No. 19-199

In the Supreme Court of the United States

MANFREDO M. SALINAS, PETITIONER,

v.

UNITED STATES RAILROAD RETIREMENT BOARD, RESPONDENT.

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

BRIEF FOR PETITIONER

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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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OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-4a) is unreported and is available at 765 F. App'x 79. The decisions of the United States Railroad Retirement Board (Pet.App.5a-8a) and the 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 to file a petition for a writ of certiorari to August 15, 2019. The petition was filed on August 15, 2019, and granted on January 10, 2020. 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 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 petition appendix. Pet.App.18a-41a.

STATEMENT

Railroad work is perilous. Congress enacted the 1937 Railroad Retirement Act ("RRA") and the 1938 Railroad Unemployment Insurance Act ("RUIA") to offer a lifeline to disabled, retired, sick, and unemployed workers

throughout the railroad industry. The Railroad Retirement Board, a three-member independent agency, administers these statutes and renders millions of decisions involving railroad workers, unions, and employers.

Congress gave the Board significant power over how to administer that scheme, but charged courts with reviewing the Board's ultimate decision-making. Under 45 U.S.C. § 355(f), parties aggrieved by the Board's decisions under the RUIA may seek judicial review of "any final decision of the Board." The RRA prescribes the "same manner" of judicial review for "[d]ecisions of the Board determining the rights or liabilities of any person" under the Act. *Id.* § 231g.

Those judicial-review provisions provide a critical check on all final Board decisions—including Board decisions denying requests to reopen prior benefits determinations. "Any" ordinarily means "every," so by subjecting "any" final Board decision to judicial review, section 355(f) authorizes courts to review every type of final decision. Congress tellingly did not qualify that phrase, even as Congress singled out particular types of final decisions for special treatment elsewhere in section 355(f). Further, Congress made the same range of decisions reviewable under section 355(f) of the RUIA and section 231g of the RRA. Section 231g extends judicial review to all Board "[d]ecisions … determining the rights or liabilities of any person," *i.e.*, to all sorts of final decisions, confirming that section 355(f) likewise extends to all final decisions.

Board decisions denying reopening are "final." They are the agency's last word on the matter, and they deny applicants any further opportunity to pursue their claims. Here, for instance, petitioner Manfredo Salinas presented

newly available evidence showing that the Board had erroneously denied an earlier application for benefits. The Board's denial of his request to reopen that application terminated the agency's deliberations and deprived Mr. Salinas of the opportunity to receive disability benefits as of an earlier date.

The strong presumption in favor of judicial review of all agency action reinforces the reviewability of Board decisions denying reopening. The government must present clear and convincing evidence of congressional intent to bar judicial review before courts will take the drastic step of immunizing agency action from further scrutiny. Such evidence usually entails statutory language barring review—the opposite of section 355(f)'s broad mandate of judicial review of "any final decision of the Board."

Judicial review also vindicates the policies underlying the statutory scheme. Congress delegated to the Board the authority to work out the details of how to administer a complex benefits scheme for the railroad industry. The Board has always understood that delegation to include the power to reopen erroneous prior decisions. But Congress established judicial review of all types of final Board decisions as an important safeguard against arbitrariness and error. The volume of decisions within the Board is so high that error is inevitable. Judicial review of the Board's denials of reopening requests ensures that consequential decisions are not left to agency self-policing.

There is no good reason to adopt the government's view that section 355(f) closes the courthouse doors to the Board's denials of reopening requests, as well as myriad other Board decisions. In the government's view, "any final decision of the Board" refers only to the narrow subset of final decisions listed in 45 U.S.C. § 355(c), *i.e.*, initial benefits determinations and determinations whether an

employer is subject to the statutory scheme. That unnatural reading of section 355(f) defies established canons of statutory construction. Cabining judicial review to decisions under section 355(c) would also shield from scrutiny many decisions that section 355(g) indicates are reviewable, as well as other types of decisions that courts have long considered reviewable—raising serious separation-of-powers concerns. Nor do decisions interpreting the Social Security Act justify denying review here. That the very different text of the Social Security Act forecloses judicial review of decisions denying reopening of Social Security determinations is no basis to conclude that Congress exempted Board decisions from meaningful accountability.

A. Statutory and Regulatory Framework

1. During the Great Depression, Congress replaced private railroad employers' pension systems for railroad workers with a federal benefits scheme for the railroad industry. Courts, however, invalidated Congress' first two attempts. *See R.R. Ret. Bd. v. Alton R. Co.*, 295 U.S. 330 (1935); *Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936).

The third attempt—the Railroad Retirement Act of 1937—survived, and provides railroad workers with retirement pensions and disability benefits. *See* Pub. L. No. 75-162, ch. 382, pt. I, 50 Stat. 307. The 1938 Railroad Unemployment Insurance Act added unemployment and sickness benefits. *See* Pub. L. No. 75-722, ch. 680, § 1, 52 Stat. 1094. In 1974, Congress re-enacted the RRA and modified the RUIA so that railroad workers receive benefits equal to or greater than what they could obtain under the Social Security Act. *See* Pub. L. No. 93-455, 88 Stat. 1305. Today, this statutory scheme "provides generous pensions as well as benefits 'correspon[ding] ... to those an

employee would expect to receive were he covered by the Social Security Act.'" *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 897 (2019) (alterations in original) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979)).

The Railroad Retirement Board, a three-member "independent agency in the executive branch," administers these benefits. 45 U.S.C. § 231f (RRA); *id.* § 362 (RUIA). In 2017, the Board administered nearly $12.7 billion in retirement, survivor, and disability benefits to some 634,000 beneficiaries, and paid another $93 million in unemployment and sickness benefits to some 25,000 claimants. *See* Congressional Research Service, *Railroad Retirement Board: Retirement, Survivor, Disability, Unemployment, and Sickness Benefits* 1 (Mar. 26, 2020).

Congress vested the Board with "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 RRA] and make awards and certify payments." 45 U.S.C. § 231f(b)(1). The Board's authority under the RUIA is the same: in addition to its "expressly provided" powers, "the Board shall have and exercise all the powers and duties necessary to administer or incidental to administering" the RUIA. *Id.* § 362(*l*). Congress also 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 RRA]." *Id.* § 231f(b)(5); *see id.* § 362(*l*) (incorporating these powers with respect to RUIA).

2. Railroad workers must navigate a multi-step process to apply to the Board for benefits and to appeal adverse administrative rulings. Exhausting these administrative remedies often takes years. The Board has struggled to complete all initial benefits determinations within two years of filing; exhausting ensuing administrative appeals takes even longer. *See* R.R. Ret. Bd.,

Performance and Accountability Report: Fiscal Year 2019, at 18.

Initial Determinations: Claimants must first file a claim for benefits or annuities with the relevant division of the Board. *See* 45 U.S.C. §§ 231a(a)(1) (RRA), 355 (RUIA). Once the division renders its decision, it notifies claimants within 15 to 30 days. *Id.* § 231f(b)(3) (30-day notification for RRA benefits decisions); *see id.* § 355(c)(5) (15-day notification for RUIA benefits decisions).

Reconsideration: Disappointed claimants must request reconsideration within 60 days of receiving notice of an adverse decision, absent "good cause" for a late filing. *See* 20 C.F.R. §§ 260.3(a), (d)(1)-(6) (RRA regulations), 320.10(a), (d), (e) (RUIA regulations).

Appeals to the Bureau of Hearings and Appeals: Claimants who disagree with the reconsideration decision have 60 days to appeal to the Board's Bureau of Hearings and Appeals, again absent good cause for delay. 20 C.F.R. §§ 260.5(a)-(b) (RRA decisions), 320.12(a)-(b) (RUIA decisions). Bureau hearing officers adjudicate appeals. *Id.* §§ 260.5(e)-(*l*) (RRA), 320.18 (RUIA). Absent further appeal, the hearing officer's decision is the agency's "final decision." 45 U.S.C. §§ 231f(b)(3) (RRA), 355(d) (RUIA); 20 C.F.R. §§ 261.1(b) (RRA regulations), 320.32 (RUIA regulations).

