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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

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Congress unambiguously authorized judicial review of all final decisions of the Railroad Retirement Board. Section 355(f) of the Railroad Unemployment Insurance Act (RUIA) authorizes parties to "obtain a review of any final decision of the Board." 45 U.S.C. § 355(f). That language is crystal clear: "Any" means *every* final decision, including decisions denying reopening of earlier benefits determinations. Had Congress wanted to limit the field of reviewable final decisions, it could easily have done so—as it did so elsewhere in section 355. The longstanding presumption of judicial review of agency action confirms reviewability. And judicial review of final Board decisions—including denials of reopening—ensures accountability and accuracy for decisions that can profoundly affect individual lives.

The government instead equates "any final decision" in section 355(f) with final decisions under section 355(c). That interpretation inserts words that Congress omitted, defies longstanding interpretive canons, and would also leave significant categories of decisions unreviewable, raising serious separation-of-powers concerns.

I. Congress Authorized Judicial Review Of Reopening Denials

The statutory text, structure, and presumption of judicial review—as well as underlying statutory policies—confirm that decisions denying reopening are reviewable.

A. The Text Confirms Reviewability

1. **Section 355(f).** This RUIA provision unambiguously subjects "any final decision of the Board" to judicial review. "Any" means every. Br. 19. The government does not dispute that reopening denials qualify as "final decisions," *i.e.*, decisions that represent the endpoint of the Board's decision-making. That should end the case.

But there is more. Congress reinforced its intent to subject all final decisions to judicial review by omitting qualifiers from the phrase "any final decision" while singling out subsets of final decisions (like a final decision "concerning a claim for benefits") elsewhere in section 355. Br. 19-20. The government (at 28) responds that Congress in section 355(f) implicitly limited "any final decision" to decisions under section 355(c), by listing "any other parties aggrieved by a final decision under [section 355(c)]" as one category of litigants eligible to sue. But section 355(f) implies nothing of the sort. *Infra* p. 10-16.

The government (at 19) is also wrong that petitioner's interpretation permits non-aggrieved parties to challenge any final Board decision. Under section 355(f), the "claimant or other party" seeking judicial review must have

been a party to that decision in administrative proceedings. Further, Article III independently forecloses suits by non-aggrieved parties. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620-21 (2020).

2. **Section 231g.** Section 231g makes the same decisions reviewable under the RRA and RUIA, by equating "any final decision of the Board" under section 355(f) with a "[d]ecision … determining the rights or liabilities of any person under [the RRA]." Br. 21; U.S. Br. 12, 30. Because a decision denying reopening under the RRA is clearly reviewable, the same is true under the RUIA. Section 231g parallels the Administrative Procedure Act (APA), under which "final agency action" occurs when "rights or obligations have been determined, or … legal consequences will flow" from the decision. Br. 21, 23; *Smith v. Berryhill*, 139 S. Ct. 1765, 1775-76 (2019) (using APA as analogue to define "final decision" under Social Security Act). Denials of reopening determine rights or liabilities under the RRA by denying claimants further opportunity to vindicate their legal entitlement to benefits. Denials of reopening thus are also "final decisions of the Board" under section 355(f).

The government (at 30) unconvincingly argues that denials of reopening do not "determin[e] rights or liabilities" because they "leave the Board's original decision intact." But requesting reopening does seek a legal benefit, and the agency's denial of that benefit is reviewable even though the agency did not change its answer. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016). The government elsewhere (at 33) seemingly acknowledges that denials of reopening carry legal consequences; why those denials do not also determine legal rights is not apparent. For instance, the denial here bars petitioner from raising newly available evidence showing

his statutory entitlement to benefits. Courts have considered similar denials of reopening to be decisions determining rights or liabilities. *E.g.*, *Mulloy v. United States*, 398 U.S. 410, 414-15 (1970) (refusal to reopen Selective Service classification deprived draftee of an "essential procedural right" to reconsideration and appeal which would follow from a reopening grant); *Berry v. Dep't of Labor*, 832 F.3d 627, 633-34 (6th Cir. 2016) (describing denial of reopening in the face of new evidence as a "concrete injury" to the claimant).

The government's alternative assertion (at 30)—that reopening denials do not determine rights or liabilities "under [the RRA]" because the RRA confers no "right" to reopening—misreads section 231g. The relevant "right" is a claimant's entitlement to benefits, which the Board "determin[es]" against him by refusing to consider new grounds potentially demonstrating that entitlement. *See Berry*, 832 F.3d at 633-34.

