

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

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

Tuesday, April 19, 2022

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

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

2 (10:00 a.m.)

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

6 Ms. Bostwick.

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

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

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

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

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

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

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

15 But this dilemma created by the  
16 agency's own unlawful acts does not stop a later  
17 tribunal from identifying and remedying the  
18 clear legal error that infected the decision.  
19 Nor is this legal error a mere change in  
20 interpretation. VA's regulations have long  
21 distinguished between genuine legal changes that  
22 might warrant updating prior benefits rulings  
23 and legal errors that entitle veterans to  
24 revision of a flawed ruling.

25 Furthermore, what the agency did here

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

11                I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 JUSTICE THOMAS: So how was --

11 MS. BOSTWICK: -- such as Rivers.

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

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

17 JUSTICE THOMAS: Yes.

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

24 In the Look decision, the Veterans  
25 Court said first there was a clear and



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

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

18            JUSTICE THOMAS: Thank you.

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

21            MS. BOSTWICK: Correct.

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

1 has, right?

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

8 That language appears --

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

12 MS. BOSTWICK: Certainly.

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

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

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

1 suggests.

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

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

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

25              And, more importantly, what it's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Now, of course, you still have to

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

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

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

1                   So how do you respond to that?

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

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

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



1 relief should be higher because the implications  
2 are going to be dramatic.

3 And the veterans court here, for  
4 example, has said that doing this would impose  
5 tremendous hardship under -- on the agency  
6 and -- and all that's the reason for the high  
7 bar.

8 So how do you respond to all that?

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

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

18 JUSTICE KAVANAUGH: Can I just stop  
19 you there?

20 MS. BOSTWICK: Yes.

21 JUSTICE KAVANAUGH: Because I'm  
22 wondering how high a bar you're saying it is?  
23 Anytime a regulation is determined to be an  
24 impermissible interpretation of the statute, it  
25 seems to me you're saying that's clear and

1     unmistakable error. And if it's not, can you  
2     tell me what the delta is?

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

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

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

22            MS. BOSTWICK: Yes, absolutely. That  
23    is what Congress intended in this -- right,  
24    because the -- the point is, under the law,  
25    under the statute, the veteran was supposed to

1 receive those benefits all along. And so we go  
2 back and we put him close to the position he  
3 would have been in. There isn't an interest  
4 payment, but --

5 JUSTICE BARRETT: But --

6 JUSTICE KAGAN: But --

7 JUSTICE BARRETT: -- Ms. Bostwick, can  
8 I just follow up on what Justice Kavanaugh said?  
9 So it's your position that every single time the  
10 agency misinterprets a statute, it's always  
11 clear and unmistakable?

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

20 Are all misinterpretations of a  
21 statute clear?

22 MS. BOSTWICK: So we think they are,  
23 but even if the Court thinks that there are some  
24 statutory interpretation errors that wouldn't  
25 satisfy CUE, this is the paradigmatic example.

1 And I want to address what you brought up about  
2 the supposed lack of clarity in the -- the  
3 statute and -- and the VA's regulation.

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

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

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

1     there, and they simply deleted the end of the  
2     sentence.

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

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

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

1 saying no, we want it in there.

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

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

8 You have a client.

9 MS. BOSTWICK: Correct.

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

13 MS. BOSTWICK: Correct.

14 JUSTICE BREYER: And so he gets money.

15 MS. BOSTWICK: Correct.

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

23 MS. BOSTWICK: Unless A or B.

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

1 MS. BOSTWICK: Correct.

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

4 MS. BOSTWICK: Correct.

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

7 MS. BOSTWICK: Correct.

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

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

13 JUSTICE BREYER: Yeah. Had noted it.

14 MS. BOSTWICK: Correct.

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

17 MS. BOSTWICK: Correct.

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

20 MS. BOSTWICK: Correct.

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

1 MS. BOSTWICK: I think I might have  
2 misunderstood your -- your -- you're a and B. I  
3 think I made the --

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

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

10 MS. BOSTWICK: Mm-hmm.

11 JUSTICE BREYER: -- no money.

12 MS. BOSTWICK: No. No, no, no.

13 JUSTICE BREYER: Well, wait. Wait.

14 MS. BOSTWICK: Oh, sorry.

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

20 MS. BOSTWICK: Right.

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

23 MS. BOSTWICK: No.

24 JUSTICE BREYER: Okay. Now there's a  
25 second way he's not sound, if he really was very



1 sick when he was accepted but the sickness was  
2 aggravated during his service.