Appeals to the Board: Claimants dissatisfied with the hearing officer's decision "have a right to a final appeal" to the three-member Board. 20 C.F.R. §§ 260.9(a) (RRA regulations), 320.38 (RUIA regulations); 45 U.S.C. § 231f(b)(3) ("any person aggrieved by a decision on his application for an annuity or other benefit" under the RRA has "the right to appeal to the Board"). Claimants have 60 days to appeal, subject to good cause for delay. 20 C.F.R. §§ 260.9(b), (c) (RRA), 320.39(a) (RUIA).

Employers and other interested parties can also participate in agency adjudications. For example, a claimant's "base-year employer," *i.e.*, any company that employed the claimant for the year preceding the benefits claim, 45 U.S.C. § 351(n), can "submit information … before" the relevant Board division "mak[es] an initial determination," *id.* § 355(b). Base-year employers can also request reconsideration and appeal grants of benefits within the agency. *Id.* § 355(c)(3); 20 C.F.R. § 345.405(b).

3. Section 355(f) is the central judicial-review provision in the statutory scheme. Section 355(f) states that, with respect to decisions under the RUIA, "[a]ny claimant"—as well as other listed entities, including "any other party aggrieved by a final decision under [§ 355(c)]"—"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." 45 U.S.C. § 355(f) (emphasis added). The party does so by filing a petition for review in the D.C. Circuit, the Seventh Circuit (where the Board is headquartered), or the circuit where the litigant resides. *Id.* Parties generally must seek judicial review "within [90] days." *Id.*

Section 231g of the RRA ties judicial review of final decisions under that Act to section 355(f). Section 231g mandates: "Decisions of the Board determining the rights or liabilities of any person" under the RRA "shall be subject to judicial review in the same manner, subject to the same limitations … as though the decision were a determination of corresponding rights or liabilities" under the RUIA. *Id.* § 231g. The review schemes are thus identical except the RRA's deadline is one year, rather than 90 days, for "decision[s] with respect to an annuity, supplemental annuity, or lump-sum benefit." *Id.*

Courts have treated section 355(f) as the sole path for challenging Board decisions, to the exclusion of review under the Administrative Procedure Act. *E.g.*, *Steebe v. R.R. Ret. Bd.*, 708 F.2d 250, 254 (7th Cir. 1983). Courts have also held that section 355(f) limits challenges to the RRA and RUIA, Board regulations, and even constitutional claims. Litigants thus can bring such challenges only in the course of challenging Board determinations in their individual cases under section 355(f). *E.g.*, *Denberg v. R.R. Ret. Bd.*, 696 F.2d 1193 (7th Cir. 1983).

4. Since its inception, the Board has exercised the authority to reopen its decisions. As a 1939 Board-approved legal opinion put it, Congress gave the Board the power to reopen cases to ensure that the Board does not "act arbitrarily or capriciously, and thus distort the provisions of the Act." Legal Op. 39-527, at 18 (Aug. 16, 1939) (approved by Board Order 39-547, Aug. 22, 1939); *see Szostak v. R.R. Ret. Bd.*, 370 F.2d 253, 254 (2d Cir. 1966) (Friendly, J.) (noting the agency's longstanding reopening practice); 60 Fed. Reg. 66,203 (Dec. 21, 1995) (describing prior reopening standards).[1]

The Board's current regulations, promulgated in 1997, provide that prior "decisions of the agency may be reopened and revised." 20 C.F.R. §§ 261.1(a) (RRA), 349.1(a) (RUIA). The agency decision-maker who rendered the prior decision (*e.g.*, the relevant division that initially denied benefits, or the hearing officer) can grant reopening upon request or *sua sponte*. *Id.* §§ 261.1(a) (RRA), 349.1(a) (RUIA). Alternatively, any "other entity at a higher level," including the three-member Board itself, may order reopening. *Id.*

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[1] Citations to the Board's Legal Opinions can be found by searching the Board's database, https://rrb.gov/Resources/LegalInformation/LegalOpinions.

The Board's regulations also set parameters for when reopening is appropriate. An agency decision-maker may reopen a decision "within 12 months … for any reason." *Id.* §§ 261.2(a) (RRA), 349.2(a) (RUIA). Further, an agency decision-maker may reopen a decision "within four years" 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) (RRA); *see id.* § 349.2(b) (similar but more limited reopening grounds under RUIA). Reopening is also available at "any time" on specific grounds. *Id.* § 261.1(c)(1)–(10) (listing ten grounds for reopening under the RRA); *see id.* § 349.2(c)(1)-(3) (listing three grounds for reopening under the RUIA). Conversely, the regulations prohibit reopening on certain grounds, like changes in law. *Id.* §§ 261.4 (RRA), 349.3 (RUIA). Finally, the Board can reopen a prior decision even if it is not otherwise eligible for reopening, or can deny reopening even if the decision is otherwise eligible for reopening. *Id.* §§ 261.11 (RRA), 349.8 (RUIA).

B. Factual and Procedural Background

1. Petitioner Manfredo Salinas, a 64-year-old former railroad employee, has spent three decades seeking disability annuities under the RRA because his "permanent physical or mental condition is such that [he is] unable to engage in any regular employment." *See* 45 U.S.C. § 231a(a)(1)(v). 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-38.[2]

After serving in the U.S. Army, AR-263, in 1979 Mr. Salinas started working for Union Pacific Railroad. AR-

[2] Citations to the Administrative Record below are denoted "AR."

141. He began as a Bridge and Building Helper, eventually rising to Bridge and Building Assistant Foreman. AR-44. The work was arduous. He built and dismantled bridges, often climbing high in the air to access hard-to-reach areas and lifting heavy objects. AR-45-46.

In 1989, a twelve-pound sledgehammer fell from a bridge, landing on Mr. Salinas's hardhat. AR-67. An emergency-room trip ruled out immediate surgery. But as the weeks passed, Mr. Salinas suffered ongoing neck pain and numbness in his limbs, forcing him to miss work. AR-398. By 1991, he required spinal-fusion surgery. *Id.*

Mr. Salinas resumed work post-surgery. But in 1993, a heavy piece of timber fell from a truck and struck him. AR-132. He blacked out; at first, he could not move at all. He regained some mobility, but needed another spinal-fusion surgery. AR-398. The pain continued, and brought further stress. AR-035. Doctors prescribed various medications for his pain, anxiety, and depression. AR-399, AR-416. Nothing fully worked. AR-398.

Nonetheless, Mr. Salinas kept trying to hold his job and to help his wife raise their six children. He left Union Pacific in 1994, but worked as a self-employed carpenter as long as he could. In 1997, numbness in his neck and limbs forced him to stop work altogether. AR-478.

2. After his 1991 spinal-fusion surgery, and with his wife's aid, Mr. Salinas applied to the Board in 1992 for disability annuities. AR-34. Mr. Salinas returned to work, but reapplied for benefits in 1994 following his 1993 injuries. AR-86. The Board denied his 1992 and 1994 applications. Though acknowledging Mr. Salinas's limitations from his injuries, the agency considered his condition "not severe enough to prevent performance of any regular and substantial work" given his age. AR-059, AR-126.

Mr. Salinas applied for a disability annuity again in February 2006. AR-158. In its August 2006 initial determination, the Board found that his spinal injuries and depression were "so severe that [they have] lasted or [are] expected to last for at least 12 months, or [are] expected to result in death," and that he was "not able to do past relevant work." AR-181-82. A psychiatric examination confirmed that his "mental impairment is severe." AR-199. But the Board denied his application, concluding that "[a]lthough you do have severe impairments, you are not considered totally and permanently disabled for all work in the national economy." AR-205.