Contrary to the government's claim (at 31-32), this Court's precedents do not treat reopening denials as unreviewable legal nullities. Denials of reopening of Social Security benefits determinations are "final decision[s]" under the Social Security Act. Under *Califano v. Sanders*, 430 U.S. 99 (1977), and *Smith*, those denials are nonetheless unreviewable because the Act's text subjects only final decisions "made after a hearing" to review—a limitation not present here. Br. 40-41; *Smith*, 139 S. Ct. at 1774-75. Nor did this Court deem denials of reopening categorically unreviewable in the Medicare context. *Your Home Visiting Nurse Services, Inc. v. Shalala*, 525 U.S. 449 (1999), deferred under *Chevron* to the government's view that certain denials of reopening are not "final determination[s] … as to the amount [of] reimbursement" under the Medicare statute for purposes of determining

whether one agency body had jurisdiction over a different adjudicator's decisions. *Id.* at 453 (quoting 42 U.S.C. § 1395*oo*(a)(1)(A)(i)). The "primary issue" in *Your Home* thus involved review procedures within the agency, *i.e.*, whether one administrative body (the Board) "has jurisdiction to review a fiscal intermediary's refusal to reopen a reimbursement determination"—not judicial review. *Id.* at 452. And that statutory text also restricted review to certain "final determination[s]." *Id.* at 453.

SEC v. Louisiana Public Service Commission (cited at U.S. Br. 32), does not help the government. The Court held that a reviewable "order made under" section 11(b) of the Public Utility Holding Company Act did not include decisions denying reopening. 353 U.S. 368, 371 (1957) (per curiam). But section 11(b) delineated types of "orders" the agency could make, and reopening denials were not one of them. *Id.* at 371-72. That holding reinforces that when Congress wants to confine judicial review to some decisions—like "order[s] made under this subsection"—it employs specific modifiers. 15 U.S.C. § 79k(b) (1952). But when Congress uses broader language—like "any final decision" or a "decision determining the rights or liabilities of any person"—decisions denying reopening are among the decisions Congress had in mind.

3. **Section 355(g).** Section 355(g) identifies three kinds of final decisions reviewable under section 355(f), including "the determination of any claim for benefits or refund." Section 355(g) thus covers denials of reopening. Br. 21-22. The government (at 28-29) responds that section 355(g) just sets contingent rules *if* those decisions are reviewable. But it would be irrational for Congress in section 355(g) to make section 355(f) the exclusive channel of review for decisions that Congress intended would *not* be reviewable.

B. The Statutory Structure Supports Reviewability

Reading the RUIA according to its plain terms is neither "haphazard" nor "bizarre." *Cf.* U.S. Br. 23-24. Congress reasonably singled out certain decisions under the RUIA for exhaustion and exclusivity-of-review rules, while ensuring that all final decisions face judicial scrutiny. The RRA's similar structure—which the government never discusses—confirms there is nothing odd about petitioner's reading.

Start with the RUIA's exhaustion rules. Section 355(c) requires the three-member Board to review three types of cases, *i.e.*, decisions denying benefits on certain grounds, employer appeals from grants of benefits, and determinations of covered-employer status. 45 U.S.C. §§ 355(c)(2)-(4). Congress prescribed hearings—but not necessarily Board review—for other cases involving initial benefits determinations. *Id.* § 355(c)(1). Congress authorized the Board to create its own procedures for administrative review of other decisions. *Id.* § 355(d). But whether the decision is one the three-member Board must make, chooses to make, or leaves to an intermediate body, sections 355(c) and (d) recognize the end result as the "final decision of the Board." *Id.* §§ 355(c)(5), (d).

The RUIA's exhaustion and judicial-review provisions thus work together. Sections 355(c) and (d) sketch out different exhaustion paths for different decisions. But all paths produce a "final decision of the Board," *id.* § 355(d), and section 355(f) refers to "any final decision of the Board" to ensure that all such decisions are judicially reviewable.

