No. 19-199

In the Supreme Court of the United States

MANFREDO M. SALINAS, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 765 Fed. Appx. 79. The decisions of the U.S. Railroad Retirement Board (Board) (Pet. App. 5a-8a) and the Board's Bureau of Hearings and Appeals (Pet. 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 within which to file a petition for a writ of certiorari to and including August 15, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Railroad Retirement Act (Act), 45 U.S.C. 231 *et seq.*, establishes a system of disability and retirement

benefits for railroad employees. See generally *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 573-576 (1979). As relevant here, the Act provides that former railroad employees "whose permanent physical or mental condition is such that they are unable to engage in any regular employment" may be eligible for an annuity, provided that the applicant submits sufficient evidence supporting his or her disability and satisfies certain other criteria. 45 U.S.C. 231a(a)(1)(v).

Disability benefits under the Act are administered by the U.S. Railroad Retirement Board (Board), an "independent agency in the executive branch" composed of three presidentially appointed members. 45 U.S.C. 231f(a). In addition to requirements imposed by the Act, Board benefits determinations are generally subject to the Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*, a related benefits scheme that the Board also administers. 45 U.S.C. 231g (providing that disability benefits decisions "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," with limited exceptions); see, *e.g.*, 45 U.S.C. 355 (governing benefits claims under the Railroad Unemployment Insurance Act).

a. The Act, as implemented by Board regulations, specifies the form, process, and standards for disability benefits applications. See generally 20 C.F.R. Pts. 216, 220; see 45 U.S.C. 231f(b)(5) (authorizing the Board to promulgate regulations implementing the Act). An individual seeking disability benefits must first file a claim with the Board that demonstrates his or her eligibility.

See 45 U.S.C. 231a(a) (establishing eligibility requirements). Upon receipt of the application, a claims examiner in the Disability Benefits Division will issue an "initial decision" on the claim. 20 C.F.R. 260.1(a) and (d)(1); see also 45 U.S.C. 231f(b)(3), 355(b).

A claimant who receives an adverse initial determination is entitled to internal review of that determination. 45 U.S.C. 355(c). First, the claimant may request reconsideration from the Reconsideration Section of the Program Evaluation Management Services Division within 60 days. 20 C.F.R. 260.3(a)-(b). The Reconsideration Section may consider an untimely request for reconsideration if the claimant shows that there is "good cause" to excuse the delay, such as a serious illness affecting the claimant or the claimant's immediate family member. 20 C.F.R. 260.3(c)-(d).

When the Reconsideration Section rejects a request, the claimant may seek further review in the Bureau of Hearings and Appeals (Bureau) within 60 days, again unless the claimant shows there is "good cause" for a delay. 20 C.F.R. 260.5(a)-(c); see 45 U.S.C. 355(d) (authorizing the Board to "provide for intermediate reviews of * * * decisions by such bodies as the Board may establish or assign thereto"). A hearings officer who has not participated in any prior decision on the application adjudicates the appeal. 20 C.F.R. 260.5(e).

If the Bureau rules against the claimant, he or she may then pursue a "final appeal" to the Board. 20 C.F.R. 260.9(a); see 45 U.S.C. 231f(b)(3) (providing "the right to appeal to the Board"). The claimant must file the appeal within 60 days, once again unless the claimant shows there is "good cause" to excuse any delay. 20 C.F.R. 260.9(b)-(c).

The Act and its implementing regulations also establish rules governing finality. A decision of the Board on an appeal of an initial benefits determination constitutes the "final decision" of the agency. Moreover, when a claimant fails to seek timely administrative review of an initial determination at an earlier stage in the administrative review process, that determination becomes the "final decision" of the Board. 20 C.F.R. 261.1(b) (providing that a "final decision" is "any decision of the type listed in [20 C.F.R. 260.1] * * * where the time limits for review * * * have expired") (emphasis omitted); see 45 U.S.C. 355(d) (providing that "the decision of an intermediate reviewing body shall * * * be deemed to be the final decision of the Board" unless the claimant timely pursues further administrative remedies).