Mr. Salinas requested reconsideration in November 2006. AR-207. Though the request was untimely, he argued that good cause excused the missed deadline, citing his limited English, his depression, and delays in acquiring medical records and getting an MRI appointment. AR-207. The Board's Reconsideration Section in December 2006 denied the request, finding no "good reason for the delay." AR-208. The denial indicated that Mr. Salinas could seek reconsideration of the good-cause finding, then contradictorily 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, then 58 years old, re-applied for a disability annuity, again recounting his workplace injuries and surgeries. AR-277, AR-290. This time, his application was successful. The Board reasoned that once Mr. Salinas reached age 55, on October 9, 2010, he could no longer find any job that he could physically perform. AR-300. The agency awarded a monthly annuity of $1,624.35 starting December 1, 2012, and a monthly annuity of $1,647.33 starting December 1, 2013. AR-310. For the two-year period from 2010, when his disability officially began, to 2012, Mr. Salinas received nothing.

In September 2014, Mr. Salinas timely requested reconsideration of his annuity start date. AR-323. The Reconsideration Section denied that request, AR-324-25, and Mr. Salinas appealed to the Bureau, AR-326-32.

As part of this appeal, Mr. Salinas also requested the "reopening of all prior applications[.]" AR-332. Specifically, he requested reopening of his 2006 application, pointing to new evidence that he had good cause excusing his untimely request to reconsider the initial denial of that application. That evidence included medical records from the Department of Veterans Affairs that he had not been able to obtain in 2006, which supported that his mental condition had prevented his timely filing. AR-408-09, AR-410-12, AR-462-64. If the Board concluded that "good cause" justified reopening the 2006 application, Mr. Salinas could keep litigating that application and potentially obtain a disability annuity with a 2005 start date. *See* AR-159; 20 C.F.R. § 218.9(c).

A hearing officer denied Mr. Salinas's reopening request, reasoning that the 2006 decision was "more than four years ago," and that "new and material evidence or administrative error [could not] be considered." Pet.App.14a. The officer found no other basis for reopening and affirmed the 2012 annuity start date. Pet.App.14a-15a.

Mr. Salinas timely appealed to the three-member Board, which rejected his request to reopen the 2006 denial and his challenge to the 2012 start date. Pet.App.5a. The Board reasoned that Mr. Salinas had raised his "limited English proficiency and mental impairments" in 2006 and that those factors were not "good cause." Pet.App.7a-8a. The Board added that even had Mr. Salinas's medical records constituted new, material evidence, that conclusion would not justify reopening the 2006 denial more than four years later. *See id.* The Board never addressed

whether Mr. Salinas would have succeeded in obtaining benefits under his 2006 application had that application been reopened. When transmitting its decision, the Board advised that Mr. Salinas 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 judicial review of the Board's decision denying reopening in the Fifth Circuit, where he resides. The Fifth Circuit dismissed Mr. Salinas's petition in a *per curiam* opinion. Pet.App.1a-4a. The court "acknowledged a circuit split" concerning the availability of judicial review of Board decisions denying reopening. Pet.App.3a. But the court followed Circuit precedent holding that only "final decisions on the merits of a claim as described in [45 U.S.C.] 355(c)" are judicially reviewable. *Roberts v. R.R. Ret. Bd.*, 346 F.3d 139, 141 (5th Cir. 2003); *see* Pet.App.3a.

SUMMARY OF ARGUMENT

I. All final decisions of the Railroad Retirement Board are judicially reviewable, including decisions denying reopening of prior benefits determinations.

A. The statutory text unambiguously subjects all final Board decisions to judicial review. Section 355(f) authorizes specified litigants—including benefits "claimant[s]" like Mr. Salinas—to seek judicial review of "*any* final decision of the Board" under the RUIA in specified courts of appeals. Congress used "any" to signify that *every* final Board decision is reviewable. Elsewhere in section 355(f), Congress singled out certain types of final decisions for special treatment, yet imposed no similar limitations on the broad phrase "any final decision."

Section 231g provides further textual evidence of section 355(f)'s breadth. Section 231g subjects all Board decisions "determining the rights or liabilities of any person" to judicial review in the "same manner" as section 355(f) subjects "corresponding" determinations under the RUIA to judicial review. A decision "determining the rights or liabilities of any person" is a synonym for a "final decision." That linkage reinforces that all final decisions, including denials of reopening, are judicially reviewable.

Section 355(g) confirms the breadth of decisions that section 355(f) subjects to review. Section 355(g) prescribes specific finality rules for a subset of final decisions, including Board "determination[s] of any claim for benefits or refund." That subcategory includes the Board's denial of reopening in this case. By denying Mr. Salinas's request to reopen its prior denial of his benefits claim, the Board "determin[ed] … [a] claim for benefits."

B. Board decisions denying reopening are "final decision[s] of the Board." A denial of reopening is the last stop in the agency's review process, and thus qualifies as "final" under the ordinary meaning of the word. Denials of reopening also determine a claimant's rights. Here, the Board's decision denying reopening prevented Mr. Salinas from establishing an earlier start date for his disability benefits.

C. The longstanding presumption in favor of judicial review of agency action applies to actions agencies take pursuant to their own regulations, and supports review here. Only clear and convincing evidence of congressional intent can preclude review. The government cannot satisfy that stringent standard here. Far from expressly barring review of denials of reopening or other Board decisions, section 355(f) authorizes broad and wide-ranging review.

D. Strong policy reasons support the reviewability of denials of reopening. In the RRA and RUIA, Congress established a complex and wide-reaching benefits scheme, but Congress left to the Board the details of how to administer it. As a necessary counterweight to the Board's broad delegation of power, Congress instituted equally broad judicial review. The Board has long understood that it will inevitably make mistakes in administering benefits for millions of railroad workers. From its inception, the Board thus viewed reopening as a necessary corrective mechanism, and recognized that courts would check its decisions on whether to reopen. Judicial review is particularly important given the stakes involved: erroneously depriving railroad workers and their families of benefits to which they are legally entitled can make all the difference in the world to their quality of life.

II. The government incorrectly interprets section 355(f) as severely cabining the range of Board decisions that courts may review.

A. Section 355(f) does not limit judicial review just to Board decisions identified in section 355(c), *i.e.*, initial benefits determinations and decisions about which employers the Act covers. Section 355(f) authorizes four types of litigants to seek judicial review of "any final decision": "claimant[s]," labor unions, employers, and "any other party aggrieved by a final decision under [section 355(c)]." Under the well-established last-antecedent rule, that list does not mean that *all* litigants must be aggrieved by decisions under section 355(c). Only someone who is not a claimant, union, or employer must be aggrieved by a decision under section 355(c) in order to sue.

Because the government interprets the statute to mean that all litigants must be aggrieved by a decision under section 355(c) to sue, it faces the conundrum that

section 355(f) would still authorize all litigants to challenge "any final decision of the Board," not just decisions under section 355(c). To fix that self-inflicted mismatch, the government attempts to rewrite the statute further, so that "any final decision of the Board" means "any final decision of the Board under section 355(c)." This degree of statutory redlining only highlights the unnaturalness of the government's reading.

The government's interpretation is also incompatible with section 355(g), which identifies various categories of decisions that are reviewable under section 355(f)—many of which are *not* decisions under section 355(c). Congress cannot have possibly meant to exclude from judicial review decisions that it recognized as reviewable. This interpretation would also stop courts from reviewing many other types of decisions that do not arise under section 355(c), but which courts have long deemed reviewable.

The notion that denials of reopening and many other decisions that fall outside section 355(c) face no judicial scrutiny whatsoever also raises serious separation-of-powers concerns. Courts have held that section 355(f) is the only route to judicial review of Board decisions. And the Board has significant independence from Executive Branch oversight, even by independent-agency standards. By preventing the judiciary from serving as a critical safety valve against arbitrary agency action, the government's interpretation would empower the Board to define its own powers, then leave it up to the Board to police itself. That interpretation defies bedrock principles of agency accountability.

