No.

In the Supreme Court of the United States

MANFREDO SALINAS, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LISA S. BLATT
Counsel of Record
CHARLES L. MCCLOUD
ROBERT BELDEN
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

QUESTION PRESENTED

Whether, under section 5(f) of the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), and section 8 of the Railroad Retirement Act, 45 U.S.C. § 231g, the Railroad Retirement Board's denial of a request to reopen a prior benefits determination is a "final decision" subject to judicial review.

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The opinion of the court of appeals (App. 1a-4a) is unreported and is available at 765 F. App'x 79. The decisions of the United States Railroad Retirement Board (App. 5a-8a) and the Bureau of Hearings and Appeals (App. 9a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2019. On May 20, 2019, Justice Alito extended the time to file a petition for a writ of certiorari to August 15, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 5(f) of the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), provides in pertinent part:

> Any claimant, or any railway labor organization . . . , of which claimant is a member, or any base-year employer of the claimant, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies . . . have been . . . exhausted, obtain a review of any final decision of the Board . . . .

Section 5(c) of the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(c), provides in pertinent part:

> (1) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection shall be granted an opportunity for a fair

> hearing thereon before a referee or such other reviewing body as the Board may establish . . . .
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> * * *
>
> (5) Final decision of the Board in the cases provided for in the preceding three paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party . . . may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this Act, of every party . . . .

Section 8 of the Railroad Retirement Act, 45 U.S.C. § 231g, provides in pertinent part:

> Decisions of the Board determining the rights or liabilities of any person under this Act shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act . . . .

Section 5 of the Railroad Unemployment Insurance Act, 45 U.S.C. § 355; section 7 of the Railroad Retirement

Act, 45 U.S.C. § 231f; and section 8 of the Railroad Retirement Act, 45 U.S.C. § 231g, are set forth in their entirety in the appendix. App. 18a-41a.

STATEMENT

This case is the ideal vehicle for resolving a deep and acknowledged circuit conflict over the reviewability of decisions of the Railroad Retirement Board. The nation's railroad workers often face uniquely hazardous on-the-job conditions. Congress enacted the Railroad Retirement Act ("RRA") and the Railroad Unemployment Insurance Act ("RUIA") at the height of the Great Depression to give these workers disability, retirement, sickness, and unemployment benefits. Every year, the Board—a three-member independent agency charged with administering those benefits programs—adjudicates thousands of claims from American railroad workers and their families.

Section 5(f) of the RUIA, 45 U.S.C. § 355(f), subjects "any final decision of the Board" to judicial review in federal courts of appeals. And section 8 of the RRA, 45 U.S.C. § 231g, prescribes the "same manner" of judicial review for "[d]ecisions of the Board determining the rights or liabilities of any person under this Act."

Courts of appeals have sharply divided over whether Board decisions denying requests to reopen earlier proceedings are eligible for judicial review under those statutory provisions. This circuit conflict has left Board decisions denying reopening reviewable in some parts of the country, but not others. Within the Second, Eighth, and D.C. Circuits, federal courts of appeals review Board denials of requests to reopen prior proceedings. The Second and Eighth Circuits have long embraced this rule. And in *Stovic v. Railroad Retirement Board*, 826 F.3d 500 (D.C. Cir. 2016), then-Judge Kavanaugh, writing for the D.C.

Circuit, explained that Congress meant what it said in authorizing federal courts of appeals to review "any final decision" of the Board. Because the Board's decisions denying requests to reopen prior proceedings are final decisions, they are just as reviewable as any other final Board decision. *Id.* at 506.

But within the Third, Fourth, Fifth, Seventh, and Tenth Circuits, such decisions are not subject to any judicial review. Those courts instead hold that a different provision, 45 U.S.C. § 355(c), which governs *the parties* who may seek judicial review, also limits the types of Board decisions subject to judicial review and excludes review of decisions denying reopening. In those circuits, the Board's decision denying reopening is the end of the line.

This 5-3 split is deep, widely acknowledged, and entrenched. Numerous courts of appeals, including the Fifth Circuit in the decision below, have recognized this division of authority. The split was outcome determinative in this case. Only this Court can create uniformity and break the logjam on an important and recurring issue under a longstanding federal program.

This Court should act now, because this conflict is too important to ignore. The statutory text unambiguously grants federal courts of appeals jurisdiction over the Board's reopening decisions. Abdicating this jurisdiction turns the presumption in favor of judicial review on its head, and leaves no one to check the legality of these decisions of an unusually independent agency.

That dereliction of judicial duty is particularly troubling because the Board's decisions carry life-changing consequences for thousands of railroad workers who depend on disability benefits for financial support. Whether the Board denies an application on the merits or rejects a

request to reopen a prior benefits determination, the stakes are the same: Railroad workers do not receive money that could transform their quality of life.

In sum, this case presents an ideal opportunity to resolve an intractable circuit conflict on a significant but straightforward question of federal law. Only this Court's intervention can resolve the split and bring uniformity to an important nationwide program.

