct.

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

17 MR. CHEN: That's right.

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

25 MR. CHEN: Correct.

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

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

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

22 JUSTICE KAGAN: A necessary?

23 MR. CHEN: A necessary part of a
24 decision under a law, a necessary part of
25 taking the statute as a given and determining

1 how to apply it. And --

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

4 MR. CHEN: Correct.

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

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

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

15 MR. CHEN: I -- we --

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

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

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

25 MR. CHEN: I -- I -- well, I think

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

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

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

22 And the House report says the bill as
23 revised, the first sentence, imposes a duty
24 upon the administrator to resolve all legal and
25 factual questions which are necessary to a

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

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

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

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

24 MR. CHEN: Right. Right.

25 JUSTICE KAGAN: -- but it -- it -- it

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

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

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

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

1 someone with principal officer authority to
2 render decisions on behalf of the executive on
3 whether to disregard acts of Congress.

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

12 MR. CHEN: Right.

13 JUSTICE GORSUCH: So how would that
14 work?

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

23 The problem with that is that in the
24 vast majority of circumstances, there will be
25 no prospective guidance on the

1 constitutional of a statute. The last
2 precedent opinion of the -- of the VA that was
3 issued was in 2019, and that was on any -- that
4 was -- sorry, the last -- go ahead.

5 JUSTICE GORSUCH: 2019?

6 MR. CHEN: 2019, correct.

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

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

14 My point here is that --

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

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

24 It's also impractical to expect the VA
25 to identify all the statutes that could

1 feasibly affect the provision of benefits and
2 then determine the constitutionality or render
3 an opinion on the constitutionality of each one
4 of them, right?

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas?

23 Justice Alito?

24 JUSTICE ALITO: Suppose the claim is
25 that the -- the Board's prior interpretation of

1 a statutory provision is unconstitutional. Is
2 that a claim that can be raised in -- in
3 district court?

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

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

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

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

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

1 benefits that is experienced by a veteran who
2 is living in the outside world, but that the
3 provision is unconstitutional as applied to
4 someone who has a sentence of 61 days.

5 MR. CHEN: Mm-hmm.

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

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

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

20 JUSTICE ALITO: Okay. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: Going back --
24 going back to what Justice Kagan was referring
25 to, that House report, was creating a totally

1 different new system, correct?

2 MR. CHEN: Yes. Correct.

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

5 MR. CHEN: Yes.

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

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

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

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

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

23 MR. CHEN: It could not. Section 7252
24 precludes the government.

25 JUSTICE SOTOMAYOR: So we have to take

1 the system as it exists.

2 MR. CHEN: Right.

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

5 MR. CHEN: That is not just odd. That
6 it -- that raises very serious questions under
7 Article II and the Appointments Clause.

8 JUSTICE SOTOMAYOR: It leads to the --
9 your conclusion which is keep what Robison
10 said, which is --

11 MR. CHEN: Yes.

12 JUSTICE SOTOMAYOR: -- let
13 constitutional questions go to the court
14 because that's where the government would have
15 a right to defend the law, correct?

16 MR. CHEN: That's exactly right.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?
18 Justice Gorsuch?

19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: Just, just one.
21 I'm thinking about the precedent, our precedent
22 from 1974. What's the relevance of the Federal
23 Circuit now being part of the process in the
24 statute that's passed subsequently?

25 MR. CHEN: Yeah. So the relevance is

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

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

19 And, in fact, you know, Congress's
20 creation of this scheme actually, I think,
21 confirms that Section 511(a) does not include
22 constitutional challenges to statutes, because
23 Congress in creating the scheme was very --
24 used very specific words to delineate the scope
25 of a review at each level of the scheme.

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

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

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

17 JUSTICE KAVANAUGH: One might think
18 that the problem undergirding the decision in
19 1974 was the lack of any meaningful judicial
20 review and that was solved by the federal
21 circuit. But I take your response. Thank you.

22 JUSTICE BARRETT: I just want to be
23 sure I understand how this might work. Let's
24 imagine that your client filed a claim for
25 benefits, didn't know about the statute, and

1 then was denied the benefits because of being
2 in jail.

3 In that circumstance, then, could he
4 then later up the chain say before the federal
5 circuit press his constitutional claim even
6 though it's facial inherent in the statute
7 itself, whatever we want to say?

8 MR. CHEN: Yes. We -- we believe so.
9 Yes. It could raise it in the CAVC first
10 probably and then the federal circuit.

11 JUSTICE BARRETT: So he has a route?

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

15 JUSTICE BARRETT: Okay. But he has a
16 route. He still has a way of pressing the
17 constitutional claim?

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

19 JUSTICE BARRETT: Yes.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: He has a way of
23 pressing it but just to be clear, as Justice
24 Sotomayor mentioned, the government, if it
25 lost, could not appeal, right?

1 MR. CHEN: Correct. If the government
2 lost at the BVA, 7252 prohibits or precludes
3 the government from appealing that decision.

4 JUSTICE JACKSON: And can you just
5 give us the quick version of your response to
6 the argument that Robison applied to a
7 different statute and that it was a
8 constitutional avoidance decision? Why isn't
9 that right?