B. The Court's decision in *Califano v. Sanders*, 430 U.S. 99 (1977), which held that denials of reopening are not judicially reviewable under the Social Security Act,

does not govern here. That Act has a significant textual difference from section 355(f): it limits review to decisions "made after a hearing." The Court relied on that qualifier in holding that Social Security reopening denials are unreviewable. *Sanders* also noted that Social Security reopening exists only by regulation, and that judicial review of reopening denials would undermine statutory deadlines for judicial review of initial Social Security determinations. Those observations were part and parcel of the Court's textual analysis of the Social Security Act, and are not a freestanding basis for barring judicial review in other statutory contexts.

ARGUMENT

I. Board Decisions Denying Requests to Reopen Are Judicially Reviewable

Section 355(f) grants courts of appeals jurisdiction over "*any* final decision" that the Railroad Retirement Board makes under the RUIA. 45 U.S.C. § 355(f) (emphasis added). Section 231g adopts the same expansive scope of judicial review over Board decisions under the RRA. That text and established canons of statutory construction show that *all* final Board decisions are reviewable. Denials of reopening qualify as such final decisions. The presumption of judicial review, as well as strong policy reasons, further support reviewability.

A. The Text of Sections 355(f) and 231g Confirm that All Final Board Decisions Are Reviewable

Statutory interpretation starts with the text—and when, as here, the text is plain, courts need not go further. *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019).

1. Section 355(f) of the RUIA, the key judicial-review provision, states in relevant part: "Any claimant"—plus "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 [section 355(c)]"—"may … obtain a review of *any final decision* of the Board" in specified federal courts of appeals. 45 U.S.C. § 355(f) (emphasis added). Section 355(f) thus does two things. It first identifies *who* can seek judicial review: claimants, labor organizations, etc. Then section 355(f) spells out *what* decisions these litigants can challenge: "any final decision of the Board." So long as one of these litigants has exhausted administrative remedies, section 355(f) subjects "any final decision of the Board" issued under the RUIA to judicial review. *See Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 503 (D.C. Cir. 2016) (Kavanaugh, J.).

By subjecting "any" final Board decision to judicial review, Congress encompassed *all* final Board decisions. "[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019). "Any" final decision thus covers every such decision, just as "any" claimant means every sort of claimant. Congress used the word "any" seven times in section 355(f) alone and 40 times throughout section 355, each time to convey breadth.

Other features of section 355(f)'s text confirm that Congress empowered courts to review all types of final Board decisions, including denials of reopening. Elsewhere in section 355(f), Congress used clear qualifiers to

single out specific subcategories of final decisions for special treatment. For instance, when identifying who bears litigation costs, section 355(f) specifies that "[a]n applicant for review of *a final decision of the Board concerning a claim for benefits* shall not be liable for costs" of judicial review. By contrast, Congress subjected to judicial review "any final decision of the Board," without limitation—signaling that "any final decision" covers every final decision, not just claims for benefits. *See Stovic*, 826 F.3d at 503 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). When Congress "uses particular language in one section of a statute but omits it in another," this Court presumes that choice was deliberate. And that presumption heightens when, as here, the relevant phrases appear "in close proximity." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015).

2. Section 231g, the RRA's parallel judicial-review provision, reinforces that courts can review all final Board decisions, including denials of reopening. Section 231g mandates judicial review of "[d]ecisions of the Board determining the rights or liabilities of any person" under the RRA. 45 U.S.C. § 231g. Section 231g then ties the scope of judicial review to section 355(f): All such Board decisions under the RRA "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 RUIA. *Id.* Section 231g carves out one exception to the parallel between the RRA and RUIA: litigants have one year, not the 90 days that section 355(f) would otherwise provide, to seek review "of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit" under the RRA. *Id.*

Section 231g thus illustrates that the same broad range of final decisions are subject to judicial review under the RRA and the RUIA. A "[d]ecision … determining the rights or liabilities of any person" under section 231g is another way of saying "any final decision." *Cf. U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (final agency action for APA purposes is a decision that determines rights or obligations). Section 231g reinforces that breadth by identifying "a decision with respect to an annuity, supplemental annuity, or lump-sum benefit" as subsets of the broader category of "decision[s] … determining the rights or liabilities of any person." And section 231g subjects "[d]ecision[s] … determining the rights or liabilities of any person" under the RRA to judicial review in the same manner as "a determination of corresponding rights or liabilities" under the RUIA. That parallelism suggests that Congress subjected an equally extensive range of decisions to judicial scrutiny under the RRA and RUIA.

3. Section 355(g) confirms that a wide range of final decisions—including denials of reopening—are reviewable. Section 355(g) prescribes specific rules for "[f]indings of fact and conclusions of law" with respect to three subsets of final Board decisions: (1) "the determination of any claim for benefits or refund"; (2) "the determination of any other matter pursuant to [section 355(c)]"; and (3) "the determination … that the unexpended funds in the [Railroad Unemployment Insurance] account are available" to pay claims or benefits. 45 U.S.C. § 355(g). Section 355(g) then indicates that these decisions are subject to judicial review under section 355(f)—and that section 355(f) is the *only* avenue for judicial review. "[E]xcept as provided in [section 355(f)]," these decisions are "not … subject to review in any [other] manner" and

are "binding and conclusive for all purposes and upon all persons." *Id.*

A "determination of any claim for benefits or refund" under section 355(g) includes decisions denying requests to reopen the Board's prior denial of benefits. Requests to reopen a decision denying benefits comfortably fall within that category. Unlike section 355(c), which refers specifically to "*initial* determination[s]" of benefits claims, section 355(g) refers to "determination[s]" of "any" benefits claims without qualification. The premise of a reopening request is that the claimant is legally entitled to benefits and that the agency's prior decision was so erroneous that the agency should not allow it to stand. Denying reopening thus "determin[es]" a claim for benefits, and section 355(g) makes clear that such determinations are judicially reviewable under section 355(f).

B. Board Decisions Denying Reopening Are Final

Because Board decisions denying reopening qualify as "final" Board decisions, section 355(f) subjects them to judicial review. The government (at BIO 12) obliquely disagrees, suggesting that under *Your Home Visiting Nurse Services, Inc. v. Shalala*, 525 U.S. 449 (1999), a case involving the Medicare statute, Railroad Retirement Board denials of reopening are non-final.

But a denial of reopening fits squarely within the ordinary meaning of a "final" decision; it is "[l]ast," "conclusive," "[t]erminating," or "completed." *Final*, Black's Law Dictionary (4th ed. 1951). Thus, this Court in *Smith* concluded that "the phrase 'final decision'" in the Social Security Act's judicial-review provision "clearly denotes some kind of terminal event." 139 S. Ct. at 1774 & n.6. Dismissals of Social Security claims as untimely are

"final" decisions because such dismissals terminate proceedings within the agency. *Id.* at 1777. Likewise, decisions denying reopening of Social Security benefits determinations are "final decisions" because they are "conclusive"; those decisions are just not judicially reviewable because they fail other, statute-specific prerequisites. *Id.* at 1774-75; *infra* pp. 40-41. So too here, the three-member Board's denials of reopening are conclusive; claimants have no further recourse within the agency. *See* 20 C.F.R. § 260.9.

Analogous finality principles under the Administrative Procedure Act reinforce that the Board's denials of reopening are final. Final agency action under the APA "mark[s] the consummation of the agency's decisionmaking process," and involves a decision "by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Board denials of reopening fit both criteria. *See Stovic*, 826 F.3d at 502. Board decisions are the last stop in the agency review process. And denials of reopening determine legal rights and produce legal consequences. Here, the Board's denial prevented Mr. Salinas from using newly obtained medical records to reopen his 2006 application and establish his legal entitlement to benefits as of 2005.

Your Home is not to the contrary. That decision addressed one Medicare administrative entity's appellate jurisdiction over another, not judicial review of the final agency action. 525 U.S at 452. The intermediate decisionmaker—the Provider Reimbursement Review Board—can review only a "final determination ... as to the amount" of reimbursement. *Id.* at 453 (alteration in original) (quoting 42 U.S.C. § 1395*oo*(a)(1)(A)(i)). The government

contended that denials of reopening of Medicare reimbursement decisions do not qualify. Rather than resolving whether the intermediate decision denying reopening was "final ... as to the amount" of reimbursement, this Court deferred to the government's interpretation under *Chevron*. *See* 525 U.S. at 453.