Further, the RRA also subjects only some decisions to mandatory exhaustion rules, *i.e.*, the three-member

Board must review "decision[s] on [a claimant's] application for an annuity or other benefit." *Id.* § 231f(b)(3). But the RRA's judicial-review provision is broader: all "[d]ecisions … determining the rights or liabilities of any person" are reviewable. *Id.* § 231g; *see* U.S. Br. 33 (acknowledging that "decisions respecting an annuity" are a subset of that category). So any purported oddity in subjecting a broad category of decisions to judicial review and a narrower category to mandatory-exhaustion rules would persist even under the government's reading, as would other purported mismatches. *Infra* p. 16-19.

Nor should the Court ignore the plain statutory text simply because section 355(g) specifies that findings of fact and conclusions of law in some, but not all, types of reviewable decisions receive conclusive effect and are reviewable only via section 355(f). *Cf.* U.S. Br. 23-24. Congress sensibly might have singled out certain Board "findings of fact and conclusions of law" because those judgments draw on the Board's adjudicatory expertise, and are thus decisions that Congress would not want other Executive Branch actors to second-guess. And Congress might have rationally decided to make section 355(f) the exclusive means of reviewing those determinations in connection with "the determination of any claim for benefits or refund," "any other matter pursuant to [section 355(c)]," and the availability of unexpended funds because those decisions relate to the Board's basic mission of adjudicating benefits. Congress did not prescribe the full range of other decisions the Board might make, or whether other avenues of review would make sense for those types of decisions. Br. 36-37.

C. The Presumption of Judicial Review and Statutory Policies Favor Review

The government (at 41) suggests disregarding the venerable presumption of judicial review "in a large benefits program" where Congress "leaves the availability of reopening entirely to agency discretion." But the notion that such agencies are too big or too busy to face judicial scrutiny is anathema to separation-of-powers principles and common sense. Precisely because "the [Social Security Administration] is a massive enterprise, and mistakes will occur," this Court in *Smith* did "not presume that Congress intended for this claimant-protective statute … to leave a claimant without recourse to the courts when such a mistake does occur." 139 S. Ct. at 1776. The presumption applies to other decisions made pursuant to regulations (like Social Security filing deadlines and standalone jurisdictional determinations under the Clean Water Act). Br. 24. And the Court applied the presumption to discretionary denials of reopening in immigration proceedings, noting that reopening had no statutory basis for decades and that courts reviewed denials of reopening all the while. *Kucana v. Holder*, 558 U.S. 233, 242, 251-52 (2010). There is no reason to treat Board reopening denials differently.

The government (at 41-42) emphasizes that *Your Home*, *Sanders*, and *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270 (1987), did not mention the presumption. But *Your Home* and *Sanders* are significantly distinguishable. *Supra* p. 4-5. And *Locomotive Engineers* concerned the APA provision precluding judicial review of "agency action … committed to agency discretion by law," 5 U.S.C. § 701(a)(2); *see* 482 U.S. at 282. The government concedes

(at 36 n.6) that reopening challenges based on new evidence (like petitioner's) are *not* committed to agency discretion by law.

Finally, statutory policies favor review. Making all final Board decisions reviewable, including denials of reopening, serves as a critical check on the wide powers Congress delegated to the Board. Judicial review also ensures the "accuracy and fairness" of decisions that carry momentous consequences for railroad employees and their families. *Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 505 (D.C. Cir. 2016); Br. 26-29.

The government (at 14, 16, 36-37) calls judicial review of reopening denials a gratuitous "second bite at the apple." But the premise of reopening claims is that something materially changed or warrants a new look. The initial review process is inadequate for petitioner and others who obtain material evidence thereafter, or for anyone who uncovers fraud or has other bases for reopening. 20 C.F.R. §§ 261.2 (RRA), 349.2 (RUIA). The government's accusation (at 40) that petitioner is "raising arguments that [he] could have raised in 2006" is irrelevant to the question presented and misapprehends petitioner's claim. Mr. Salinas seeks to reopen his 2006 benefits application based on material new medical evidence that the Board never saw and which he could not submit earlier through no fault of his own. Br. 13 (citing AR-408-09, AR-410-12, AR-462-64).