A. Statutory and Regulatory Framework

During the Great Depression, railroad employees called on Congress to protect the private railroad pension systems that had been in place since 1874. *See* U.S. Gov't Accountability Off., GAO-18-111SP, The Nation's Retirement System: A Comprehensive Reevaluation Is Needed to Better Promote Future Retirement Security, at 114, 116 (2017). Congress first tried to create a federal program administering railroad employee pensions in 1934, but this Court struck that version down. *R.R. Ret. Bd. v. Alton R. Co.*, 295 U.S. 330 (1935). The 1935 replacement faced additional legal challenges. *See Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936). But the third version—the Railroad Retirement Act of 1937—survived. *See* Railroad Retirement Act of 1937, Pub. L. No. 75-162, ch. 382, part I, 50 Stat. 307 ("RRA"). Shortly thereafter, Congress supplemented the benefits available to railroad workers by enacting the Railroad Unemployment Insurance Act, Pub. L. No. 75-722, ch. 680, § 1, 52 Stat. 1094 (1938) ("RUIA").

1. The Board—"an independent agency in the executive branch"—administers retirement and disability benefits available to railroad employees under the RRA,

45 U.S.C. § 231f(a), along with unemployment and sickness benefits available under the RUIA, 45 U.S.C. § 362.[1]

Congress vested in the Board "all the duties and powers necessary to administer" the statutory scheme and empowered the Board to "take such steps as may be necessary to enforce [the Act] and make awards and certify payments." *Id.* § 231f(b)(1). Congress further directed the Board to "establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of [the Act]." *Id.* § 231f(b)(5).

The Board consists of three members, each of whom serves a staggered, five-year term. *Id.* § 231f(a). While each is "appointed by the President, by and with the advice and consent of the Senate," section 231f(a) strictly limits the President's choice of candidates. The Labor Member of the Board "shall be appointed from recommendations made by representatives of the employees." *Id.* The President therefore must wait for employee representatives to present a list of options from which the President must then choose. Likewise, the Employer Member of the Board "shall be appointed from recommendations made by representatives of employers." The President need not heed employees' or employers' recommendations for the third member, the Board's Chairman. *Id.* But section 231f(a) still cabins the President's choices

[1] "[A]ny individual in the service of one or more employers for compensation" is an employee. 45 U.S.C. § 231(b)(1). An "employer" includes "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board" and "any railway labor organization, national in scope, which has been or may be organized in accordance with the Railway Labor Act." *Id.* §§ 231(a)(1)(i), (v); *id.* §§ 231(a)(1)(ii)–(iv) (additional employers), 231(a)(2) (exceptions).

for Chairman to individuals who "shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees." *Id.*

Further, Congress requires the Board to submit all of its budget requests, legislative recommendations, prepared congressional testimony, and internal views on legislation straight to Congress, without any Executive Branch review beforehand. *Id.* § 231f(f). Congress prohibits any "officer or agency of the United States" from "requi[ring] the Board" to submit such materials for Executive Branch review before Congress sees them. *Id.*

2. The Board follows a multi-step process in issuing benefits determinations and adjudicating any ensuing appeals of those determinations.

a. To obtain benefits, claimants must first file an "application for annuities" or a "claim for benefits" with the Board. 45 U.S.C. §§ 231a(a)(1), 355. The application goes to the division of the Board that renders initial decisions on applications for that type of benefit (*i.e.*, retirement, unemployment, disability, or sickness). Once that division renders its initial decision, the Board must normally notify the applicant of the outcome within 30 days. 45 U.S.C. §§ 231f(b)(3), 355(c)(5). An applicant must submit a request for reconsideration within 60 days of the mailing of the initial decision, unless "good cause" excuses a late filing. 20 C.F.R. §§ 260.3(d)(1)-(6); *see id.* §§ 320.10(a), (d), (e).

b. If the relevant division denies reconsideration, the applicant can appeal the decision further up the chain within the Board. The first step is an appeal to the Bureau of Hearings and Appeals. 20 C.F.R. §§ 260.5(a), 320.12. The applicant has 60 days from when the Board mails its denial of the reconsideration request to file an appeal, although that deadline again can be excused for good cause.

Id. §§ 260.5(b), (c); *see id.* §§ 320.12(a), (b). The Bureau then appoints a hearing officer to adjudicate the appeal. *Id.* §§ 260.5(e)-(l), 320.18. The hearing officer's decision becomes the agency's "final decision" absent a further appeal. *See* 45 U.S.C. §§ 231f(b)(3), 355(d); 20 C.F.R. § 261.1(b).

Finally, applicants "have a right to a final appeal" to the three-member Board itself. 20 C.F.R. §§ 260.9(a), 320.38; 45 U.S.C. § 231f(b)(3) (guaranteeing "any person aggrieved by a decision on his application for an annuity or other benefit . . . the right to appeal to the Board"). Again, applicants have 60 days from the date when the hearing officer mails the notice of that decision to file this appeal, subject to a further good-cause exception. 20 C.F.R. §§ 260.9(b), (c), 320.39(a). The Board's decisions qualify as "final decision[s]" under the Board's regulations. *See id.* §§ 261.1(b), 320.42.

c. The employee is not the only party who can participate in the Board's benefits determination and review process. For example, a claimant's "base-year employer," *i.e.*, the company that employed the claimant for the year preceding the benefits claim, 45 U.S.C. § 351(n), has a statutory right to "submit information relevant to the claim before" the Board "mak[es] an initial determination on the claim." 45 U.S.C. § 355(b). That employer also has the power to appeal the grant or denial of benefits. *Id.* §§ 355(c)(1), (3); 20 C.F.R. § 345.405(b). Moreover, in the event of an appeal, any "parties properly interested" in the Board's decision, such as a claimant's employer or a union representative, has the right to "participate in the proceeding," *see, e.g.*, 45 U.S.C. § 355(c)(1); 20 C.F.R. 200.10(a)(1)-(3).