C. The Presumption of Judicial Review Supports Reviewability

If any doubts remained that Board decisions denying requests to reopen are reviewable, the presumption of judicial review resolves them in petitioner's favor. *Kucana v. Holder*, 558 U.S. 233, 251 (2010); *Guerrero-Lasprilla v. Barr*, No. 18-776, __ S. Ct. __, 2020 WL 1325822 at *6 (Mar. 23, 2020). "[L]egal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC,* 575 U.S. 489, 486 (2015) (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)).

That presumption applies to any type of agency decision, including decisions that exist by virtue of agency regulations. Thus, this Court applied the presumption of judicial review to denials of Social Security claims based on non-compliance with the agency's filing deadlines, which the agency established by regulation. *Smith*, 139 S. Ct. at 1776-77. Likewise, this Court applied the presumption to standalone jurisdictional determinations, *i.e.*, the Army Corps of Engineers' determinations regarding whether property contains waters subject to the Clean Water Act, even though those determinations exist solely by virtue of regulation and the Act "makes no reference" to them. *Hawkes*, 136 S. Ct. at 1816.

Agencies can carry their "heavy burden" of rebutting the presumption of judicial review, *Mach Mining*, 575 U.S. at 486, only with "clear and convincing evidence" from the statutory text or context. *See Bowen*, 476 U.S. at 671; *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016). Satisfying the clear-evidence standard usually requires "unambiguous and comprehensive" statutory language that "bar[s] judicial review altogether." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 769, 771 (1985). Congress, for instance, insulated determinations about compensation for workplace injuries from judicial review by making them "'not subject to review … by a court by mandamus or otherwise.'" *Id.* at 779 n.13 (quoting 5 U.S.C. § 8128(b)). Likewise, Congress "barr[ed] judicial review of … mine-run claim[s] … involving the Patent Office's decision to institute inter partes review" by providing: "'The determination … whether to institute an inter partes review under this section shall be final and non-appealable.'" *Cuozzo*, 136 S. Ct. at 2136 (quoting 35 U.S.C. § 314(d)).

Section 355(f) bears no resemblance to these review-precluding provisions. Instead, section 355(f) authorizes judicial review of "any final decision of the Board," which is about as clear a demonstration of congressional intent to *grant* broad judicial review as can be. Further, section 355(g) mentions "any determination of a claim for benefits or refund" as one category of reviewable decisions, and denials of reopening easily fit within that category. *Supra* p. 22. Regardless, section 355 need not specifically mention reopening for denials of reopening to be reviewable. "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others," because "[t]he right to review is too important to be excluded on such slender and indeterminate evidence."

Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967) (internal quotation marks omitted); *see Hawkes,* 136 S. Ct. at 1816.

D. Policies Underlying the Statute Support Judicial Review

1. Extending judicial review to all final decisions of the Board, including denials of reopening, also comports with the way Congress structured the Board's powers under the statutory scheme.

Complex benefits schemes like this one involve a host of decisions beyond the initial question of whether someone is statutorily entitled to benefits. For instance: How and when can someone file for benefits? How do administrative appeals work, how many layers of review are there within the agency, and how deferentially should more senior agency personnel review initial decisions? And initial benefits determinations are just one type of Board decision among many. Beneficiaries who meet initial criteria to receive benefits may no longer satisfy those criteria if they return to work or their disability diminishes. How should the Board decide whether to change initial benefits determinations in light of new circumstances? What should the Board do about errors in its prior decision-making? What if new evidence emerges showing that beneficiaries should have received benefits they were denied, or should not have received benefits they obtained?

Rather than spelling out these details itself, Congress instructed the Board to address these sorts of issues. Congress directed the Board to "take such steps as may be necessary to enforce [the RRA] and make awards and certify payments." 45 U.S.C. § 231f(b)(1); *see id.* § 362(*l*) (similar powers under RUIA). Congress also instructed the Board to issue regulations "provid[ing] for the adjustment of all controversial matters arising in the

administration of [the RRA]," illustrating Congress' understanding that the Board would resolve many disputed issues. *Id.* § 231f(b)(5); *see id.* § 362(*l*) (incorporating these powers with respect to RUIA).

Reopening is one of many examples of determinations that the Board makes in exercising its delegated powers. Indeed, the Board from its inception believed that Congress implicitly *required* it to reopen prior determinations to prevent arbitrary and capricious decision-making. Legal Op. 39-527, at 18. The Board "presumed that Congress intended finality to attach to Board action only when taken on a reasonable basis of evidence and law," and for errors to "be corrected retroactively." *Id.* Thus, while Congress left it to the Board to articulate procedures for reopening, the Board viewed its power to reopen as a safety valve to protect the integrity of its decisions.

At the same time, Congress in section 355(f) prescribed robust judicial review of *all* types of final Board decisions, regardless of whether Congress named them in the statute or allowed the Board to set them up via regulation. Subjecting "any final decision of the Board" to judicial review preserves the Board's flexibility to flesh out the statutory scheme, while ensuring that courts hold the agency accountable for any and all final decisions—including denials of reopening.

Tellingly, the Board understood as early as 1942 that denials of reopening were subject to judicial review. For instance, the Board reopened a decision denying benefits to a claimant after an intervening D.C. Circuit decision in a materially similar case repudiated the Board's reasoning. Legal Op. 42-673 at 4 (Dec. 15, 1942) (approved by Board Order 42-653, Dec. 15, 1942). The Board did so after the Board's General Counsel warned, "Any action by the Board refusing to reopen [the] case could not … be

successfully sustained in court," *id.*—advice that would make no sense if the Board thought Congress had precluded judicial review. Of course, the Board has since taken a different tack. But the fact that the Board early on did not believe it could deny reopening free of judicial scrutiny is strong evidence that review of such decisions comports with the statutory scheme.

2. Judicial review of reopening decisions is especially important given the stakes involved and the potential for agency error. The scale of the agency's task is immense: the Board administers benefits to hundreds of thousands of railroad workers. *Supra* p. 6. Like other benefits schemes, railroad benefits are "a massive enterprise, and mistakes will occur." *See Smith*, 139 S. Ct. at 1776; *cf. Regions Hosp. v. Shalala*, 522 U.S. 448, 461-62 (1998) (considering it unlikely that Congress would preclude correction of costly agency mistakes). For instance, circumstances can shift after initial benefits determinations, such that claimants warrant more or less benefits. Or, as in Mr. Salinas's case, claimants may obtain new, material evidence relevant to a prior determination. As the Board acknowledged in 1939 when setting forth reopening criteria, perfection in adjudicating so many claims is impossible, especially if the Board is to adjudicate them promptly. Legal Op. 39-527, at 17-18.

The price of those errors can be intolerably high. Congress established a separate system of benefits for railroad workers in part because jobs in that field are so hazardous, as Mr. Salinas's serious on-the-job injuries illustrate. *See* R.R. Ret. Bd., *R.R. Ret. Handbook* 1 (2018). Claimants, who often lack formal education, spend years navigating a complex administrative exhaustion process to try to obtain benefits.

The amounts these workers can expect if they prevail—just over $2,000 per month on average for a totally disabled worker—may be small to the federal government. R.R. Ret. Bd., *Annual Report* 17 (2018). But those sums can be transformative for workers and their families. Few pursue denials of reopening. But for those who do, section 355(f) is their only hope. Without judicial review of Board reopening decisions, the agency is the end of the line. Section 355(f) appears to be the only avenue for obtaining judicial review, or even for challenging the Board's reopening regulations. *See* 5 U.S.C. §§ 551(1)(E), 701(b)(1)(E); 45 U.S.C. § 355(g); *infra* p. 38. "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." *Stovic*, 826 F.3d at 505.