10 MR. CHEN: So I think even if Robison
11 relied in part on constitutional avoidance, it
12 still rendered a judicial construction of the
13 very phrase that Congress chose to reenact,
14 which is decisions under a law.

15 So there is at least still a
16 presumption that Congress also adopted
17 Robison's construction of that phrase. And I
18 think our other point is just that even -- even
19 if -- again, even if Robison had relied in part
20 on constitutional avoidance, it's not like
21 constitutional avoidance isn't relevant here.

22 This -- the government's reading
23 presents a constitutional problem of its own.
24 It's different from the one in Robison, but
25 it's still very serious under the Article II --

1 under Article II and the Appointments Clause.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Barber.

6 ORAL ARGUMENT OF KEVIN J. BARBER

7 ON BEHALF OF THE RESPONDENT

8 MR. BARBER: Mr. Chief Justice and may
9 it please the Court:

10 The law entitles Petitioner to
11 judicial review, just not in district court.
12 Under Section 511(a) Petitioner's challenge to
13 validity of Section 5313 is a question of law
14 that is necessary to a decision under the
15 benefits laws because the answer to that
16 question dictates whether his benefits under
17 Section 1131 must be reduced. 511(a) therefore
18 channels his claim to the Veterans Court and
19 the Federal Circuit.

20 Indeed those courts have already
21 decided the very same constitutional claims.
22 If Petitioner concedes that as-applied claims
23 are covered by 511(a), then there's no basis
24 for treating facial claims differently.

25 Petitioner resists that

1 straightforward analysis with two main
2 theories. The first is that the VJRA
3 incorporated this Court's holding in Johnson
4 against Robison but the VJRA fundamentally
5 changed the statutory scheme. It amended
6 511(a) to establish that the relevant question
7 of law need not arise under a benefits statute
8 to be covered.

9 And it enacted Chapter 72. Which
10 obviates Robison's constitutional concerns and
11 explicitly contemplates that challenges to VA
12 benefit statutes are channeled into the
13 exclusive review scheme. It's the current
14 statute that matters.

15 The second theory is that is the VA
16 can't decide constitutional challenges to
17 statutes so 511(a) can't apply to such claims.
18 But the premise is mistaken. True, the Board
19 of Veterans Appeals in the past has been
20 inconsistent on its authority. Sometimes
21 deciding such claims and sometimes not. But as
22 we see it, the Board can and must decide
23 Veterans constitutional claims subject to the
24 supervision of agency leadership.

25 Petitioner's contrary view would

1 conflict with the statutory text and deprive
2 veterans of their ability to bring such claims
3 to the agency. It would even compel the VA to
4 enforce a hypothetical benefits statute that
5 was blatantly unconstitutional.

6 The judgment of the court of appeals
7 should be affirmed. I welcome the Court's
8 questions.

9 JUSTICE THOMAS: How would you respond
10 to Petitioner's point that if the government
11 lost a constitutional claim before the Board,
12 it had no right to appeal it?

13 MR. BARBER: So that would be a very
14 easy situation to deal with. We wouldn't need
15 to appeal to the Veterans Court. First of all,
16 the Board makes the Secretary's decision. So
17 it is the VA's decision.

18 I think we're in a world in which a
19 member of the Board sort of goes rogue and
20 declares a federal statute unconstitutional in
21 a scenario where the agency leadership
22 disagrees with that.

23 That would be easily dealt with
24 through the reconsideration process. The
25 Board's chairman has plenary authority to order

1 reconsideration of cases before the Board. By
2 the time that step was taken, the VA leadership
3 could have used the mechanisms that my friend,
4 Mr. Chen, was discussing to dictate the Board's
5 resolution of that constitutional claim.

6 So instructions of the Secretary, a
7 precedential legal opinion of the agency's GC.
8 This is a very hypothetical scenario because
9 the Board, although it has decided facial
10 constitutional challenges to statutes on
11 numerous occasions, it has never struck down a
12 federal --

13 JUSTICE KAVANAUGH: If it did --

14 MR. BARBER: -- benefits statute.

15 JUSTICE KAVANAUGH: -- the -- the suit
16 would be a government agency against a
17 government agency, correct?

18 MR. BARBER: No. Because there
19 wouldn't be this appeal. If there were
20 theoretically an appeal by the VA of the VA's
21 own decision that would be very strange but
22 that would be --

23 JUSTICE KAVANAUGH: Because that would
24 be government against government.

25 MR. BARBER: Yes.

1 JUSTICE KAVANAUGH: And I, at least in
2 the old days, I said that should be tossed.
3 Figure it out yourselves.

4 (Laughter.)

5 MR. BARBER: Yes.

6 JUSTICE BARRETT: But, you know --

7 JUSTICE SOTOMAYOR: In the sense of
8 independence of an agency decision of a BVA
9 decision. And that's what you're suggesting.

10 Tell me something. Robinson -- are
11 you challenging whether Robinson was correctly
12 decided?

13 MR. BARBER: No.

14 JUSTICE SOTOMAYOR: All right. So you
15 accept that as the law?

16 MR. BARBER: Yes, under a different
17 statute.

18 JUSTICE SOTOMAYOR: And so when
19 Congress was amending or creating 511, that was
20 the state of the law, correct?

21 MR. BARBER: Yes.

22 JUSTICE SOTOMAYOR: It's very clear
23 that when Congress wants to include
24 constitutional law issues within agency
25 consideration, it's very clear about it. It

1 did it with the court of appeals for veterans
2 claims and said there that -- that VA actions
3 that are, "contrary to constitutional right,
4 power, privilege or immunity," that that Court
5 could decide that, correct?