3. Of particular importance here, the Board's procedures expressly provide that prior "decisions of the agency may be reopened and revised." 20 C.F.R.

§§ 261.1(a), 349.1(a). The Board can make determinations regarding reopening in several ways. The Board personnel who rendered the prior decision (for instance, the relevant division that issued the initial decision, or the hearing officer in an ensuing administrative appeal) can decide to reopen it either upon request or *sua sponte*. 20 C.F.R. §§ 261.1(a), 349.1(a). Alternatively, any "other entity at a higher level" within the Board may decide to reopen the proceeding. 20 C.F.R. §§ 261.1(a), 349.1(a).

Board regulations set forth criteria for reopening its prior decisions. First, the Board may reopen a decision "within 12 months" of its issuance "for any reason," again either upon request or *sua sponte*. *Id.* §§ 261.2(a), 349.2(a). Second, the Board may reopen a decision "within four years" of its issuance if the request is based upon "new and material evidence" or an "adjudicative error not consistent with the evidence of record at the time of the adjudication." *Id.* §§ 261.2(b), 349.2(a). Third, the Board may reopen a decision at "any time" if the basis for reopening satisfies specified conditions that vary slightly depending on whether the reopening request pertains to benefits available under the RRA or the RUIA. *See id.* §§ 261.1(c)(1)-(10) (listing ten conditions for reopening RRA benefits decisions); *see also id.* §§ 349.2(c)(1)–(3) (listing the three conditions under which RUIA benefits decisions may be reopened at "any time"). Finally, the three-member Board can order the reopening of any prior decision, even if any otherwise applicable regulatory requirements are not met. *Id.* §§ 261.11, 349.8.

4. Section 5(f) of the RUIA, 45 U.S.C. § 355(f), provides that "[a]ny claimant"—as well as any other listed entities—"may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of *any final decision* of the Board by filing

a petition for review" in specified federal courts of appeals. 45 U.S.C. § 355(f) (emphasis added). Parties must seek such review "within [90] days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow." *Id.* § 355(f). And parties must seek such review in the D.C. Circuit, the Seventh Circuit (where the Board is headquartered), or in the circuit where the claimant resides. *Id.* Those courts of appeals have "exclusive jurisdiction of the proceeding and of the question determined therein." *Id.*

Congress prescribed the same scope of review for Board decisions arising under the RRA. The RRA mandates that "[d]ecisions of the Board determining the rights or liabilities of any person" under that Act "shall be subject to judicial review in the same manner" as Board decisions under 45 U.S.C. § 355(f), except with respect to filing deadlines. *Id.* § 231g. Parties may seek "review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit" under the RRA within one year of the Board communicating the decision to the claimant, *id.*, rather than the 90-day window for decisions arising under the RUIA. Congress thus prescribed a uniform rule for all Board decisions under either the RUIA or RRA: any claimant, after exhausting administrative remedies, may seek judicial review of "any final decision."

B. Factual and Procedural Background

1. Petitioner Manfredo Salinas is a 63-year-old former railroad employee who has long resided in Laredo, Texas. AR-020 to 21. His primary language is Spanish; he has difficulties fully understanding English. AR-255. He never completed high school, though he eventually obtained his GED. AR-038, AR-104 .

After serving in the U.S. Army, AR-263, AR-310, AR-418, in 1979 Mr. Salinas embarked on his career for Union Pacific Railroad, where he worked until 1994, AR-141. He began as a Bridge and Building Helper, advanced to a Bridge and Building Carpenter, and ultimately rose to a Bridge and Building Assistant Foreman. AR-044, AR-46. The work was arduous. Mr. Salinas built and dismantled wooden bridges, often climbing high in the air to access hard-to-reach areas. AR-044 to 45, AR-263, AR-478. He routinely lifted heavy objects, from jackhammers and 50-pound hydraulic jacks to railroad ties and concrete blocks. AR-478; AR-045.

In May 1989, a twelve-pound sledgehammer fell from a bridge, landing on Mr. Salinas's hardhat. AR-067. An initial emergency-room trip ruled out immediate surgery. But as the weeks went on, Mr. Salinas experienced ongoing neck pain and numbness in his limbs, forcing him to miss work. AR-398. By 1991, Mr. Salinas required spine surgery. AR-133, AR-398.

Mr. Salinas resumed work post-surgery. But in August 1993, a heavy piece of timber fell from a truck and struck him. AR-132. He blacked out and initially could not move. AR-398. Numbness and pain in his limbs and neck returned, ultimately requiring another spinal fusion surgery. AR-290, AR-398. The pain never went away, and it brought enormous further stress. AR-035. Mr. Salinas was prescribed various medications to ease the pain and to treat his anxiety and depression, AR-399, AR-416, AR-341; AR-73, AR-99, AR-445, but nothing fully worked, AR-398.