II. Arguments Against Reviewability Are Meritless

The government (at BIO 8-13) and some courts of appeals have embraced two arguments against judicial review. They maintain that "any final decision" under section 355(f) refers only to final decisions described in section 355(c), *i.e.*, initial benefits determinations and employer status determinations. Further, relying on *Califano v. Sanders*, 430 U.S. 99 (1977), they contend that because decisions refusing to reopen Social Security benefits determinations are unreviewable, the same must be true of decisions denying reopening of railroad benefits. Neither argument has merit.

A. Congress Did Not Insulate All Board Decisions Outside Section 355(c) from Judicial Scrutiny

The government's reading rests on the premise that everyone on section 355(f)'s list of litigants who can seek

judicial review—"[a]ny 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 [section 355(c)]"—must be "aggrieved by a final decision under [section 355(c)]." And, the theory goes, if only litigants aggrieved by final decisions under section 355(c) can sue, then such decisions must be the only ones that Congress permitted these litigants to challenge in court. So, in the government's view, section 355(f)'s authorization of judicial review of "any final decision of the Board" must mean "any final decision of the Board under section 355(c)." *See* BIO 10; *accord*, *e.g.*, *Cunningham v. R.R. Ret. Bd*, 392 F.3d 567, 572 (3d Cir. 2004); *Roberts v. R.R. Ret. Bd.*, 346 F.3d 346, 141 (5th Cir. 2003); *Harris v. R.R. Ret. Bd.*, 198 F.3d 139, 142 (4th Cir. 1999); *Steebe v. R.R. Ret. Bd.*, 708 F.2d 250, 254-55 (7th Cir. 1983).

In other words, the government reads the provision as follows:

> Any claimant [aggrieved by a final decision under subsection (c)], or any railway labor organization …, of which claimant is a member [aggrieved by a final decision under subsection (c)], or any base-year employer of the claimant [aggrieved by a final decision under subsection (c)], or any other party aggrieved by a final decision under subsection (c) of this section may obtain a review of any final decision of the Board [under subsection (c)].

That interpretation is flawed from start to finish.

1. The most natural way to interpret section 355(f)'s list of litigants eligible to sue is that only "other part[ies] aggrieved by a final decision under [section 355(c)]" must be aggrieved by decisions under section 355(c). Claimants and other types of litigants can be aggrieved by any type

of Board decision. *See Stovic*, 826 F.3d at 503 (internal quotation marks omitted).

Section 355(f)'s list of potential litigants resembles countless other statutes that "list … terms or phrases followed by a limiting clause." *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016). Confronted with such lists, courts generally interpret the limiting clause—here, "aggrieved by a final decision under [section 355](c)"—by applying the "last-antecedent rule." Under that rule, "'a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *Id.* (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012).

Thus, in *Lockhart*, this Court held that each crime in the list of "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor" need not "involv[e] a minor"; only the offense of "abusive sexual conduct involving a minor" does. 136 S. Ct. at 962-63 (internal quotation marks omitted). Likewise, each baseball player on the list of "a defensive catcher, a quick-footed shortstop, or a pitcher from last year's World Champion Kansas City Royals" need not play for the Royals; only the pitcher does. *Id.* at 963. And while the last-antecedent rule is not an absolute command, exceptions to the rule involve "simple and parallel [lists] without unexpected internal modifiers or structure." Scalia & Garner, *supra*, at 147; *see Lockhart*, 136 S. Ct. at 963.

Section 355(f) is a paradigmatic case for applying the last-antecedent rule. Section 355(f)'s first sentence contains 166 words and features an elaborate, 20-phrase grammatical structure; the main verb appears only 67 words in. The key portion of that sentence states: "Any claimant, or any railway labor organization organized in

accordance with … the Railway Labor Act … of which claimant is a member, or any base-year employer of the claimant, or any other party aggrieved by a final decision under [section 355(c)]" can seek judicial review of "any final decision of the Board." No ordinary English speaker would understand these conjunctions of different groups as "a straightforward, parallel construction that involves all nouns or verbs in a series," such that the modifying phrase might naturally apply across the board. Scalia & Garner, *supra*, at 147. Rather, the syntax of the sentence ("any" A, "or any" B, "or any" C, "or any other" D) uses commas and "or anys" to fence off four types of litigants into self-contained categories.

Further, Congress saddled different types of litigants on the list with different (often elaborate) modifiers. Not just "any railway labor organization" can seek judicial review; the organization must be "organized in accordance with … the Railway Labor Act," and must count "the claimant [a]s a member." And not just "any base-year employer" will do; the employer must be "of the claimant." Those modifiers cannot be read to carry over to other types of litigants on the list—claimants, for instance, need not also be organized under the Railway Labor Act. Accordingly, it would be a "heavy lift" to conclude that Congress closed out the list of litigants eligible to seek judicial review with one catch-all modifier ("aggrieved by a final decision under [section 355(c)]") that somehow carries backwards to every other type of litigant when other modifiers do not. *See Lockhart*, 136 S. Ct. at 963. Had Congress intended that blanket limitation, it could have used far more straightforward language. Rather than listing four categories of litigants, Congress could have simply said that "any party aggrieved by a decision under section 355(c)" can sue.

2. The government's interpretation requires further statutory contortions to limit "any final decision" to "any final decision [under section 355(c)]." Under the government's reading that every litigant entitled to sue must be "aggrieved by a final decision under subsection (c)," the government still has a problem: section 355(f) says that all of these litigants "may obtain a review of *any final decision of the Board*." So, under that reading, section 355(f) would allow litigants aggrieved by decisions under section 355(c) to obtain review of any final Board decision, including decisions that did not arise under section 355(c).

The government contends that Congress could not have possibly authorized litigants to challenge decisions that do not aggrieve them, and concludes that "any final decision" must also contain the implied modifier "under section 355(c)." *See* BIO 9-10. But this Court should not rewrite the statute to solve a problem that exists under only the government's interpretation. Under petitioner's reading, no mismatch exists between *who* can sue and *what types* of decisions they can challenge. Any claimant, for instance, can sue over "any final decision," and the phrase "any final decision" reflects the range of decisions that might aggrieve different types of litigants. The government's argument just illustrates the implausibility of its reading.

Further, had Congress intended to limit judicial review under section 355(f) solely to decisions mentioned in section 355(c), Congress could have easily said "any final decision *under section 355(c)*" when providing for judicial review. *See Stovic*, 826 F.3d at 503; *see generally Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013). That is what Congress did when limiting the "any other party" category of litigants entitled to sue under section 355(f) to those "aggrieved by a final decision under [section

355(c)]." Congress also used similar language in section 355(c) to refer specifically to final decisions under that provision. *E.g.*, 45 U.S.C. § 355(c)(5) (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 section 355(f)). Given that Congress used express language targeting final decisions under section 355(c) when it wished to do so, Congress' decision not to qualify the phrase "any final decision" in section 355(f) seems especially deliberate.

The government (at BIO 9 n.2) argues that section 355(c)(5) "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).'" But that phrase does not show that decisions under section 355(c) are the *only* decisions subject to review pursuant to section 355(f).

3. The government's position also conflicts with section 355(g), which recognizes that Board decisions that fall *outside* section 355(c) are subject to judicial review under section 355(f). Again, section 355(g) prescribes specific finality rules for three subsets of judicially reviewable decisions: (1) the "determination of any claim for benefits or refund"; (2) "the determination of any other matter pursuant to [section 355(c)]"; and (3) "the determination of the Board that the unexpended funds in the [Railroad Unemployment Insurance] account are available" to pay claims or benefits. 45 U.S.C. § 355(g); *supra* pp. 21-22.

But many decisions that section 355(g) indicates are judicially reviewable under section 355(f) would be unreviewable under the government's view, because section 355(c) addresses a much narrower list of decisions than section 355(g) does. Section 355(c) prescribes special administrative-review rules for four types of decisions.