6 MR. BARBER: Yes. I mean this is one
7 of the real oddities with Petitioner's position
8 because Chapter 72, 7261, 7292, make crystal
9 clear in their text that among the issues that
10 the Veterans Court and the Federal Circuit must
11 decide are constitutional challenges to
12 statutes.

13 JUSTICE SOTOMAYOR: But that's a very
14 different independent consideration than what
15 the BVA looks at, because, by regulation, the
16 BVA does not consider --

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

18 JUSTICE SOTOMAYOR: -- constitutional
19 questions, correct?

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

23 JUSTICE SOTOMAYOR: Why?

24 MR. BARBER: -- when --

25 JUSTICE SOTOMAYOR: Congress is always

1 solicitous of veterans to make sure that they
2 get full rights in whatever avenue they pursue,
3 correct? And so, if they pursue a claim
4 through the system and fail, they can still
5 present it to the V -- to the -- to the court
6 of appeals for veterans, but that doesn't
7 preclude them from challenging it under Robison
8 in a district court as well.

9 MR. BARBER: It does by virtue of
10 511(a). The point I was going to make is it
11 would be very strange if the Veterans Court and
12 the Federal Circuit explicitly could and had to
13 decide these questions, and yet those questions
14 were not channeled to those courts by 511(a).
15 That would be very strange.

16 We think Congress did show solicitude
17 for veterans by commanding the VA to decide
18 their constitutional challenges.

19 JUSTICE GORSUCH: Just a few questions
20 on that --

21 MR. BARBER: Yes.

22 JUSTICE GORSUCH: -- just so I
23 understand the state of play as -- on the
24 ground. You tell us on page 33 of your brief
25 that the Veterans Court opinion is that the

1 Board can but is not required to address
2 constitutional questions. You understand that
3 to be the present state of play in the Veterans
4 Court, right?

5 MR. BARBER: Yes.

6 JUSTICE GORSUCH: Okay. And a year
7 ago, in *Pereida*, the government took the
8 position that even the Veterans Court couldn't
9 consider constitutional questions, right?

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

12 JUSTICE GORSUCH: Yes, you did.

13 MR. BARBER: Yes.

14 JUSTICE GORSUCH: Okay. And then just
15 to be clear about the Thunder Basin point, you
16 acknowledged that when dealing with an express
17 provision like we have here, this Court
18 generally determines the scope of preclusion
19 simply by interpreting the words Congress has
20 chosen, right?

21 MR. BARBER: Yes.

22 JUSTICE GORSUCH: Thank you.

23 JUSTICE BARRETT: Mr. Barber, do you
24 want to address the Article II problem that
25 your friend on the other side says that your

1 interpretation poses?

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

13 I think the upshot of Petitioner's
14 position would have to be that this supposed
15 constitutional problem means that the Board is
16 entirely unconstitutional because it wouldn't
17 just be Board decisions on constitutional
18 questions that would be problematic under his
19 view. It would be the Board issuing final
20 decisions about individual veterans'
21 entitlements to benefits that would be the
22 problem.

23 So we don't think that there is any
24 sort of constitutional avoidance basis for
25 reading out just these facial constitutional

1 claims from the statutory scheme.

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

8 The other thing I wanted to just
9 mention before I forget, Justice Sotomayor, you
10 suggested that there's a regulation prohibiting
11 the Board of Veterans Appeals from deciding
12 these kinds of claims. That's not correct.
13 The regulation refers to the Board being bound
14 by applicable statutes. We don't think that an
15 unconstitutional statute could be deemed
16 applicable. And we don't think that in the
17 four decisions that we've cited at page 33 of
18 our brief, where the Board did decide facial
19 constitutional challenges -- I could have cited
20 12 more -- we don't think in those cases that
21 the Board was violating that regulation, and we
22 also don't think that the Board was somehow
23 exceeding its jurisdiction under Section
24 511(a).

25 The other thing I wanted to circle

1 back to, Justice Gorsuch suggested that the
2 Board could decline to enforce or apply a
3 blatantly unconstitutional statute even if it
4 wasn't channeled, even if that claim was not
5 channeled, to --

6 JUSTICE GORSUCH: Well, isn't that --
7 isn't that your position, that it can, but it
8 doesn't have to decide constitutional
9 questions?

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

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

13 MR. BARBER: -- it only can if it
14 must. I'm sorry.

15 JUSTICE GORSUCH: I thought -- I
16 thought that's exactly what I read earlier, was
17 that the Board -- the Veterans Court has stated
18 the Board can but is not required to decide
19 constitutional questions.