b. In addition to the administrative review process, a dissatisfied claimant may seek judicial review pursuant to 45 U.S.C 355. Section 355(f) provides that a claimant (and certain other parties) "aggrieved by a final decision under subsection (c) of this section, 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." 45 U.S.C. 355(f). Section 355(c), in turn, principally governs exhaustion of initial benefits determinations on the merits. 45 U.S.C. 355(c)(1)-(4); see also 45 U.S.C. 355(c)(5) (claimant may seek judicial review of a "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"). A claimant must file his or her petition within one year, 45 U.S.C. 231g, in either the Seventh Circuit, the D.C. Circuit, or the circuit court in which the claimant resides or maintains his or her principal place of business, 45 U.S.C. 355(f).

c. Neither the Railroad Retirement Act nor the Railroad Unemployment Insurance Act itself provides for a claimant to seek reopening of an initial determination on a benefits application. The Board, however, has adopted regulations permitting an initial decision to "be reopened and revised" by the agency entity that issued the original decision or by "a higher level" of the agency. 20 C.F.R. 261.1(a).

The regulations further specify various conditions that may warrant reopening. If the agency's initial decision is less than four years old, for example, the agency may reopen it to consider "new and material evidence." 20 C.F.R. 261.2(b). Other circumstances permit the Board to reopen a decision at any time, such as if an initial decision was "obtained by fraud." 20 C.F.R. 261.2(c). Ultimately, despite these general rules, the Board retains plenary discretion over reopening. 20 C.F.R. 261.11 ("In any case in which the three-member Board may deem proper, the Board may direct that any decision, which is otherwise subject to reopening under this part, shall not be reopened or direct that any decision, which is otherwise not subject to reopening under this part, shall be reopened.").

2. Petitioner is a former railroad employee who has filed four applications for disability benefits in total. Pet. App. 9a, 11a-12a. Petitioner filed his first application on March 3, 1992. *Id.* at 11a-12a. That application was denied after petitioner's spouse informed the Board that petitioner had returned to work. *Id.* at 12a. Petitioner did not seek administrative or judicial review of the initial determination. *Ibid.* On April 20, 1994, petitioner filed a second application, which was denied because petitioner failed to show that he was disabled and unable to maintain any regular employment. *Ibid.* Again,

petitioner did not seek administrative or judicial review of that initial decision. *Ibid.*

On February 28, 2006, petitioner filed a third application for disability benefits. Pet. App. 12a. A claims examiner determined that petitioner had not shown that he was unable to maintain any regular employment, and denied the application on August 28, 2006. *Ibid.* Petitioner submitted a late request for reconsideration on November 30, 2006, urging the agency to excuse his untimeliness because of his limited English proficiency and depression, among other things. Pet. 12. The Reconsideration Section denied petitioner's request, explaining that these considerations did not constitute good cause for delay. Pet. App. 8a. Petitioner did not seek further review of that decision. *Id.* at 12a.

On December 16, 2013, petitioner filed a fourth application for disability benefits. Pet. App. 9a. This time, the agency granted petitioner's application. *Id.* at 6a. The claims examiner concluded that petitioner was disabled and unable to maintain regular employment as of October 9, 2010, and was eligible to begin receiving annuity payments as of December 1, 2012. *Id.* at 9a; see 45 U.S.C. 231d(a) (prescribing when an annuity may begin, depending on the applicant's circumstances); 20 C.F.R. 218.9 (same).

Petitioner first sought reconsideration of, and then appealed, the annuity beginning date calculated by the claims examiner. Pet. App. 9a. On appeal, he also sought to reopen the agency's decision on his 2006 disability application. *Ibid.*[1] Petitioner urged that the decision

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[1] Although petitioner initially sought to reopen the 1992 and 1994 determinations, as well, he has since abandoned that request. See Pet. 13.

should be reopened because he "lacked the mental capacity to understand the procedures for requesting review," due to "a language barrier, depression, anxiety and agoraphobia." *Id.* at 13a.

On August 26, 2016, the hearings officer affirmed the start date calculated by the claims examiner and declined to reopen the agency's 2006 decision. Pet. App. 9a-17a. Applying the regulation governing reopening, see 20 C.F.R. 261.2, the hearings officer explained that the 2006 decision could not be reopened based on new evidence because the decision was more than four years old, and that petitioner had not satisfied any of the conditions permitting reopening without regard to the time elapsed. Pet. App. 14a.