Nonetheless, Mr. Salinas continued trying to work and to help his wife with raising their six children. He stopped working for Union Pacific in 1994 but continued working as a self-employed carpenter as long as he could.

In 1997, ongoing numbness in his neck and limbs prompted him to stop working altogether. AR-478.

2. With his wife's aid, Mr. Salinas reached out to the Board for assistance by applying for disability annuities. *See, e.g.*, AR-034 (March 1992), AR-086 (April 1994). The Board acknowledged his limitations due to his injuries but denied the applications he filed in 1992 and 1994 because it believed his condition was "not severe enough to prevent performance of any regular and substantial work" given his age. AR-059, AR-126.

Because the pain and anxiety continued after he stopped working, Mr. Salinas applied for a disability annuity again in February 2006. AR-158. The Disability Benefits Division found that his condition was "so severe that it has lasted or is expected to last for at least 12 months, or it is expected to result in death," and found that he was "not able to do past relevant work." AR-181 to 182. A psychiatric examination confirmed his "mental impairment is severe." AR-199. But in August 2006, the Division denied his application, again stating that his condition was "not severe enough to prevent performance of any regular and substantial work." AR-205. The Board informed him that "[a]lthough you do have severe impairments, you are not considered totally and permanently disabled for all work in the national economy." *Id.*

Mr. Salinas requested reconsideration of this decision in November 2006. AR-207. Though the request was untimely, he asked to be excused for missing the deadline for good cause, namely his limited English proficiency, his depression, and a delay in acquiring medical records and getting an appointment for an MRI. AR-207. The Board's Reconsideration Section denied the request as untimely. While the denial informed Mr. Salinas that he could request reconsideration of this decision, AR-208, the Board

also stated: "No further action can be taken on the application you filed on February 28, 2006." AR-208. Mr. Salinas took no further action on this application.

3. In December 2013, Mr. Salinas, by then 58 years old, applied again for a disability annuity. AR-277. He again recounted his 1989 sledgehammer injury, his 1993 injury from being struck by heavy timber, and his two spinal fusion surgeries. AR-290. This time, the Board granted the annuity application, reasoning that once Mr. Salinas reached age 55, he was no longer able to adjust his work and find employment that would not have required him to lift over 20 pounds. AR-300. The Board awarded him a monthly disability annuity of $1,624.35 from October 1, 2012, through September 30, 2013, and a monthly disability annuity of $1,647.33 from October 1, 2013 forward. AR-310.

On September 17, 2014, Mr. Salinas timely requested reconsideration of the Board's decision, arguing that the Board erred in setting October 1, 2012, as the first day on which he would be entitled to disability benefits. He contended that the proper date was instead his 55th birthday, October 9, 2010, because that was the point at which the Board determined he could no longer work any job. AR-323. The Board's Reconsideration Section denied that reconsideration request, AR-324 to 325, and Mr. Salinas appealed to the Bureau for review of the start date of the annuity awarded to him on his 2013 application, AR-326 to 332.

In connection with this appeal, Mr. Salinas also requested the "reopening of all prior applications[.]" AR-332. Specifically, he requested a reopening of his 2006 application, which the Reconsideration Section had ultimately denied after refusing to excuse the untimeliness of his request to reconsider the initial denial of that application. Mr. Salinas contended that "good cause" excused

the untimeliness of that reconsideration request and entitled him to continue exhausting his administrative remedies on the 2006 application because of his mental condition, his limited English proficiency, his *pro se* status, and the Board's lack of assistance in aiding him in securing medical records from the Veterans Administration to support his application. AR-408-09, 462–64. If "good cause" excused the untimeliness, then Mr. Salinas could keep litigating whether the Board properly denied his 2006 application and might obtain a disability annuity with an earlier start date.

The hearing officer considering Mr. Salinas's request for reopening accepted additional evidence from him, including the VA medical records, AR-410 to 412, and held a hearing to resolve factual issues relating to whether "good cause" existed for his untimely reconsideration request in 2006. AR-408. The hearing officer denied this reopening request, reasoning that the 2006 decision was "more than four years ago," and so "new and material evidence or administrative error [could not] be considered," and that Mr. Salinas's grounds for reopening "d[id] not fall into any category outlined in §261.2(c) of the Agency's regulations." App. 14a. The hearing officer also denied Mr. Salinas's challenge to the beginning date for the disability annuity the Board had awarded him on his 2013 application. App. 14a-15a.

Mr. Salinas timely appealed to the three-member Board, arguing that the hearing officer erred by not reopening the 2006 decision. App. 5a. But the Board declined to reopen the 2006 denial, reasoning that Mr. Salinas's "limited English proficiency and mental impairments were presented to the RRB in 2006" and did not constitute "good cause" excusing his failure timely to request reconsideration of that 2006 denial. App. 7a-8a. The Board further held that even if Mr. Salinas's VA records constituted

new and material evidence, that evidence would not justify reopening the denial of his 2006 application for disability benefits because more than four years had passed since that decision. *See id.* The Board thus did not address whether the new evidence Mr. Salinas presented would have changed the outcome of his 2006 application.

When transmitting its decision denying reopening to Mr. Salinas, the Board advised that he could "seek judicial review of the Board's opinion by filing a petition for review with an appropriate United States court of appeals within one year from the date of the Board's decision." AR-487.