20 MR. BARBER: We -- we disagree with
21 the Veterans Court.

22 JUSTICE GORSUCH: You disagree with
23 the Veterans Court as well?

24 MR. BARBER: Insofar as it
25 suggested --

1 JUSTICE GORSUCH: So you disagree with
2 what you said last year and you disagree with
3 the Veterans Court?

4 MR. BARBER: We disagree with an
5 aspect of that decades-old precedent of the
6 Veterans Court. We think that the Board can
7 and must decide these constitutional claims.
8 If that were not the case, under the text of
9 511(a), I don't see how the Board could decline
10 to enforce a blatantly unconstitutional
11 benefits statute.

12 That would be the final decision of
13 the agency. And so then all veterans would
14 have to go to the Veterans Court and the
15 Federal Circuit to get relief on those kinds of
16 claims. We don't think that's the scheme that
17 Congress designed.

18 Again, going back to what Justice
19 Sotomayor was discussing about Robison --

20 JUSTICE GORSUCH: How is it supposed
21 to do that? The Board doesn't have much
22 competence in questions of constitutional -- or
23 it tells us in a lot of cases, and I could cite
24 you a dozen of those. And you say, well, we've
25 got maybe some process we can create with the

1 General Counsel.

2 But we're told the last time the
3 General Counsel came up with a binding
4 prospective opinion was -- was 2019, which was
5 a minute ago. And many of these constitutional
6 questions won't even be sufficiently obvious
7 that there's prospective guidance available to
8 give the Board. So it does seem like a bit of
9 a rabbit hole.

10 MR. BARBER: Well, first of all, I
11 think --

12 JUSTICE GORSUCH: Plus, this will
13 decide constitutional questions even though the
14 court that reviews the Board says they can't,
15 and -- and we don't know what the issues are,
16 and we're not going to provide any guidance.

17 So isn't it really saying -- isn't the
18 upshot of the government's position is the
19 Board's never going to decide a constitutional
20 question?

21 MR. BARBER: But the Board has done
22 so. Again --

23 JUSTICE GORSUCH: Oh, yeah, no,
24 it'll -- it'll do so once in a while, and God
25 bless it when it does. I mean, it's great when

1 somebody follows the Constitution. But just as
2 often and more likely than not, the veteran is
3 likely to find a decision saying, ah, yeah,
4 it's a nice constitutional argument you have
5 here; I don't know anything about that; I see
6 nothing, I know nothing, I hear nothing.

7 MR. BARBER: I think, Justice Gorsuch,
8 particularly if this Court agrees with us on
9 the proper interpretation of 511(a), the Board
10 is going to take very seriously its obligation
11 to decide these claims going forward.

12 There has been uncertainty in the
13 past, I think probably as a result of this
14 notion that administrative agencies are often
15 thought not to have jurisdiction to decide
16 these claims.

17 JUSTICE GORSUCH: Why can't they just
18 continue to do what they've always done, which
19 is say we can, but -- sometimes, and -- and --
20 and we won't most of the time?

21 MR. BARBER: That would be --

22 JUSTICE GORSUCH: What's to stop them
23 from doing that?

24 MR. BARBER: That would be a violation
25 of their statutory duty, which they take very

1 seriously, and we do too.

2 JUSTICE JACKSON: Well, but only if --

3 JUSTICE GORSUCH: Well, except for
4 you've never done it.

5 JUSTICE JACKSON: Only if we interpret
6 it that way. I mean, is it -- is it your
7 position that this case could actually be
8 monumental in this regard? Because, as I take
9 your argument, we would be holding that it
10 would be necessary for the Board to address
11 constitutional questions as a precursor to its
12 determination? So then we pretty much are
13 saying that, in every case, even though the
14 Board has previously disclaimed this
15 responsibility, they would have to from now on?

16 MR. BARBER: Yes. Absolutely. But I
17 don't think --

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

21 MR. BARBER: Well, they have on
22 numerous occasions, which we've discussed, and
23 they haven't done it on other occasions. And
24 so what this Court would be saying is the Board
25 was right in the first set of cases and not the

1 second.

2 JUSTICE JACKSON: Is there a
3 regulation --

4 JUSTICE SOTOMAYOR: But what's the --
5 I'm sorry.

6 JUSTICE JACKSON: I -- I thought there
7 was a -- is there a regulation where they say
8 they're not going to do it or they -- this is
9 just as a matter of practice?

10 MR. BARBER: That's the regulation I
11 was discussing with Justice Sotomayor. We
12 don't think that that prohibits the Board at
13 all from deciding constitutional challenges.
14 It basically just means that in cases
15 particularly where there's no colorable
16 constitutional challenge at all, the Board does
17 need to attend to the statutory requirements
18 for benefits. By referring to applicable
19 statutes, that regulation makes quite clear
20 that the Board is not duty-bound to apply, say,
21 the base -- the blatantly unconstitutional
22 benefits statute that Justice Alito was
23 mentioning.

24 JUSTICE JACKSON: I understand, but I
25 guess I'm just trying to reconcile the position

1 you -- going forward, that the government is
2 taking, with what has been happening. We have
3 many cases in which the Board has said we don't
4 have particular competency in this area; we are
5 not going to answer this constitutional
6 question. They bracket it and they deal with
7 the application in terms of just figuring out
8 the benefits, which is what they understand
9 their duties, or have traditionally understood
10 their duties, to be.