3 MS. BOSTWICK: Correct.

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

9 MS. BOSTWICK: Correct.

10 JUSTICE BREYER: Okay.

11 MS. BOSTWICK: And that's --

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

17 MS. BOSTWICK: Exactly.

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

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

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

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

7                   MS. BOSTWICK:   -- which was --

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

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

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

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

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

25                  MS. BOSTWICK:   I -- I believe you've

1       said it correctly. And -- and --

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

7                   MS. BOSTWICK: Mm-hmm.

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

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

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

23                  MS. BOSTWICK: Because the Board was  
24      also commanded to follow the statute. And we're  
25      not suggesting that the Board should have

1     violated Section 4004 at the time, now 7104.  
2     What we're saying is that the Board -- sure, the  
3     Board sitting there with both of those  
4     directives, it could not comply with both.

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

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

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

23            JUSTICE ALITO: I mean, well, you're  
24    --

25            MS. BOSTWICK: It's a --

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

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

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

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

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

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

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

25 MS. BOSTWICK: We have -- we have

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

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

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

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

20 MS. BOSTWICK: Yeah.

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

25 MS. BOSTWICK: Yes.

1 JUSTICE BREYER: And that's the issue.

2 MS. BOSTWICK: That is --

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

7 And you say?

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

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

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

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

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

1     there's sort of two questions: Was there error  
2     and what are the consequences?

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

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

8             MS. BOSTWICK: Certainly.

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

11            MS. BOSTWICK: Yes.

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

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



1 MS. BOSTWICK: Mm-hmm.

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

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

9 JUSTICE GORSUCH: Yeah.

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

15 JUSTICE GORSUCH: But we could say --

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

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

22 MS. BOSTWICK: Certainly. You could  
23 say that when you have a -- a regulation that  
24 contradicts a plain statute, that can be CUE. I  
25 think that it would also be natural for the

1 Court to go on to say: And that's what we have  
2 here. The question whether that was, for  
3 example, outcome-determinative in Mr. George's  
4 case could be addressed on remand.

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

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

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

21 JUSTICE BREYER: The other side might  
22 be.

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

1 to Dixon, that when the agency's regulation  
2 contradicts the statute, that clearly is a legal  
3 nullity.

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

9 MS. BOSTWICK: Yes.

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

12 MS. BOSTWICK: Correct, Your Honor.

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

19 MS. BOSTWICK: No, Your Honor. That  
20 is a separate type of revision.

21 JUSTICE SOTOMAYOR: Right.

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

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

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

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

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

18 JUSTICE SOTOMAYOR: Got it.

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

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

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

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

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

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

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

23 MS. BOSTWICK: So I would say the  
24 relevant time period is after that decision  
25 issues. Certainly, notwithstanding the

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

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

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

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

24                JUSTICE SOTOMAYOR: Thank you.

25                CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Breyer, anything?

4 JUSTICE KAVANAUGH: Oh.

5 JUSTICE BARRETT: Is it to me?

6 JUSTICE KAVANAUGH: Yeah, I'm sorry.

7 I had --

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

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

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

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

24 MS. BOSTWICK: That's part one of my  
25 answer, is that it wasn't lifted into the

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

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

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

11 JUSTICE KAVANAUGH: Okay.

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

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

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

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



1       that is already extraordinarily strained.

2               Your response to that?

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

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

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

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

24              JUSTICE KAVANAUGH: Thank you.

25              CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

23 MS. BOSTWICK: It's -- it's not a  
24 change -- it may be a change in the abstract,  
25 but that's not the relevant question, right?

1     You have to look at it in context. It talks  
2     about changes in law or changes in  
3     interpretation thereof, both of those things  
4     together.

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

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

12            MS. BOSTWICK: But I think --

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

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

23            And one of the ways we know that's not  
24    what it's doing is, when there is a change in  
25    law, nobody would say that the original decision

1 was erroneous. This simply isn't taking errors  
2 and carving them out. It's identifying things  
3 that were never errors to begin with. That's  
4 how this language was used in the regulations  
5 dating back to the 1920s.