4. Mr. Salinas, appearing *pro se*, timely sought review of the Board's decision denying reopening in the Fifth Circuit. His petition acknowledged the Fifth Circuit's decision in *Roberts v. Railroad Retirement Board*, 346 F.3d 139 (5th Cir. 2003), which held that 45 U.S.C. § 355(f) restricts the courts of appeals' jurisdiction "to the review of Board decisions on the merits of a claim for benefits." *Id.* at 140. But the petition urged the court to instead follow the D.C. Circuit's recent opinion in *Stovic v. R.R. Retirement Board*, 826 F.3d 500 (D.C. Cir. 2016), which held that 45 U.S.C. § 355(f) "grants [courts of appeals] jurisdiction to review Board decisions denying requests to reopen initial benefits determinations." *Id.* at 506.

The Fifth Circuit dismissed Mr. Salinas's petition in a three-page, *per curiam* opinion. App. 1a-4a. The court conceded that it had previously "acknowledged a circuit split on this issue." App. 3a. The court cited the "divergent conclusions" of courts of appeals' decisions—namely, that the Fourth, Sixth, Seventh, and Tenth Circuits, like the Fifth Circuit, hold that courts of appeals lack jurisdiction over reopening decisions, whereas the Second and Eighth Circuits find jurisdiction. *Id.* The Fifth Circuit further conceded that the D.C. Circuit's *Stovic* decision

had deepened that circuit split. *Id.* But the court of appeals concluded that the "rule of orderliness prevent[ed] [it] from reconsidering [*Roberts*]." App. 4a.

REASONS FOR GRANTING THE PETITION

The division of authority on the question presented is clear and acknowledged. Eight circuits have squarely addressed whether 45 U.S.C. §§ 231g and 355(f) provide for judicial review of the Board's denial of a request to reopen a final decision of the Board. Three have answered in the affirmative; five have answered in the negative. This deep and persistent split thwarts uniform application of a federal law that serves as a critical safety net for retired railroad workers, and removes an essential judicial check on important decisions of an independent agency. This Court's review is warranted to resolve the intractable division of circuit court authority and to correct a deeply erroneous interpretation of a significant federal statute.

A. The Decision Below Entrenches A Circuit Split Over Whether Congress Provided for Judicial Review of Board Decisions Denying Reopening

1. As the decision below recognized, three courts of appeals have concluded that Congress conferred jurisdiction to review Board decisions denying requests to reopen initial benefits determinations. App. 3a.

Start with the D.C. Circuit, which most recently addressed the question presented. In *Stovic v. Railroad Retirement Board*, 826 F.3d 500 (D.C. Cir. 2016), the D.C. Circuit engaged in a textual analysis of 45 U.S.C. § 355(f), the critical jurisdiction-conferring provision of the RUIA that also determines the reviewability of decisions pursuant to the RRA. *Id.* at 502. Then-Judge Kavanaugh emphasized that the statute broadly "provides for judicial review of '*any* final decision of the Board.'" *Id.* (quoting 45

U.S.C. § 355(f)). A Board decision denying a request to reopen is both "final" and a "decision of the Board." *See id.* Thus, under the plain language of 45 U.S.C. § 355(f), a Board decision denying a request to reopen an initial benefits determination is subject to judicial review. *Id.*

Like the D.C. Circuit, the Second Circuit has held that it had jurisdiction to review the Board's denial of a request to reopen a claim for prior benefits. *Szostak v. R.R. Ret. Bd.*, 370 F.2d 253, 254-55 (2d Cir. 1966). But unlike the D.C. Circuit, which focused on the statutory text of section 355(f), the Second Circuit grounded its jurisdiction under the Administrative Procedure Act ("APA"), or if the APA was inapplicable, then in federal common law. *Szostak*, 370 F.2d at 254-55. Relying on the Second Circuit's decision in *Szostak*, the Eighth Circuit likewise found "jurisdiction to review" a Board decision denying a request to reopen. *Sones v. R.R. Ret. Bd.*, 933 F.2d 636, 638 (8th Cir. 1991).

2. In stark contrast, five circuits have held that a Board decision declining to reopen a case is not judicially reviewable—an approach that the Fifth Circuit reaffirmed in the decision below.

Take, for instance, the Seventh Circuit. In *Steebe v. R.R. Ret. Bd.*, 708 F.2d 250 (7th Cir. 1983), the court read into 45 U.S.C. § 355(f) a limitation on the kinds of Board decisions that are judicially reviewable. *Id.* at 253-55. The Seventh Circuit held that only final initial benefit determinations made under 45 U.S.C. § 355(c) are reviewable. Because decisions on a request to reopen do not fall within section 355(c), the Court reasoned, they are not reviewable under section 355(f).

In reaching this conclusion, the Seventh Circuit relied on this Court's decision in *Califano v. Sanders*, 430 U.S.