11 So is it the government's position
12 that, from now on, under your view, as a result
13 of this case, the -- the Board can no longer do
14 that? They would have to answer the
15 constitutional question?

16 MR. BARBER: They do. And I don't see
17 why that's so strange when everybody agrees
18 they have to decide the as-applied --

19 JUSTICE GORSUCH: Well, here's --
20 here's what's strange about it.

21 JUSTICE JACKSON: Well, the -- the
22 strangeness, I --

23 JUSTICE GORSUCH: Here's what's
24 strange about it. I'm sorry.

25 JUSTICE JACKSON: That's okay. Go

1 ahead.

2 JUSTICE GORSUCH: What's strange is we
3 normally interpret statutes as they were
4 understood by the public, ordinary readers, at
5 the time they were enacted. And at the time
6 this statute was enacted, we had Robison, and
7 the understanding was, hey, these guys in the
8 Board, they're technical experts, they know a
9 lot about veterans' benefit laws and all the
10 intricacies, and we leave that to them.

11 But the Constitution of the United
12 States is different, and that goes to federal
13 district court and -- where the competent
14 experts reside, we hope, right? And that's how
15 everybody worked.

16 Now you can point me to some examples
17 where the Board may have, in its good graces,
18 decided to do otherwise. But the dominant
19 practice from the time this statute was
20 enacted, before it was enacted, up until, oh,
21 today, because a year ago the government had
22 the opposite position about how all this
23 worked, the understanding, the dominant
24 understanding of the public meaning of this
25 statute was these are experts who decide things

1 that are necessary under the statute, not under
2 the Constitution.

3 What's wrong with that?

4 MR. BARBER: I think, with respect,
5 it glosses over the fundamental changes to the
6 statutory scheme that Congress made in the
7 VJRA.

8 It edited the text of 511(a) in a
9 pretty significant way, making clear that the
10 question of law does not need to arise under
11 a benefits statute to be covered. And then it
12 created Chapter 72. And it made clear that
13 those courts, the Veterans Court and the
14 Federal Circuit, are going to decide
15 constitutional challenges to the validity of
16 statutes.

17 What sense would it make to make the
18 Federal Circuit the exclusive circuit --

19 JUSTICE GORSUCH: So --

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

21 JUSTICE GORSUCH: -- a perfectly
22 sensible reading except for, the government
23 itself hasn't understood the law that way --

24 MR. BARBER: Well --

25 JUSTICE GORSUCH: -- up until today.

1 MR. BARBER: -- there is a line about
2 wisdom coming too late --

3 JUSTICE GORSUCH: Yeah, maybe it is
4 too late.

5 MR. BARBER: -- that's escaping me
6 right now. But I don't think it is too late
7 in this case. I think the Court can accept --

8 JUSTICE SOTOMAYOR: What sense is
9 there in your system?

10 This is a pure challenge to --
11 constitutional challenge to a -- a provision.
12 The veteran has to go through this elaborate
13 administrative process where, now you're saying
14 the Board has to look at it, but before, he
15 didn't understand that. He had to go through
16 that and wait to have the constitutional
17 challenge decided. Why?

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

22 JUSTICE SOTOMAYOR: Well, you're
23 trying to go and change what the understanding
24 had been at the time of the law to create a new
25 understanding. We have to go there with you.

1 But even assuming, what is the sense
2 of it?

3 MR. BARBER: Well, one important point
4 I want to make, Justice Sotomayor, is that one
5 of the impressions that Petitioner has left
6 is that you can have kind of a standalone
7 constitutional claim that doesn't have any
8 other issues accompanying it. That will never
9 be the case. Every veterans benefits dispute
10 involves case-specific, fact-specific
11 determinations that need to be made.

12 Is the person a veteran? Do they have
13 a disability? Is the disability related to
14 their service? So you're always going to have,
15 under his view, dual-track litigation going on
16 both in the VA and then in federal district
17 courts around the country.

18 It makes a lot more sense, and I think
19 Congress agreed with us when it enacted the
20 VJRA, to consolidate all of those issues
21 together and to send them to the Federal
22 Circuit.

23 If Petitioner is right --

24 JUSTICE SOTOMAYOR: You're still
25 not -- because you're -- those -- all of the

1 issues you're talking about are as-applied
2 challenges.

3 We're talking about a pure, he is
4 saying, only pure facial challenge. It doesn't
5 matter how extensive the disability is. Those
6 questions are all going to be decided by the
7 Board. This is a pure constitutional question.

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

11 So if you look at the complaint --

12 JUSTICE SOTOMAYOR: Well --

13 MR. BARBER: -- that was filed in this
14 case --

15 JUSTICE SOTOMAYOR: -- that's -- you
16 run -- you always run that risk anyway in
17 as-applied or facial challenges.

18 MR. BARBER: Well, right. But I think
19 it is pretty important that the jurisdictional
20 analysis here would hinge on facial versus
21 as-applied.

22 If you look at the complaint that
23 Petitioner filed when he was pro se, as many
24 veterans will be, there's nothing about facial
25 versus as-applied. It just says: 5313 is

1 unconstitutional. I want my full benefits.

2 That's the relief I'm demanding. So --

3 JUSTICE ALITO: Can I -- let me ask
4 you a -- what would be, from your perspective,
5 a damage-control question.

6 Suppose the Court were to hold that a
7 claim that does not implicate any -- does not
8 seriously implicate any factual issues can be
9 brought in district court.