First, section 355(c) identifies "initial determination[s]" that deny claims for benefits on grounds that do not confer an automatic right to an appeal to the three-member Board, but which the agency must subject to intermediate review. 45 U.S.C. § 355(c)(1). Then section 355(c) identifies three types of decisions where litigants have a guaranteed right of review by the three-member Board: (1) "initial determination[s]" denying claims for benefits because the employee is not "a qualified employee," or which allegedly "award[] benefits at less than the proper rate," *id.* § 355(c)(2); (2) "initial determination[s]" granting benefits, where the claimant's base-year employer considers the decision erroneous, *id.* § 355(c)(3); and (3) "initial determination[s]" granting benefits, where an employer objects that it is not covered by the statute, *id.* § 355(c)(4).

Most obviously, this list of decisions under section 355(c) does not include Board determinations about the availability of unexpended funds in the Railroad Unemployment Insurance Account. Yet section 355(g) identifies such determinations as judicially reviewable.

Further, section 355(g) recognizes the reviewability of "determination[s] of any claim for benefits or refund," but that category covers many decisions that section 355(c) does not. Decisions terminating or modifying benefits, for instance, fall within section 355(g) but not section 355(c) because they are not "initial determination[s]" on benefits claims. *See* 45 U.S.C. § 355(c)(1), (2). The agency may terminate annuities long after an initial determination if, for example, someone raises (or the agency discovers) evidence questioning the claimant's continuing disability. *E.g.*, 20 C.F.R. §§ 220.180, 220.185, 220.186, 260.1(a)(4). And courts have uniformly treated decisions terminating annuities as reviewable. *E.g.*, *Johnson v.*

R.R. Ret. Bd., 925 F.2d 1374 (11th Cir. 1991); *Kirkland v. R.R. Ret. Bd.*, 706 F.2d 99 (2d Cir. 1983). Yet, under the government's view, these determinations—which are just as significant as the initial grant or denial of benefits—would be unreviewable simply because section 355(c) does not list them expressly.

4. The government's position would also foreclose judicial review of many final decisions that do not fall within either section 355(c) or section 355(g), but that courts have long reviewed. For instance, the Board often decides whether to grant or deny credit to claimants for service or compensation that was not reflected in their railroad employer's records. *See* 20 C.F.R. §§ 210.7, 211.15. Many of these determinations may not involve any claim for benefits or refunds, let alone an initial determination, and would thus fall outside both subsections 355(c) and (g). For example, employees receive annual statements of the service time and compensation that their railroad employer reports to the Board, and must challenge any errors in those determinations within four years—which could be long before the employee seeks benefits. *See* 45 U.S.C. § 231h; 20 C.F.R. §§ 211.16, 260.2; *R.R. Ret. Handbook* at 16. But decisions about whether to grant or deny credit can dramatically affect what benefits claimants receive. Courts routinely review grants or denials of such credit. *E.g.*, *Weyerhaeuser Co. v. R.R. Ret. Bd.*, 503 F.3d 596 (7th Cir. 2007); *Gatewood v. R.R. Ret. Bd.*, 88 F.3d 886 (10th Cir. 1996). The government's position would upend that understanding.

Similarly, Board orders requiring beneficiaries to repay erroneous payments do not fall within section 355(c) or section 355(g). Such "recovery" orders simply seek repayment for what may be a one-time mistake. These orders can arise if, for instance, the beneficiary performs

temporary work during retirement or the Board makes a mistake in overpaying benefits during a given month. *See* 20 C.F.R. § 255.2; *R.R. Ret. Handbook* at 24. The beneficiary has the right to request that the Board waive recovery at its discretion, if the beneficiary was not at fault and recovery would be inequitable. *Id.* § 255.10; *Scott v. R.R. Ret. Bd.*, 631 F.3d 359, 362 (6th Cir. 2011).

These decisions do not fall within section 355(c), because overpayment recovery involves developments after the initial grant of benefits, and may not affect a claimant's ultimate entitlement to benefits. Nor are these decisions covered by section 355(g), since they concern "recovery" of already-paid benefits, not a claim for benefits or a contribution refund. *See* 45 U.S.C. § 231*i*. Yet courts have long considered recovery decisions—and even Board decisions denying a waiver of recovery—to be final decisions subject to judicial review. *E.g.*, *Burke v. R.R. Ret. Bd.*, 165 F.2d 24 (D.C. Cir. 1947) (per curiam); *King v. R.R. Ret. Bd.*, 981 F.2d 365 (8th Cir. 1992); *Scott*, 631 F.3d at 362. The government's cramped position would upend that settled understanding.

At bottom, it is unsurprising that section 355(c) does not cover the waterfront of final Board decisions subject to judicial review. Section 355(c) simply identifies specific types of decisions where the Board *must* make administrative appeals available. Section 355(c) does not bar the Board from reviewing other types of decisions. Section 355(c) thus says nothing about the full range of "final decisions" that the Board might ultimately issue.

5. By cutting off judicial review of denials of reopening and myriad other types of decisions, the government's interpretation raises separation-of-powers concerns. If the government is right, there are virtually no checks on

hugely consequential Board decisions that fall outside section 355(c). The Board could deny a reopening request despite later revelations that the hearing officer harbored inappropriate bias that affected all of his decisions. The Board could require beneficiaries to resubmit evidence of disability every week, on pain of terminating their benefits. The Board could categorically reject reopening requests from employers. Or the Board could force impoverished railroad workers to repay all at once annuities that the Board had erroneously paid for years.

Section 355(f) also appears to be the only means of mounting challenges to statutory provisions or regulations, which litigants can challenge only in connection with individual Board determinations. Courts have held that section 355(g) prescribes judicial review under section 355(f) as the exclusive channel for judicial review, and have considered the APA inapplicable. *E.g.*, *Steebe*, 708 F.2d at 254; *Denberg*, 696 F.2d at 1193; *see also* 5 U.S.C. §§ 551(1)(E), 701(b)(1)(E) (APA exemption for "agencies composed of representatives of the parties or of representatives of the organizations of the parties" to disputes the agency hears); H.R. Rep. No. 79-1980, at 253 (1946) ("the Railroad Retirement Board" is "exclude[d] from all but the [APA's] public-information provisions"). If the Board promulgated a regulation limiting reopening to redheaded claimants, or a regulation terminating all annuities granted in leap years, claimants would have no judicial recourse.

These examples are extreme—but they highlight the unlikelihood that Congress intended to subject the Nation's railroad workers to the mercy of an unchecked bureaucracy. As this Court observed in *Bowen*, "[i]t has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined

to the scope of authority granted or to the objectives specified." 476 U.S. at 667, 671 (1986) (internal quotation marks omitted). Otherwise, "statutes would in effect be blank checks drawn to the credit of some administrative officer or board." *Id.*

The upshot of the government's position is that, because Congress delegated to the Board the authority to establish these types of decisions instead of listing them in section 355(c), Congress freed the Board from any judicial checks on the Board's exercise of that authority. Aggravating the problem, Congress cabined Executive Branch supervision, which could otherwise provide a check on arbitrary agency action. *See generally Myers v. United States*, 272 U.S. 52 (1926). Ordinarily, the President shapes agency decision-making by installing his choice of principal officers to run the agency. *See, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 488-89 (1989) (Kennedy, J., concurring). But here, Congress requires the President to choose two of the Board's three members from lists supplied by labor and industry, and limits the President's choice of chairman to individuals unrelated to employers or labor organizations. *See* 45 U.S.C. § 231f(a). Nor can the President discipline the Board through executive oversight of its budget; section 231f(f) prohibits any Executive Branch supervision of the Board's budgetary and legislative requests. *Id.* § 231f(f).

This Court should not lightly infer that Congress sealed off many of the Board's critical decisions from executive or judicial accountability. The Constitution created an "interior structure of the government" that would enable "its several constituent parts …, by their mutual relations, [to] be the means of keeping each other in their proper places." The Federalist No. 51, at 317-18 (J. Madison) (Clinton Rossiter ed., 2003); *see Free Enter.*

Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 501 (2010). But if litigants aggrieved by Board decisions cannot turn to the judiciary, there are few other checks in sight. The Board would be a law unto itself, empowered to invent its own procedures and then apply them however it pleased to hundreds of thousands of claimants for whom Board-administered benefits may be the only source of income—not to mention employers and others with significant stakes in the adjudicatory process.