99 (1976). *Sanders* held that section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), did not grant courts jurisdiction to review the denial of a claimant's application to reopen a claim. 430 U.S. at 107-08. That section provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain review of such decision." *Id.* at 108 (quoting 42 U.S.C. § 405(g)). This Court explained that the Social Security Act limited judicial review to a particular kind of administrative action: a "final decision of the Secretary made after a hearing." *Id.* Because a request to reopen could be denied without a hearing, the Court concluded that such a decision was not the kind of administrative action reviewable under the Social Security Act. *Id.*

The Third, Fourth, Fifth, and Tenth Circuits have all followed the Seventh Circuit's lead and held that Board decisions denying reopening are not subject to judicial review. *See, e.g.*, *Cunningham v. R.R. Ret. Bd.*, 392 F.3d 567, 571-73 & n.5 (3d Cir. 2004) (finding *Sanders* "persuasive" and deciding that 45 U.S.C. § 355(c) defines the kinds of decisions "suitable for review"); *Harris v. R.R. Ret. Bd.*, 198 F.3d 139, 142 (4th Cir. 1999) (supporting the Tenth and Seventh Circuits' application of *Sanders* to Board reopening cases and limiting judicial review to final decisions under 45 U.S.C. § 355(c)); *Roberts v. R.R. Ret. Bd.*, 346 F.3d 139, 141 (5th Cir. 2003) (noting the similar "limitation on judicial review" in the Social Security Act and cabining review to final decisions under 45 U.S.C. § 355(c)); *Abbruzzese v. R.R. Ret. Bd.*, 63 F.3d 972, 974 (10th Cir. 1995) (agreeing with the Seventh Circuit's ap-

plication of *Sanders* and thereby restricting review to "final decisions of the Board regarding the initial denial of an employee's claim for benefits").[2]

3. The enduring divide among the circuits over this question has not gone unnoticed. Numerous courts—including the Fifth Circuit below—have "acknowledged a circuit split" on the question presented. App. 3a; *see also, e.g.*, *Harris*, 198 F.3d at 141 ("The circuits that have addressed this issue are in disagreement."); *Stovic*, 826 F.3d at 502, 504 n.2 (stating "[t]he courts of appeals are divided" on the question presented); *Cunningham*, 392 F.3d at 572-75 (cataloguing the disagreement); *Roberts*, 346 F.3d at 141 (same); *Rivera*, 262 F.3d at 1010 (same); *Abbruzzese*, 63 F.3d at 973-74 (same); *Clifford v. R.R. Ret. Bd.*, 3 F.3d 536, 538 (1st Cir. 1993) (same).

Commentators as well have highlighted the division among the courts "as to the reviewability of a refusal to reopen an earlier claim denial." William S. Jordan III, *News from the Circuits*, 29 Admin. & Reg. L. News, Winter 2004, at 22 (noting that the Fifth Circuit "join[ed] the Fourth, Sixth, Seventh, and Tenth Circuits, contrast[ing] with the position of the Second and Eighth Circuit"); *accord* Steven L. Willborn, *Advising the Elderly Client* § 20:115 & n.2 (Kimberley Dayton et al. eds., 2019); Aaron

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[2] In addition, the Ninth Circuit held in *Rivera v. R. R. Ret. Bd.*, 262 F.3d 1005, 1009-1010 (9th Cir. 2001), that it lacked jurisdiction to review the Board's decision not to extend the time for filing an untimely challenge. The Ninth Circuit "agree[d] with the Fourth Circuit's view in *Harris*" and reasoned that the "Board's dismissal of [the petitioner's] appeal as untimely is not a 'final decision' under § 355(c) because it did not decide the case 'on the merits.'" *Id.* at 1010 (citation omitted); *see also Gutierrez v. R.R. Ret. Bd.*, 918 F.2d 567, 570 (6th Cir. 1990) (asserting that "a final decision under 45 U.S.C. § 355(c)" is necessary for judicial review).

Nielson, *D.C. Circuit Review – Reviewed: A Flamingo in the Shadows*, Yale J. on Reg.: Notice & Comment (June 25, 2016), *available at* https://yalejreg.com/nc/d-c-circuit-review-reviewed-a-flamingo-in-the-shadows-by-aaron-nielson/; *see also Case Law Update*, 6 Tex. Tech. J. Tex. Admin. L. 3, 13-14 (2005); 18 Fed. Proc. Forms § 67:74 (2019).

The division over whether the courts of appeals have jurisdiction to review the Board's denial of a prior benefits claim is stark, deep, and longstanding. The two sides of the split apply the same statutory language in 45 U.S.C. §§ 231g and 355(f) in irreconcilably different ways. Similarly situated workers and other interested parties entitled to seek reopening of the Board's decisions face opposing outcomes in courts of appeals depending on the happenstance of where they file their petition for review. Only this Court can break the impasse to ensure equal treatment across the country.

B. The Question Presented Is Important and Squarely Presented

1. Whether Board decisions on reopening requests are subject to judicial review is a question of substantial importance to the hundreds of thousands of individuals around the country who rely upon the Board's decisions for retirement, disability, unemployment, and sickness benefits. In 2017 alone, the Board paid at least some benefits to some 574,000 beneficiaries, of whom nearly 28,000 receive some type of disability annuities. *See* United States Railroad Retirement Board, Annual Report, at 1, 18 (2018). That same year, the Board awarded claimants 1,600 disability annuities—700 for total disability averaging $2,029 per month, and 900 for occupational disability averaging $3,259 per month. *See id.* at 17.