10 Is there a way to draw a distinction
11 between that kind of constitutional claim and
12 other constitutional claims? For example, one
13 that challenges the constitutionality of the
14 interpretation of the statute or some other --
15 or an as-applied challenge?

16 MR. BARBER: I think that approach --

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

19 MR. BARBER: I think you could
20 certainly write an opinion like that in theory.
21 I think it would break down very quickly in
22 practice.

23 This is why the Court said, in *Elgin*,
24 that the distinction between facial and
25 as-applied claims are very amorphous, hard to

1 get your hands around. And so it's a bad basis
2 to distinguish between claims that must be
3 channeled through an administrative and
4 judicial review scheme and claims that should
5 not be.

6 So we don't think that that is
7 tenable. And we also just don't think that
8 there is any basis in the text or structure of
9 Section 511(a) to distinguish these kinds of
10 claims.

11 A facial claim is certainly necessary
12 to a decision in just the same way that an
13 as-applied claim would be. And, frankly, we
14 think that the kind of uniformity concern that
15 Congress often has in mind when it enacts a
16 channeling provision are even more serious for
17 facial claims, because if you have as-applied
18 claims turning on a particular circumstance of
19 individual veterans, maybe it's not as big a
20 deal that you're going to have district --
21 different district courts around the country
22 issuing different types of decisions on that
23 basis --

24 JUSTICE KAVANAUGH: Can I --

25 MR. BARBER: -- with respect to the

1 facial validity.

2 JUSTICE ALITO: Thank you. Perhaps
3 Mr. Chen will choose to take another shot at
4 answering that question in rebuttal.

5 JUSTICE KAVANAUGH: Can I ask,
6 following up on Justice Gorsuch's questions,
7 if it is a close call in the statutory
8 interpretation, why upset the longstanding
9 practice?

10 MR. BARBER: Well, first of all, there
11 is no consistent longstanding practice. As
12 I have said multiple times, the Board has
13 repeatedly decided these kinds of claims, and
14 so we're going to have consistency one way or
15 another going forward.

16 We think that the statutory --

17 JUSTICE KAVANAUGH: They haven't had
18 to decide them, right?

19 MR. BARBER: We think that they do
20 have to decide them, yes. And I don't think
21 there is anything anomalous about that. I
22 mean, if you imagine a Board of Veterans'
23 Appeals decision in this case, if the Board had
24 been given an opportunity to do so, it's not
25 that hard to have a section at the end of the

1 opinion saying: There is an equal protection
2 challenge, we've overturned your challenge,
3 it's rejected for these reasons.

4 JUSTICE KAVANAUGH: And then what's
5 the harm the government -- from the current
6 state of play?

7 MR. BARBER: I think it's a few
8 different fronts.

9 JUSTICE KAVANAUGH: Other than you
10 want to get the law right. I get that one,
11 but --

12 MR. BARBER: Obviously, we want to get
13 the law right.

14 JUSTICE KAVANAUGH: But apart from
15 that, is there something going on that's
16 problematic from the government's perspective?

17 MR. BARBER: Well, it would be
18 problematic to make the VA start litigating
19 these kinds of claims all around the country.
20 The VA is incredibly burdened as it is, and
21 I think that would be a significant problem.

22 As I said before, you would have
23 dual-track litigation going on in every single
24 case, because the veteran always needs to have
25 a claim with the VA, and that's always going to

1 raise some fact- and case-specific matters. So
2 you're always going to have a process that
3 needs to go on at the VA.

4 You have the disuniformity concerns,
5 but I really do think the main thing is the
6 litigation burden.

7 At the time of Robison the Court said
8 that, you know, these kinds of constitutional
9 challenges to statutes are pretty uncommon,
10 it's not a big deal to make the VA have to
11 litigate them.

12 JUSTICE KAVANAUGH: How common are
13 they now?

14 MR. BARBER: They are much more
15 common. I think that --

16 JUSTICE KAVANAUGH: How successful are
17 they?

18 MR. BARBER: They are never
19 successful. I am not aware of a benefits
20 statute ever having been held unconstitutional
21 since, like, Hayburn's Case maybe.

22 JUSTICE JACKSON: Then why is there
23 a burden? I am so confused. I am trying to
24 understand what you mean, the litigation
25 burden.

1 You -- you also seem to say these are
2 easily disposed of, that you want to channel
3 them into the veterans scheme precisely because
4 you can get a higher-up to come and say, oh,
5 this was a rogue -- a Board of Veterans'
6 Appeals person who thought it might be
7 unconstitutional, but we're going to squelch
8 that.

9 So what is the litigation burden?

10 MR. BARBER: Having to defend against
11 meritless claims is still a great burden on the
12 agency, particularly if they have to do it all
13 around the country from district courts and
14 then up to all the regional courts of appeals.

15 The point I wanted to just tie off
16 that I was going to make earlier was that
17 Section 7292(c) goes out of its way to say
18 the Federal Circuit shall have exclusive
19 jurisdiction to decide challenges to the
20 validity of statutes.