Nor would judicial review of denials of reopening "undermine" the limitations period and exhaustion requirements for seeking review of the underlying claim. *Cf.* U.S. Br. 39-40. That objection misconceives of reopening requests as vexatious, carbon-copy relitigation. If reopening were so disruptive, it is unclear why "the Board

[has] viewed (and continues to view) reopening as consonant with the purposes of the RRA and RUIA." U.S. Br. 35 n.5. Nor is it obvious why the Board would have originally considered denials of reopening reviewable. *See* Legal Op. 42-673 at 4 (Dec. 15, 1942).[1] Surely, were the government right, agency regulations would not authorize the three-member Board to reopen prior decisions at any time, for any reason. *But see* 20 C.F.R. §§ 261.11 (RRA), 349.8 (RUIA). Some circuits have allowed review of reopening denials for a half-century, yet no flood of litigants has invoked reopening to circumvent earlier defaults. *Stovic*, 826 F.3d at 505-06.

II. The Government's Reliance On Section 355(c) Lacks Merit

The government contends that section 355(f) limits judicial review to "final decisions of the Board" under section 355(c). Further, the government claims that Congress subjected the same categories of decisions to

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[1] The government (at 16, 47-48) dismisses the Board's prior position because the 1942 statute purportedly contained a "materially broader review provision" allowing review of both "decision[s]" and "action[s]." The government suggests denials of reopening are "actions," not "decisions," and became unreviewable when Congress in 1946 limited judicial review to "decisions." That subtle change falls short of the clear jurisdiction-withdrawing language this Court requires. *E.g.*, *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012). Indeed, observers believed "the only thing that this bill does … is to make applicable to retirement proceedings the present judicial review of [sic] procedure of the [RUIA]." *Railroad Retirement: Hearings on H.R. 1362 Before the H. Comm. on Interstate and Foreign Commerce*, 79th Cong., 1st Sess. pt. 3, 1086 (1945) (statement of Lester P. Schoene, Railway Labor Executives' Association). The government's brief describes reopening denials as "decisions" 23 times, further belying any notion that reopening denials are "actions" but not "decisions."

exhaustion rules under section 355(c), exclusivity-of-review rules under section 355(g), and judicial review under section 355(f) of the RUIA and section 231g of the RRA. That reading fails from start to finish.

1. **Extratextual insertions.** Section 355(f) provides: "Any claimant, or any railway labor organization …, or any base-year employer …, or any other party aggrieved by a final decision under [section 355(c)] … may … obtain a review of any final decision of the Board." 45 U.S.C. § 355(f). Even were the government correct that only litigants "aggrieved by a final decision under [section 355(c)]" could sue (it is not, *infra* p. 12-16), section 355(f) authorizes litigants to "obtain a review of any final decision of the Board." Accordingly, the government's position requires reading this phrase as "any final decision of the Board *under section 355(c)*." U.S. Br. 20, 28; Br. 33-34. Only then would the government's reading make sense by aligning authorized litigants with reviewable decisions. *Stovic*, 826 F.3d at 503.

But the government never justifies its extratextual footwork. "[T]his Court may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). That goes "doubly" true "when Congress has (as here) included the term in question elsewhere in the very same statutory provision." *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020). Congress declined to limit "any final decision of the Board," yet referred to "any other party aggrieved by a final decision under [section 355(c)]" elsewhere in section 355(f). There is no reason to disregard the simple, plain reading of the text in favor of a reading that requires two atextual moves.

The judicial-review provision in *Sanders*, 42 U.S.C. § 405(g), further undermines the government's reading.

Section 405(g) reads: "Any individual, after any final decision of the [Commissioner] made after a hearing to which he was a party … may obtain a review of such decision." Unlike section 355(f), section 405(g) does not list specific parties who can sue. And, unlike section 355(f), section 405(g) includes an express modifier ("made after a hearing…") to limit the types of final decisions litigants may challenge. Far from being a "parallel" to section 355(f), U.S. Br. 20, section 405(g) shows that Congress clearly limits the class of reviewable final decisions when that is its aim. *Stovic*, 826 F.3d at 504-05.

Finally, the government's contention (at 18-19) that under its reading, section 355(f) "refers to the same 'decision' and 'party' throughout" is irrelevant. Under both sides' interpretations, the relevant class of parties can seek judicial review of the relevant class of reviewable decisions after exhausting any administrative remedies with respect to that decision. That feature of section 355(f) does not show that only parties aggrieved by decisions under section 355(c) can challenge only decisions under section 355(c).