That amount of money can make a critical difference to railroad employees and their families. It is almost half of the average annual wage across all employees in the rail transportation industry ($66,810); more than half of the average annual wage for "Carpenters" in the rail transportation industry ($55,430); and more than 80 percent of the average annual wage for "Helpers" in the "Construction Trades" in the rail transportation industry ($36,860).[3] Even that comparison understates the impact that the annuity can have for those disabled individuals, such as Mr. Salinas, who are unable to work and for whom the annuity is often their only source of income.

There is obviously much at stake for railroad employees and other potential beneficiaries under the Act when they seek an annuity. They have a deep interest in the quality of the Board's decisions as to whether they will receive this transformative amount of money. Though not all interested parties will request that their prior applications be reopened, the availability of judicial review for those who do is a key backstop to ensure that the Board's decisions are accurate and fair. *See, e.g.*, *Stovic*, 826 F.3d at 505 ("It makes sense to provide for judicial review of potentially arbitrary and mistaken Board decisions denying requests to reopen. Judicial review helps ensure accuracy and fairness."). The benefit of judicial review of denied reopening requests is amplified where, as here, the often-*pro se* applicants must file lengthy and complex forms and make their way through a complex administrative apparatus before securing the right to judicial review.

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[3] *See* Bureau of Labor Statistics, Dep't of Labor, National Industry-Specific Occupational Employment and Wage Estimates – NAICS 482100 – Rail Transportation, *available at* https://www.bls.gov/oes/current/naics4_482100.htm#00-0000 (last accessed Aug. 14, 2019).

See supra pp. 7-10. And railroad workers are not the only people affected. Because employers and other interested parties can also request reopening, *supra* p. 8, they too cannot vindicate their interests in accurate Board decisions when courts of appeals close their doors to review of the Board's denial of requests to reopen.

2. This case is an ideal vehicle to resolve the conflict in the circuits. The question presented is outcome-determinative. Had Mr. Salinas filed in the D.C., Second, or Eighth Circuits, he would have obtained judicial review of his reopening claim; because he filed in the Fifth Circuit, he did not. There are no vehicle or procedural issues that would bar this Court's review. Whether 45 U.S.C. §§ 231g and 355(f) authorize judicial review of the Board's decisions denying reopening was squarely presented to the Fifth Circuit, which reaffirmed its prior precedent holding that no such jurisdiction exists. App. 1a-4a. And the court of appeals did this despite recognizing that the D.C. Circuit had recently reached a contrary result. Further percolation would do no good, and would squander a clean opportunity for this Court to address a question that has divided the lower courts for decades. The Court should grant the petition to resolve the deep and longstanding division on this important issue.

C. The Decision Below Is Wrong

The Fifth Circuit's decision flouts the text of 45 U.S.C. §§ 231g and 355(f) by reading in an implicit limitation on the kinds of Board decisions that are judicially reviewable. The decision below reaffirmed prior Fifth Circuit precedent that mistakenly relied on the very different text of Social Security Act without parsing the actual text applicable to decisions of the Railroad Retirement Board. This misguided precedent undermines accuracy, fairness, and the presumption of judicial review of administrative

actions. This Court should correct this serious misinterpretation of federal law.

1. Section 355(f) broadly makes "*any* final decision of the Board" under the RUIA reviewable by an appellate court. 45 U.S.C. § 355(f) (emphasis added). Section 231g incorporates this broad reviewability provision and extends it to final decisions of the Board with respect to disability benefits under the RRA. Taken together, these two provisions apply the same judicial-review rule to all Board decisions.

Despite the plain meaning of the statutes, the Fifth Circuit and several of its sister circuits have stripped themselves of jurisdiction, deciding that only final decisions on initial benefits determinations are subject to judicial review. *See, e.g.*, *Cunningham*, 392 F.3d at 572; *Roberts*, 346 F.3d at 141; *Harris*, 198 F.3d at 142; *Steebe*, 708 F.2d at 254-55.

By doing so, these courts have conflated the categories of *petitioners* eligible to seek judicial review with the kinds of *final decisions* that are subject to review. The term "final decision" appears twice in section 355(f). The first reference to "final decision" is in a sentence describing claimants, "any other party aggrieved by a *final decision* under [45 U.S.C. § 355(c)]," and others as the parties who can seek judicial review of Board decisions. 45 U.S.C. § 355(f) (emphasis added). That reference thus establishes "one of the four categories of petitioners who may seek judicial review." *Stovic*, 826 F.3d at 503. Courts that have refused to review decisions denying the reopening of prior claims have honed in on the language "aggrieved by a final decision under [45 U.S.C. § 355(c)]" to restrict reviewability to only those decisions made under 45 U.S.C. § 355(c). *See, e.g.*, *Roberts*, 346 F.3d at 141; *Harris*, 198 F.3d at 142; *Steebe*, 708 F.2d at 254-55.

Significantly, however, these courts ignore 45 U.S.C. § 355(f)'s second reference to a "final decision," which "defin[es] the kinds of decisions subject to review for all the categories of eligible petitioners." *Stovic*, 826 F.3d at 503. Again, that critical provision states in relevant part: "Any claimant, . . . or any other party aggrieved by a *final decision* under [45 U.S.C. § 355(c)] . . . , may . . . obtain a review of *any final decision* of the Board." 45 U.S.C. § 355(f) (emphases added)). The text of section 355(f) plainly provides for judicial review of "*any* final decision of the Board"—not just those "final decisions under subsection [45 U.S.C. § 355](c)." Courts that have nevertheless applied those limitations and abdicated their jurisdiction over Board decisions on reopening requests are mistaken.