21 If Petitioner is correct, then that is
22 essentially a nullity, because anybody can go
23 to any district court around the country and
24 then take that claim up to any court of
25 appeals.

1 JUSTICE BARRETT: Is that what they're
2 doing now? I mean, since this has been
3 the prevailing system and you told Justice
4 Kavanaugh that the problem for the government
5 is the litigation burden of being all around
6 the country, but given the government's
7 position to this point, is that what is
8 happening now?

9 MR. BARBER: Well, it hasn't been a
10 huge deal yet because there are only two
11 circuits, I think, that have adopted
12 Petitioner's view.

13 JUSTICE GORSUCH: It wasn't a problem
14 up until last year when you took the opposite
15 position in *Pereida*, right? It's a new
16 problem.

17 MR. BARBER: If the Court were to
18 adopt Petitioner's view and open the doors of
19 all the district courts around the country to
20 these claims, we think it would be a serious
21 problem because, again, as the Board decisions
22 that we've cited in the briefs addressing these
23 kinds of facial constitutional challenges show,
24 these claims are a lot more common than they
25 were back in the '70s when *Robison* was decided.

1 So we don't think that that concern can be
2 dismissed.

3 We're totally in policy land at this
4 point. We think that the statutory text
5 resolves this case completely.

6 These claims are --

7 JUSTICE KAGAN: On that, Mr. Barber,
8 I mean, I suggested before that if all I do is
9 look at 511 alone, I think you have the better
10 of the argument.

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

15 I think that those -- the differences
16 in terminology, you know, point your way, no
17 doubt. But, on the other hand, a -- a -- a
18 court that was -- a Congress that was really
19 set on reversing the Robison rule, it seems
20 very strange that it would do that by virtue of
21 making the changes in that sentence.

22 MR. BARBER: I respectfully disagree
23 with that. And I think a good example of this
24 is the Traynor versus Turnage angle, because
25 Petitioner accepts that one of Congress's

1 purposes in enacting the VJRA was to abrogate
2 this Court's decision in Traynor.

3 It also did that in a relatively
4 subtle way. It changed that second clause --

5 JUSTICE KAGAN: I mean, subtle --

6 MR. BARBER: -- of the first --

7 JUSTICE KAGAN: -- but pretty darn
8 clear.

9 MR. BARBER: Well, we --

10 JUSTICE KAGAN: I think that the first
11 part of the sentence, you know, you -- you have
12 to struggle a good deal more to understand how
13 that changes the issue.

14 MR. BARBER: We think this is also
15 pretty darn clear moving that "question of law"
16 clause away from the "under any law affecting
17 the provision of benefits" clause. We think
18 that's clear. And that's just looking at
19 511(a) in isolation, which you would never do.
20 You would always want to look at Chapter 72.
21 And we think that that statutory context really
22 eliminates any doubt.

23 Another case I would point to you is
24 Weinberger. It was decided the year after
25 Robison. That case had an express preclusion

1 clause referring to claims arising under Title
2 II of the Social Security Act. You said that
3 that clause applied to constitutional
4 challenges to the Act, even though it's pretty
5 unnatural to say that such a claim arises under
6 the Act. If that clause covered constitutional
7 claims, we don't see how this one couldn't.

8 JUSTICE KAVANAUGH: If it goes to
9 district courts, where does the appeal go? Do
10 all the appeals go to the Federal Circuit
11 still?

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

15 JUSTICE KAVANAUGH: Well, that's --

16 MR. BARBER: -- would be defeated.

17 JUSTICE KAVANAUGH: -- what do we do
18 -- this is, I guess, a helpful question for
19 you. That says exclusive jurisdiction. So
20 what do we do with that?

21 MR. BARBER: It says exclusive
22 jurisdiction in cases brought under this
23 section, I think. And so what that means is
24 that you can't go from the Veterans Court to
25 any court of appeals besides the Federal

1 Circuit.

2 JUSTICE KAVANAUGH: Mm-hmm.

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

6 JUSTICE KAVANAUGH: It says,
7 "exclusive jurisdiction to decide any challenge
8 to the validity of any statute or regulation."
9 I guess you're saying brought under this
10 section. I was wondering, you know.

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

13 JUSTICE KAVANAUGH: Got it. Thank
14 you.

15 JUSTICE JACKSON: Let's go back to
16 your exchange with Justice Kagan. I -- I -- I
17 guess one might expect for Congress, if it was
18 targeting Robison, to say all questions of law
19 and fact including constitutional issues, or
20 something, given that this Court had said
21 questions of law and fact under a law does not
22 include constitutional questions.

23 So can you say a little bit more about
24 why you think that, looking at 511 after 211,
25 the changes are enough to indicate Congress's

1 intent to move away from Robison?

2 MR. BARBER: Sure. I mean, I think we
3 have to look at the actual statutory text, not
4 hypothetically hyper-clear statutory text. We
5 think that's -- the statutory text is quite
6 clear here, particularly in conjunction with
7 Chapter 72, which --

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

10 MR. BARBER: I think the key
11 difference in this case is separating -- so the
12 "question of law" clause from the "under a law"
13 clause. The previous version of the statute
14 said decisions of the administrator on any
15 question of law or fact under any law
16 administered by the VA.