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

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett?

17 Thank you, counsel.

18 Mr. Yang.

19 ORAL ARGUMENT OF ANTHONY A. YANG

20 ON BEHALF OF THE RESPONDENT

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

23 Clear and unmistakable error is not a  
24 mere error. Congress separately provided for  
25 direct judicial review under an appropriately

1       timed appeal to correct errors like that here.

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

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

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

25              And that's exactly what we have here.

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

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

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

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

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

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

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

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

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

24                  Russell, for instance, which is cited  
25          in the legislative history, if you use that, but

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

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

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

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



1 g.

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

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

11 JUSTICE GORSUCH: Counsel, I -- I --

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

14 JUSTICE GORSUCH: If I -- if I --

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

17 JUSTICE GORSUCH: If I might?

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

20 JUSTICE GORSUCH: If I might, counsel?

21 MR. YANG: Sure.

22 JUSTICE GORSUCH: The premise of your  
23 argument, I think, is a two-step. First, we  
24 have to assume that Congress adopted words from  
25 a regulation that it didn't choose to adopt. It

1     took some but not all, and we have to take your  
2     presumption that that was just shorthand and all  
3     the rest came with it.

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

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

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

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

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

1 JUSTICE GORSUCH: Mm-hmm.

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

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

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

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

15 MR. YANG: No.

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

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

20 JUSTICE GORSUCH: -- a regulation.

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

22 JUSTICE GORSUCH: No, no, no.

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

25 JUSTICE GORSUCH: For purposes of my

1 question, counsel, it doesn't matter.

2 MR. YANG: Okay.

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

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

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

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

23 MR. YANG: If you're talking about  
24 what existed in 1997 when Congress enacted CUE,  
25 Petitioners argue -- this is at page 43 of their

1     brief -- that Congress did so knowing that  
2     there's direct judicial review to correct error,  
3     right?

4             JUSTICE GORSUCH:  I understand that.

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

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

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

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

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

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

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

23            JUSTICE GORSUCH:  Okay.

24            MR. YANG:  -- there's multiple  
25    pathways for this correction, error correction,

1 to be done. Congress --

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

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

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

12 First of all --

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

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

24 JUSTICE GORSUCH: But just so I got  
25 you square on the record, the government doesn't

1 contest it's applicable -- that it's a sound  
2 canon and -- and -- and could apply?

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

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

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

25 So there are some contexts where some

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

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

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

16 MR. YANG: This is one of them.

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

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



1     for reasons to exempt veterans from the coverage  
2     it gives.

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

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

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

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

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

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

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

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

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

1 favor the other side, and that's because it just  
2 wasn't presented.

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

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

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

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

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

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

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

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

1 I've seen in 40 years. I can't think of another  
2 one.

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

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

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

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

25 Even the government with its

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

5               Now what's wrong with that opinion?

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

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

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

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

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

5 JUSTICE KAGAN: Well, Mr. Yang --

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

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

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

15 MR. YANG: Yeah.

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

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

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

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

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

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

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

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

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

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



1 MR. YANG: Right. Right.

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

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

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

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

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

23 JUSTICE GORSUCH: Yeah.

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

1 JUSTICE GORSUCH: Yeah.

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

4 JUSTICE GORSUCH: Yeah.

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

10 JUSTICE GORSUCH: Fair enough.

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

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

18 MR. YANG: The only decision --

19 JUSTICE GORSUCH: Right?

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

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

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

1 decision for the Secretary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the lower court's opinion --

2 MR. YANG: Right, but --

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

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

11 JUSTICE GORSUCH: I must have been  
12 wrong.

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

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

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

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

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

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

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

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

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

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



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

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

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

1 the other?