"When Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning." *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (alterations omitted) (quoting *Loughrin v. United States*, 573 U.S. 351, 358 (2014)). As the D.C. Circuit has explained: "Had Congress intended to limit judicial review in [45 U.S.C. § 355(f)] to initial benefits determinations, it could have easily done so by employing the phrase 'under subsection [45 U.S.C. § 355](c)' when setting out the kinds of decisions subject to judicial review." *Stovic*, 826 F.3d at 503. Congress did precisely this in other parts of 45 U.S.C. § 355 by attaching qualifying language to statutory terms. *See, e.g.*, 45 U.S.C. § 355(c)(5) (stating that, for "[f]inal decision[s] of the Board in the cases provided for in the preceding three paragraphs," parties "may obtain a review of any *such decision*" through 45 U.S.C. § 355(f) (emphasis added)); *id.* (providing that "the decision of the Board upon all issues determined in *such decision*" is final (emphasis added)). But Congress did not impose any such

limitations in 45 U.S.C. § 355(f), electing instead to make "*any* final decision of the Board" reviewable. *See* 45 U.S.C. § 355(f). So the enacted text could not be clearer: decisions denying requests to reopen are "final decisions" and therefore subject to judicial review.

2. The Fifth Circuit—like several other circuits that refuse to review the Board's denials of requests to reopen a case—relied on this Court's decision in *Sanders*. But "reliance on *Sanders* disregards the critical textual difference between" the judicial review provisions in the Social Security Act and the RUIA. *Stovic*, 826 F.3d at 504.

Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), at issue in *Sanders*, limits judicial review to "review of *such* decision[s]." 42 U.S.C. § 405(g) (emphasis added). The term "such" refers back to a subcategory of decisions: "any final decision of the Secretary made after a hearing." *Id.* And under the Social Security Act, the Secretary may deny a petition to reopen a prior final decision without a hearing. *Sanders*, 430 U.S. at 108 (citing 42 U.S.C. § 405(b)). Thus, relying on the qualifying language in 42 U.S.C. § 405(g)—"made after a hearing"—this Court held that the Social Security Act prohibits review of agency denials of requests to reopen. 430 U.S. at 108.

In contrast, 45 U.S.C. § 355(f) contains no such qualifying language on the kinds of decisions that can be reviewed. Instead, section 355(f) plainly permits review of "*any* final decision of the Board." 45 U.S.C. § 355(f) (emphasis added); *Stovic*, 826 F.3d at 504. For that reason, "the result reached by the *Sanders* Court, which was based primarily on the text of [42 U.S.C. §405(g)], does not apply to the differently and more broadly worded text of [45 U.S.C. § 355(f)]." *Id.*

Neither the Fifth Circuit below nor any of the circuits that have relied on *Sanders* have mentioned, "much less grappled with," the key difference between the text of section 42 U.S.C. § 405(g) and that of 45 U.S.C. § 355(f). *Stovic*, 826 F.3d at 505. They have instead suggested that a finding of jurisdiction over reopening decisions under the RRA would similarly "frustrate the goal of ensuring finality of [Board] decisions on the merits of claims for benefits." *Cunningham*, 392 F.3d at 574; *see also Roberts*, 346 F.3d at 141. But as the D.C. Circuit recognized, "[i]nvocations of a general interest in finality cannot overcome the only congressional purpose of which we can be sure—the purpose stated in the text of [45 U.S.C. § 355(f)]." *Stovic*, 826 F.3d at 505.

3. The Fifth Circuit's interpretation is also inconsistent with "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption is especially important where, as here, the agency in question appears to be exempt from the Administrative Procedure Act. *See* 5 U.S.C. § 551(1)(E) (exempting "agencies composed of representatives of the parties or of representatives of the organizations of the parties to the disputes determined by them"). Not only that, the Board "enjoy[s] an independence expressly designed to insulate [it], to a degree, from '"the exercise of political oversight."' *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part and concurring in judgment)). Such insulation includes requiring the President to select two of the Board's members from lists chosen by representatives of employees and of management, restricting the qualifications for the Board's Chairman, and barring Executive Branch supervision of the Board's

budgetary and legislative proposals. *See* 45 U.S.C. §§ 231f(a), (f); *supra* p. 6.

The Fifth Circuit's interpretation flunks the core test of whether Congress intended to overcome the presumption of judicial review: There is no "clear and convincing evidence" that Congress wanted to strip courts of appeals of jurisdiction to review the Board's denial of reopening requests. *See Bowen*, 476 U.S. at 671. If anything, by making "any final decision of the Board" reviewable, Congress manifested its intent to *grant* judicial review. That result is both consistent with the statutory text and eminently reasonable. Had Congress intended to prohibit such review, it could have easily said so. The dearth of any "clear and convincing" textual support for the Fifth Circuit's restrictive, anti-review interpretation is yet another reason to reject it.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
CHARLES L. MCCLOUD
ROBERT BELDEN
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

Counsel for Petitioner

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