17 That was at least plausibly read,
18 particularly in light of the Court's
19 constitutional concerns in Robison, as
20 referring to questions of law arising under the
21 statute itself relating to its interpretation
22 or application.

23 By saying all questions of law and
24 fact necessary to a decision by the Secretary,
25 naturally invites the inclusion of

1 constitutional challenges to the statute,
2 because as Justice Kagan was explaining, it's
3 obviously necessary to a decision under or in
4 accordance with the statute if you define it
5 that way to determine whether the statute is
6 constitutional in the first place.

7 JUSTICE JACKSON: Okay. I'm going to
8 have to look, because I'm looking at 211 that
9 says, "the administrator shall decide all
10 questions of law and fact necessary to a
11 decision by the administrator under a law,"
12 which seems like it's the same --

13 MR. BARBER: That's the current
14 version.

15 JUSTICE JACKSON: That's the current
16 version? Okay.

17 MR. BARBER: Yeah. That's not the
18 Robison version.

19 JUSTICE JACKSON: Got it. Thank you.

20 MR. BARBER: Yep.

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas?

25 Justice Alito?

1 Justice Gorsuch?

2 Justice Kagan? I can't quite see you
3 there.

4 Justice Barrett, anything further?

5 Justice Kavanaugh? Anything further?

6 Thank you, counsel.

7 MR. BARBER: Thank you.

8 CHIEF JUSTICE ROBERTS: Rebuttal,
9 Mr. Chen?

10 REBUTTAL ARGUMENT OF JEFFREY W. CHEN

11 ON BEHALF OF THE PETITIONER

12 MR. CHEN: Thank you, Mr. Chief
13 Justice.

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

1 statute versus whether it attacks agency
2 action.

3 And we also know that this is both
4 before and after the VJRA was passed in 1988,
5 because after 1988, most lower courts have --
6 most lower courts have adhered to the line that
7 Robison drew. Not only that, the BVA has
8 continued to draw that line perfectly
9 adequately. They have to identify -- they
10 consistently identify what challenges they can
11 and cannot decide.

12 So I want to talk about this idea of
13 -- so I want to address the government's other
14 proposed solutions to this Article II problem.
15 The government says that the Secretary could
16 order reconsideration of a BVA's -- the BVA's
17 decisions.

18 That's not right. The -- the
19 Secretary can't do that. The only -- only the
20 BVA chairman can order reconsideration of a BVA
21 proceeding. But even if, even if the
22 government was correct that the Secretary could
23 order the BVA to keep on ordering
24 reconsiderations until the Secretary's
25 outcome -- preferred outcome was reached, that

1 is the exact kind of back-channel jury rigging
2 that this court in Arthrex held was
3 insufficient for purposes of the Appointments
4 Clause.

5 So even -- even -- even granting the
6 government all those things, it still doesn't
7 work under the Appointments Clause.

8 I think the government also alluded to
9 this sort of instruction power about how
10 somehow the government, the Secretary could
11 dictate the outcomes of individual BVA
12 proceedings using its instruction powers
13 retrospectively or -- I think that not even --
14 not even the VA has construed the instruction
15 power that broadly because it is quite
16 startling.

17 And the reason it's startling is
18 because Congress was very detailed in setting
19 out the BVA's procedures. Congress directed
20 that the BVA has to make the agency's final
21 decisions on all 511(a) matters. It precluded
22 the Secretary from appealing them. It said
23 that only the BVA chairman can order
24 reconsideration.

25 And there is no provision that

1 establishes direct review by the Secretary of
2 the BVA's decisions. All of those provisions
3 would be meaningless if the -- the -- if the
4 Secretary could, whenever it wanted to,
5 retrospectively -- retrospectively dictate the
6 outcome of individual BVA proceedings.

7 And, in fact, the VA in its own GC
8 opinion from 1992 says that the instruction
9 power is just a term of art that refers to
10 guidance documents published for newly enacted
11 -- or guiding newly enacted legislation prior
12 to the issuance of -- issuance of regulations.
13 And so not even the government thinks that the
14 instruction power is -- is as broad as they are
15 saying right now.

16 I want to talk about the asymmetric
17 review provision. The bottom line is that any
18 problems -- any constitutional problem that
19 arises out of the asymmetric review provision
20 is so much more serious on the government's
21 reading of the statute, because only the
22 government's reading of the statute opens the
23 category of unreviewable BVA decisions to
24 include decisions about whether to disregard an
25 Act of Congress. And that is a particularly

1 weighty and significant exercise of -- of
2 executive power.

3 And then one thing I'd like to address
4 is the -- my -- my friend directed you to the
5 case Weinberger, which did have -- did consider
6 language about "claim arising under" the
7 statute. But what he didn't tell you is that
8 Weinberger explicitly distinguished Robison and
9 said that the language in Robison, the decision
10 -- the "decision under the law" language in
11 Robison was "quite different" from the "claim
12 arising under a statute" language, such that
13 only the latter includes -- can include
14 constitutional challenges to statutes.

15 I think that is all I have or want to
16 address. So I don't want to keep us from
17 lunch and --

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 The case is submitted.

21 (Whereupon, at 1:02 p.m., the case was
22 submitted.)

23
24
25

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