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

3 JUSTICE KAVANAUGH: Okay.

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

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

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

25 JUSTICE KAVANAUGH: Ms. Bostwick said

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

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

5                 JUSTICE KAVANAUGH:  Mm-hmm.

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

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

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

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

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

8                   MR. YANG: Well, I think --

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

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

15                  JUSTICE KAVANAUGH: Right.

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

18                  JUSTICE KAVANAUGH: So you say general  
19    counsel opinion, Russell --

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

22                  JUSTICE KAVANAUGH: Yeah.

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

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

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

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

22           Justice Thomas, anything further?

23           Justice Breyer?

24           Justice Kagan?

25           Justice Kavanaugh?

1 JUSTICE KAVANAUGH: Yeah, two  
2 questions.

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

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

11 JUSTICE KAVANAUGH: Okay.

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

14 JUSTICE KAVANAUGH: I meant the --

15 MR. YANG: -- from the beginning.

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

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

20 JUSTICE KAVANAUGH: Yeah.

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

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

25 MR. YANG: That's prospective.

1 JUSTICE KAVANAUGH: -- prospective.

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

5 JUSTICE KAVANAUGH: Okay, but --

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

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

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

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

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

19 JUSTICE KAVANAUGH: And then, on the  
20 hardship question, you know, it's tough for us  
21 to figure out this, and this happened yesterday  
22 too, how much of a hardship will this really be  
23 in the Veterans Administration, veterans system.  
24 So, you know, to the extent you can document  
25 this in 30 seconds to 60 seconds, I would

1 appreciate hearing what -- what you think would  
2 happen.

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

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

20 And you're looking prospectively,  
21 right? You're looking prospectively at what  
22 might happen in the future with respect to  
23 future decisions and future regs. And what  
24 we're -- our point is is that Congress, when it  
25 sat and it looked at this in 1997, it already



1 had before it direct review, right?

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

11           JUSTICE KAVANAUGH: Thank you.

12           CHIEF JUSTICE ROBERTS: Justice  
13 Barrett? No?

14           Thank you, counsel.

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

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

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

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

14           CHIEF JUSTICE ROBERTS: Thank you,  
15    counsel.

16           Rebuttal, Ms. Bostwick?

17           REBUTTAL ARGUMENT OF MELANIE L. BOSTWICK  
18           ON BEHALF OF THE PETITIONER

19           MS. BOSTWICK: Thank you, Your Honor.

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

24           First, my friend on the other side  
25    spoke a great deal about the availability of

1 direct review. Of course, direct review was not  
2 available to Mr. George nor to any veteran until  
3 1988.

4 There are many veterans who received  
5 clearly erroneous decisions and did not have the  
6 ability to challenge those at the time.

7 Second, in speaking about supplemental  
8 claims, there was a suggestion that one could  
9 bring such a claim with cumulative evidence or  
10 with a legal error. Neither of those is  
11 correct. It is available only for new and  
12 relevant evidence formally known as new and  
13 material evidence.

14 So -- so I think that's just a  
15 mischaracterization of that form of relief.

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

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

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

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

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

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

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

1 other contexts, in other demanding standards.

2 For example, the clear error standard.

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

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

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

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

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

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

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

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

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

1 statutes. It's also bound by, for example,  
2 precedential general counsel opinions.

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

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

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

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

18 (Whereupon, at 11:16 a.m., the case  
19 was submitted.)  
20  
21  
22  
23  
24  
25