Petitioner timely appealed to the Board, challenging the hearings officer's decision only insofar as it declined to reopen his prior application. Pet. App. 7a. On October 5, 2017, the Board affirmed. *Id.* at 5a-8a. The Board explained that the Reconsideration Section had considered petitioner's arguments about his limited English proficiency and mental health when it rejected his prior, untimely request for reconsideration, and noted that petitioner had not sought further review of that rejection. *Id.* at 8a.

3. On October 4, 2018, petitioner sought judicial review of the Board's reopening decision in the United States Court of Appeals for the Fifth Circuit. See 45 U.S.C. 355(f) (permitting suit in "the circuit in which the claimant * * * resides"). The court of appeals dismissed the petition for lack of jurisdiction. Pet. App. 1a-4a. Acknowledging a circuit split on the question of reviewability, the court ruled that it was bound by its decision in *Roberts* v. *United States Railroad Retirement Board*, 346 F.3d 139 (5th Cir. 2003), in which a

prior panel of the court had concluded that the Board's refusal to reopen a benefits claim is not a "final decision" subject to review under 45 U.S.C. 355(f). Pet. App. 3a.

The *Roberts* court explained that the text of Section 355(f) "provide[s] for review in the courts of appeals of 'a final decision under subsection (c),'" and that Section 355(c) in turn concerns benefits determinations "on the merits"—*not* motions to reopen. 346 F.3d at 140 (citation omitted). The *Roberts* court found further support for its holding in *Califano* v. *Sanders*, 430 U.S. 99 (1977), which held that a similar provision authorizing judicial review of certain "final decision[s]" by the Social Security Administration, see 42 U.S.C. 405(g) (1970), did not permit review of the agency's discretionary refusal to reopen a prior benefits decision. 430 U.S. at 107-108; see *Roberts*, 346 F.3d at 141.

DISCUSSION

Petitioner contends (Pet. 16-20) that this Court should grant the petition for a writ of certiorari to resolve a conflict in the circuits about whether the Board's denial of a request to reopen a prior initial benefits determination is a "final decision" subject to judicial review under 45 U.S.C. 231g and 355(f). The court of appeals correctly answered that question in the negative. The government agrees with petitioner, however, that this case presents a recurring question of substantial importance on which the circuits are divided, and that it is an appropriate vehicle for deciding the question. The petition for a writ of certiorari therefore should be granted.

1. The court of appeals correctly held that it could not review the Board's refusal to reopen petitioner's prior initial benefits determination, because the Board's discretionary denial of a request to reopen is not a "final

decision" subject to judicial review under 45 U.S.C. 231g and 355(f).

a. Under Section 355(f), various parties "aggrieved by a final decision under subsection (c)"—including "[a]ny claimant," certain "railway labor organization[s]" of which claimant is a member, any "base-year employer of the claimant," or "any other party"—may "obtain a review of any final decision of the Board." 45 U.S.C. 355(f). Subsection (c), in turn, principally governs exhaustion of initial benefits determinations on the merits, and does not encompass denials of requests to reopen initial determinations. 45 U.S.C. 355(c). The textual framework here is simple: a party aggrieved by a particular type of decision may seek review of that decision. More specifically, a party aggrieved by a determination under Section 355(c) may seek judicial review of that determination under Section 355(f).[2]

Petitioner attempts to avoid this conclusion by dissecting the statute and then reading the pieces in isolation. Homing in on the text's reference to "any final decision," he contends (Pet. 23-25) that a person "aggrieved by a final decision under subsection (c)" may seek review of any and all final decisions by the Board, which, he contends, include reopening decisions as well as initial benefits determinations. This interpretation effectively detaches the class of decisions that give plaintiffs a right to sue from the class of decisions actually subject to review. That is not the most natural reading of the text for the reasons described above, and as further ev-

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[2] Section 355(c) further confirms the linkage between subsections (c) and (f) by authorizing a claimant to seek review of decisions made thereunder "in the manner provided in subsection (f) of this section." 45 U.S.C. 355(c)(5).

idenced by the numerous interpretive difficulties it creates. For example, under petitioner's reading, does the statute permit a person aggrieved by a decision under Section 355(c) to seek review of a final decision that does not aggrieve him at all? And does a claimant need to administratively exhaust the decision that aggrieved him, or the one for which he seeks review? There are no ready answers to these problems, all of which are avoidable via adoption of the simpler and more intuitive interpretation: a person aggrieved by a final decision under Section 355(c) may seek review of that decision.