B. *Califano v. Sanders* Does Not Justify Cutting Off Judicial Review Under the RRA and RUIA

This Court in *Califano v. Sanders*, 430 U.S. 99 (1977), held that denials of requests to reopen benefits determinations under the Social Security Act are unreviewable. *Id.* at 107-09. The government (at BIO 10-12) and some circuits maintain that *Sanders* dictates cutting off judicial review of denials of reopening under the RRA and RUIA.[3] But there is no basis for superimposing reasoning unique to the Social Security Act on the very different judicial-review scheme here.

1. *Sanders* does not control because of "critical textual difference[s]" between the judicial review provisions governing Social Security and railroad benefits. *Stovic*, 826 F.3d at 504. The Social Security Act authorizes "judicial review of 'any final decision of the [agency] made after a hearing.'" *Smith*, 139 S. Ct. at 1771-72 (alteration omitted) (quoting 42 U.S.C. § 405(g)). Thus, only final Social Security decisions "made after a hearing" are reviewable.

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[3] *See Steebe v. R.R. Ret. Bd.*, 708 F.2d 250, 255 (7th Cir. 1983); *Cunningham v. R.R. Ret. Bd.*, 392 F.3d 567, 573 (3d Cir. 2004); *Harris v. R.R. Ret. Bd.*, 198 F.3d 139, 142 (4th Cir. 1999); *Roberts v. R.R. Ret. Bd.*, 346 F.3d 139, 141 (5th Cir. 2003); *Abbruzzese v. R.R. Ret. Bd.*, 63 F.3d 972, 974 (10th Cir. 1995).

Sanders held that because the Social Security Administration can deny petitions for reopening "without a hearing," such denials are not reviewable final decisions "made after a hearing." 430 U.S. at 108; *see Smith*, 139 S. Ct. at 1775 & n.12.

The RUIA and RRA contain no equivalent language limiting judicial review to final decisions "made after a hearing." Rather, section 355(f) broadly authorizes judicial review of "any final decision of the Board," 45 U.S.C. § 355(f), whatever the type. *Supra* pp. 18-19. *Smith* underscores that denials of reopening generally are "final decision[s]." *See* 139 S. Ct. at 1774-76. Thus, "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 [section 355(f)]." *Stovic*, 826 F.3d at 504. No courts that have relied on *Sanders* addressed these material differences. *Id.* at 505. And the government's analogy between the two statutory schemes depends on its faulty assumption that the RRA and RUIA allow judicial review only of final decisions under section 355(c). BIO 10-11; *supra* pp. 29-32.

2. The government (at BIO 10-12) focuses on a passage in *Sanders* listing two additional considerations weighing against review. *Sanders* observed that reopening exists by virtue of regulation, not legislative command, and that judicial review of denials of reopening would undermine Congress' purpose in setting a 60-day time limit to seek judicial review of initial Social Security decisions. 430 U.S. at 108. But these considerations buttressed *Sanders*'s reading of the text of the Social Security Act; they do not independently satisfy the government's "heavy burden" of showing "clear and convincing" textual or contextual evidence to preclude judicial review. *See Mach Mining*, 575 U.S. at 486; *Bowen*, 476 U.S. at 672.

Regardless, these considerations do not translate to the RRA or RUIA.

First, the mere fact that regulations govern reopening of both Social Security and railroad benefits determinations does not control their reviewability. *Sanders* observed that "the opportunity to reopen final decisions and any hearing" on such requests were matters of agency grace to explain why final decisions rendered after hearings on reopening requests still would not qualify as "final decision[s] … made after a hearing" under 42 U.S.C. § 405(g). *See* 430 U.S. at 108. Because the agency did not have to hold a hearing before denying reopening, denial of reopening fundamentally differs from decisions on initial Social Security claims, which the Social Security Act allows the agency to make only after a hearing. *See Smith*, 139 S. Ct. at 1775. That statute-specific reasoning does not carry over here, again because section 355(f) involves no analogous language limiting judicial review to Board decisions "made after a hearing."

Sanders thus did not enshrine a blanket rule that agency-created procedures are immune from judicial review just because Congress gave the agency the discretion to establish them. *Smith* proves the point. The Court held that challenges involving claimants' compliance with agency-created deadlines for filing Social Security benefits appeals with the agency's Appeals Council are reviewable, even though those deadlines, and the Appeals Council itself, exist only by regulation. *See id.* at 1772, 1775-76. This Court explained, "While Congress left it to the SSA to define the procedures that claimants like Smith must first pass through … Congress has not suggested that it intended for the SSA to be the unreviewable arbiter of whether claimants have complied with those procedures." *Id.* at 1777. Likewise, *Hawkes*

held that the Army Corps of Engineers' standalone jurisdictional determinations were subject to judicial review even though the Corps issues those freestanding determinations as a matter of discretion and under its regulations. *See* 136 S. Ct. at 1816; *supra* p. 24.

The government's reading of *Sanders* would raise other major separation-of-powers concerns. A rule subjecting only congressionally mandated agency decisions to judicial review would perversely mean that the broader the delegation of rulemaking authority to an agency, the fewer checks on its exercise. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2134, 2144 (2019) (Gorsuch, J., dissenting). As applied to the RRA and RUIA, such a rule would insulate myriad decisions beyond reopening from judicial review—including modifications of benefits, which exist by virtue of regulations. *Supra* pp. 35-36; 20 C.F.R § 260.1(a)(5). The RRA's and RUIA's structure suggests that Congress instead had accountability in mind. "Congress granted the Board the power" to establish procedures for types of decisions beyond those listed in section 355(c), "[y]et Congress declined to place a limit on what final Board decisions are reviewable. That feature of the statutory scheme further suggests that Congress wanted courts to review final decisions flowing from the Board-created procedures." *Stovic*, 826 F.3d at 503.

Second, *Sanders*'s concern that judicial review of denials of reopening would "frustrate the congressional purpose … to impose a 60-day limitation upon judicial review" of initial Social Security benefits determinations, 430 U.S. at 108, is inapposite. *Cf.* BIO 10-12; *Cunningham*, 392 F.3d at 574; *Roberts*, 346 F.3d at 141. *Sanders* perceived the short, 60-day window as an effort to "forestall repetitive or belated litigation." 430 U.S. at 108.

The RRA and RUIA do not support similar inferences of congressional purpose. Both prescribe longer deadlines for seeking review. Litigants have a year to challenge any final "decision with respect to an annuity, supplemental annuity, or lump-sum benefit" under the RRA. 45 U.S.C. § 231g. And litigants have 90 days to challenge any other type of final decision under the RRA and all final decisions under the RUIA. *Id.* § 355(f). Congress gave no reason for those disparate deadlines; one might infer that Congress did not mind drawn-out litigation in some cases.

Meanwhile, other aspects of the statutory scheme refute an unstated legislative purpose to preclude judicial review of decisions that revisit initial railroad benefits determinations. Congress provided for judicial review of challenges to benefits terminations or alterations, *see* 45 U.S.C. § 355(g), even though such later changes obviously undermine the finality of initial determinations. *Supra* pp. 35-36. Similarly, the Board from its inception believed that Congress implicitly granted the power to reopen final decisions because Congress wanted the agency to correct its inevitable mistakes. *See* Legal Op. 39-527, at 18; *supra* p. 9. And the Board has always authorized reopening on some grounds no matter how much time has passed, further undercutting the notion that Congress intended the deadlines for judicial review to somehow bar revisiting decisions later. *E.g.*, 20 C.F.R. §§ 261.2(c), 349.2; Legal Op. 39-527 at 1-2.

Nor does judicial review of denials of reopening reward duplicative litigation. Mr. Salinas seeks reopening, for example, because he obtained new, material medical evidence after the agency denied his 2006 application. Regardless, "[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 [section 355(f)]." *Stovic*, 826 F.3d at 505.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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