## Official - Subject to Final Review

<p><b>1</b></p> <p><b>1</b> <sup>[10]</sup> 36:9,12,16,22 59:8 68:24 69:6,16 80:17,23  <b>1.4</b> <sup>[1]</sup> 71:13  <b>10:00</b> <sup>[2]</sup> 1:17 3:2  <b>1050</b> <sup>[1]</sup> 69:24  <b>11:16</b> <sup>[1]</sup> 86:18  <b>111</b> <sup>[1]</sup> 45:1  <b>1111</b> <sup>[1]</sup> 18:17  <b>120-day</b> <sup>[1]</sup> 55:10  <b>14</b> <sup>[3]</sup> 79:13 80:16,16  <b>16</b> <sup>[4]</sup> 71:2,7 79:13,16  <b>16a</b> <sup>[2]</sup> 10:9 13:11  <b>17a</b> <sup>[1]</sup> 54:20  <b>19</b> <sup>[1]</sup> 1:12  <b>1920</b> <sup>[1]</sup> 11:15  <b>1920s</b> <sup>[2]</sup> 6:15 43:5  <b>1950s</b> <sup>[1]</sup> 12:7  <b>1956</b> <sup>[2]</sup> 19:15 83:14  <b>1958</b> <sup>[1]</sup> 19:17  <b>1961</b> <sup>[2]</sup> 19:7 25:20  <b>1977</b> <sup>[1]</sup> 70:20  <b>1988</b> <sup>[1]</sup> 82:3  <b>1992</b> <sup>[1]</sup> 57:21  <b>1994</b> <sup>[2]</sup> 14:16 39:9  <b>1997</b> <sup>[8]</sup> 10:8 38:14 45:10 46:10 48:10 51:24 79:25 83:2</p> <hr/> <p><b>2</b></p> <p><b>2</b> <sup>[4]</sup> 35:23 80:18 81:1,4  <b>20</b> <sup>[2]</sup> 17:13 18:14  <b>2003</b> <sup>[1]</sup> 79:10  <b>2004</b> <sup>[1]</sup> 79:10  <b>2014</b> <sup>[1]</sup> 79:11  <b>2022</b> <sup>[1]</sup> 1:12  <b>21-234</b> <sup>[1]</sup> 3:4  <b>24</b> <sup>[1]</sup> 19:6  <b>25</b> <sup>[2]</sup> 19:6 70:21  <b>27309</b> <sup>[1]</sup> 58:17</p> <hr/> <p><b>3</b></p> <p><b>3</b> <sup>[2]</sup> 2:4 43:9  <b>3.105</b> <sup>[2]</sup> 10:4 13:22  <b>3.105(a)</b> <sup>[2]</sup> 10:12,22  <b>3.105(b)</b> <sup>[1]</sup> 10:13  <b>3.114</b> <sup>[3]</sup> 12:10 13:18 40:7  <b>3.63</b> <sup>[1]</sup> 19:14  <b>3.63(d)</b> <sup>[1]</sup> 83:15  <b>30</b> <sup>[3]</sup> 57:24 75:24 78:25  <b>3010</b> <sup>[1]</sup> 43:9  <b>35</b> <sup>[1]</sup> 46:9  <b>36</b> <sup>[1]</sup> 11:1</p> <hr/> <p><b>4</b></p> <p><b>40</b> <sup>[2]</sup> 11:2 60:1  <b>4004</b> <sup>[1]</sup> 27:1  <b>43</b> <sup>[2]</sup> 2:7 51:25</p> <hr/> <p><b>5</b></p> <p><b>5</b> <sup>[1]</sup> 65:6  <b>5109(a)</b> <sup>[1]</sup> 64:24  <b>59</b> <sup>[1]</sup> 58:17</p> <hr/> <p><b>6</b></p> <p><b>6</b> <sup>[1]</sup> 65:7</p>	<p><b>60</b> <sup>[5]</sup> 44:21 45:18 78:25 81:12,13</p> <hr/> <p><b>7</b></p> <p><b>7</b> <sup>[1]</sup> 43:7  <b>7104</b> <sup>[1]</sup> 27:1  <b>7104(c)</b> <sup>[1]</sup> 85:23  <b>7111</b> <sup>[3]</sup> 5:23 44:18 63:4  <b>7111(a)</b> <sup>[1]</sup> 63:1</p> <hr/> <p><b>8</b></p> <p><b>809</b> <sup>[1]</sup> 69:23  <b>81</b> <sup>[1]</sup> 2:10</p> <hr/> <p><b>9</b></p> <p><b>97</b> <sup>[2]</sup> 46:16 73:6  <b>994</b> <sup>[9]</sup> 45:5 46:17 48:3,9 57:23 58:21 73:19 76:16,17</p> <hr/> <p><b>A</b></p> <p><b>a.m</b> <sup>[3]</sup> 1:17 3:2 86:18  <b>ABA</b> <sup>[1]</sup> 58:23  <b>abide</b> <sup>[1]</sup> 66:21  <b>ability</b> <sup>[1]</sup> 82:6  <b>able</b> <sup>[1]</sup> 61:2  <b>above-entitled</b> <sup>[1]</sup> 1:15  <b>abrogated</b> <sup>[1]</sup> 69:21  <b>absolute</b> <sup>[1]</sup> 68:16  <b>absolutely</b> <sup>[2]</sup> 17:22 60:16  <b>absolve</b> <sup>[2]</sup> 30:9,10  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