b. This Court's precedents are to the same effect. In *Califano* v. *Sanders*, 430 U.S. 99 (1977), the applicant sought judicial review of the Social Security Administration's refusal to reopen its prior decision denying a claim for benefits. *Id.* at 102-104. The Court ruled that it lacked jurisdiction under 42 U.S.C. 405(g) (1970), which provides for judicial review of "any final decision of the Secretary made after a hearing." 430 U.S. at 108 (citation and emphasis omitted). The Court reached this conclusion for two reasons. First, Section 405(g) permits review of "a particular type of agency action" only—namely, a final decision "'made after a hearing.'" *Ibid.* But a reopening petition "may be denied without a hearing," the Court reasoned, because "the opportunity to reopen final decisions and any hearing convened to determine the propriety of such action are afforded by the Secretary's regulations and not by the Social Security Act." *Ibid.* Second, judicial review of refusals to reopen would enable claimants to end-run the statute's time limits on judicial review of initial benefits determinations, usurping Congress's "policy choice * * * to forestall repetitive or belated litigation of stale eligibility claims." *Ibid.*

The same considerations apply here. Like Section 405(g), Section 355(f) does not permit review of any and all determinations made by the Board, but rather a clearly defined subset: those made pursuant to Section 355(c).[3] And neither Section 355(c) nor any other provision of the Act provides for motions to reopen. Instead, as under the Social Security Act, 42 U.S.C. 301 *et seq.*, a claimant's right to reopen stems exclusively from Board regulations. See 20 C.F.R. 261.2 (stating conditions for reopening).

Allowing claimants to seek judicial review of the Board's refusals to reopen would also thwart the statutory limitations period for challenging initial benefits determinations. The Act provides that "the time within which proceedings for the review of a decision with respect to an annuity * * * may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant." 45 U.S.C. 231g. The choice to provide a one-year deadline reflects careful attention by Congress. Although applicants for benefits under the Act are generally subject to the provisions of the Railroad Unemployment Insurance Act, including Section 355, Congress went out of its way to displace the 90-day period contained in Section 355(f) with the one-year period in

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[3] Petitioner contends (Pet. 25) that *Sanders* is inapposite because Section 355(f) is not limited to determinations under Section 355(c), but that is wrong for the reasons discussed above. See pp. 9-10, *supra*. Regardless, petitioner has no basis for contesting that the other aspects of the *Sanders* decision discussed below—such as its holding that permitting judicial review of reopening denials would circumvent the statutory limitations period—apply with equal force here.

Section 231g. It would subvert Congress's design to allow claimants to seek review of refusals to reopen, especially when (as here) the initial decision at issue is over a decade old.

This Court's decision in *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999), provides further support for respondent's approach. There, the Court considered a provision of the Social Security Act allowing healthcare providers to obtain a hearing before the Provider Reimbursement Review Board of "a final determination * * * as to the amount of total program reimbursement due the provider." 42 U.S.C. 1395*oo*(a)(1)(A)(i); see *Your Home Visiting Nurse Servs.*, 525 U.S. at 453. The Secretary of Health and Human Services urged that this provision did not encompass the denial of a request to reopen a prior reimbursement decision, because such a denial is not a "'final determination,'" but rather "the *refusal* to make a new determination." *Your Home Visiting Nurse Servs.*, 525 U.S. at 453. The Court unanimously agreed, observing that the Secretary's reading "frankly seems to us the more natural," but ultimately upholding the Secretary's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Your Home Visiting Nurse Servs.*, 525 U.S. at 453.

c. In the face of these arguments, petitioner invokes the "presumption that Congress intends judicial review of administrative action," which he claims can be overcome only by "clear and convincing evidence." Pet. 26-27 (quoting *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-671 (1986)). But this Court "has never applied the clear and convincing evidence standard in the strict evidentiary sense," *Bowen*, 476 U.S. at 672 n.3 (citation and internal quotation marks omitted),

and in any event the statute's plain text, reinforced by *Sanders* and *Your Home Visiting Nurse Services*, amply evidences Congress's intention to limit judicial review to benefits determinations under Section 355(c). See, *e.g.*, *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2140 (2016) ("clear and convincing indications" may be "drawn from," among other things, "specific language") (citation and internal quotation marks omitted). Moreover, this case does not involve a claim that the statute strips courts of the ability to review "substantial statutory and constitutional challenges." *Bowen*, 476 U.S. at 680. To the contrary, the statute merely precludes judicial review of the agency's discretionary procedural decision to prevent the *relitigation* of petitioner's benefits determination, which was itself judicially reviewable.

2. As the court of appeals below recognized (Pet. App. 3a), the circuits are split over the question presented. On the one hand, the Third, Fourth, Fifth, Seventh, and Tenth Circuits have all concluded that the denial of a request for reopening is not a "final decision" subject to judicial review under 45 U.S.C. 355(f). See *Cunningham* v. *Railroad Ret. Bd.*, 392 F.3d 567, 571-574 & n.5 (3d Cir. 2004); *Harris* v. *United States R.R. Ret. Bd.*, 198 F.3d 139, 142 (4th Cir. 1999); *Roberts* v. *United States R.R. Ret. Bd.*, 346 F.3d 139, 141 (5th Cir. 2003); *Steebe* v. *United States R.R. Ret. Bd.*, 708 F.2d 250, 254-255 (7th Cir.), cert. denied, 464 U.S. 997 (1983); *Abbruzzese* v. *Railroad Ret. Bd.*, 63 F.3d 972, 974 (10th Cir. 1995). These courts agree that Subsections (c) and (f) of Section 355 operate in tandem, see, *e.g.*, *Cunningham*, 392 F.3d at 571-572 & n.5; *Roberts*, 346 F.3d at 141, and find further support in the reasoning of *Sanders*, see, *e.g.*, *Harris*, 198 F.3d at 142; *Abbruzzese*, 63 F.3d at 974.

On the other hand, the D.C., Second, and Eighth Circuits have concluded that the denial of a request for reopening *is* a "final decision" subject to judicial review. *Stovic* v. *Railroad Ret. Bd.*, 826 F.3d 500, 505-506 (D.C. Cir.) (Kavanaugh, J.), cert. denied, 137 S. Ct. 399 (2016); *Szostak* v. *Railroad Ret. Bd.*, 370 F.2d 253, 254-255 (2d Cir. 1966); *Sones* v. *United States R.R. Ret. Bd.*, 933 F.2d 636, 638 (8th Cir. 1991). Like petitioner here, the D.C. Circuit construed Section 355(f) in isolation, holding that claimants may "obtain a review of *any* final decision of the Board." *Stovic*, 826 F.3d at 502 (emphasis added); see *id.* at 503-506. In contrast, *Szostak* relied on the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and federal common law, 370 F.2d at 254-255, and *Sones* relied on *Szostak*, *Sones*, 933 F.2d at 638.

3. This Court's review of the question presented is warranted, and this case is a suitable vehicle. The disagreement in the circuits is well established and unlikely to dissipate without this Court's intervention. And given the particular statutory scheme at issue, the split is especially conducive to forum shopping. Section 355(f) grants claimants a wide degree of flexibility in selecting a forum, permitting suit (i) "in the United States Court of Appeals for the Seventh Circuit" (which has concluded that denials of motions to reopen are not reviewable, see *Steebe*, 708 F.2d at 254-255); (ii) "in the United States Court of Appeals for the District of Columbia" (which has determined that such denials are reviewable, see *Stovic*, 826 F.3d at 505-506); or (iii) "in the United States court of appeals for the circuit in which the claimant * * * resides" (where the rule will vary). 45 U.S.C. 355(f).

Because the statute authorizes claimants to seek review in the D.C. Circuit no matter where they reside, claimants may always funnel their suits to that court.

Like other courts that review reopening denials, the D.C. Circuit applies a "circumscribed," deferential standard of review, which often results in denial of the petition. *Stovic*, 826 F.3d at 506; see also, *e.g.*, *Szostak*, 370 F.2d at 255; but see *Sones*, 933 F.2d at 638 (concluding that the Board "abused its discretion by refusing to reopen claimant's case"). When a court rejects a challenge to a denial of reopening under that standard, it insulates the reviewability question from a writ of certiorari. At the same time, it fails to protect fully the government's interests, because it forces the government to litigate on the merits when the case should simply be dismissed. This case thus presents an especially appropriate occasion for the Court to review this recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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