2. **Last-Antecedent Rule.** By reading the phrase "aggrieved by a final decision under [section 355(c)]" as extending to everyone on section 355(f)'s list of potential litigants, the government's interpretation violates the last-antecedent rule. Applying that rule, only "any other party" must be "aggrieved by a final decision under [section 355(c)]"—claimants, base-year employers, and unions need not be. Br. 30-32.

The government (at 25) argues that the last-antecedent rule never applies when "the final list item … is set off by the word 'other.'" But this Court has already rejected the notion that when "a sentence sets out one or more specific items followed by 'any other' and a description, the

specific items must fall within the description"—because "it is precisely contrary to … the grammatical 'rule of the last antecedent.'" *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Words like "other" and "another," when used in statutory lists, "are just as likely to be words of *differentiation* as they are to be words of connection." *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 343 n.3 (2005).

For instance, Chief Justice Marshall in *United States v. Palmer*, 16 U.S. 610 (1818), held that all types of robbery, not just robberies punishable by death, were piracy under a statute defining piracy as "commit[ting], upon the high seas … murder or robbery, or any other offence, which, if committed within the body of a country, would … be punishable with death." *Id.* at 626. Had Congress wanted to limit piracy to death-eligible offenses across the board, Congress would have said "'any offence' committed on the high seas, which, if committed in the body of a country, would be punishable with death." *Id.* at 628-29.

Likewise, *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385 (1959), applied the last-antecedent rule to a statutory definition of "invoice" as "a written account … transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs." *Id.* at 386. Requiring everyone to be a fur dealer, the Court explained, "would be a partial mutilation of this Act." *Id.* at 389-90.[2]

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[2] *Accord Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996) ("The clause, 'who could obtain judicial review of that action under applicable law,' modifies only the immediately preceding category, 'any other person.'"); *MacFarland v. Elverson*, 32 App. D.C. 81, 87 (1908) (the

Had Congress intended the government's reading of section 355(f), Congress could have authorized "any party aggrieved by a final decision under [section 355(c)]" to sue. The government (at 27) effectively concedes that its interpretation creates superfluity, but speculates that Congress coupled a redundant partial list of parties aggrieved under section 355(c) with a catch-all "to rebut … any inference that only certain aggrieved parties" could sue. But that was unnecessary; section 355(c) already rebuts the inference that only certain aggrieved parties can challenge decisions under that subsection, by listing specific parties aggrieved by those decisions and reiterating that "[a]ny properly interested party" can also obtain judicial review. 45 U.S.C. §§ 355(c)(2)-(4), (c)(5). Why reinvent the wheel in section 355(f) by recapping parts of section 355(c), instead of using a cross-reference?

The government's counterexamples (at 18, 25-26) are distinguishable. No grocery-store manager would consider "fruit, vegetables, or any other fresh produce" to be "different members of a single category." Fruits and vegetables cover the waterfront of fresh produce, so a hypothetical order for "fruit, vegetables, and any other fresh fruit or vegetables" is nonsensical. Regardless, the simple structure of that list looks nothing like section 355(c)'s cornucopia of complex modifiers.

Paroline v. United States, 572 U.S. 434 (2014) (cited at U.S. Br. 25), interpreted a list of various losses to victims "as a result of" child pornography that defendants owed as restitution. The Court held that the final phrase "any other losses suffered by the victim as a proximate result of the offense" applied a proximate-cause limitation

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words "'authorized by Congress,' limit only the words preceding them in the same phrase, 'or for any other municipal purpose'").

to all preceding items. *Id.* at 446-47. But that was because "as a result of" ordinarily incorporates proximate causation. Applying the last-antecedent rule would bizarrely override that ordinary meaning for some losses and not others. *Id.* at 447-48. Further, applying the last-antecedent rule to impose a lesser causation standard for some losses would implausibly require restitution "in situations … akin to mere fortuity." *Id.* at 448.[3]

Similarly, *United States v. Standard Brewery*, 251 U.S. 210 (1920) (cited at U.S. Br. 26), held that everything in the list "no beer, wine, or other intoxicating malt or vinous liquor shall be sold" must be "intoxicating." That holding rested on Congress' stated purpose of preventing drunkenness from impairing wartime production and on constitutional concerns about Congress' power to prohibit non-intoxicating beverages. *Id.* at 219-20.

Those counterexamples illustrate that simple, parallel lists sometimes present exceptions to the last-antecedent rule (Br. 31), but they starkly contrast with the complex syntax of section 355(f). "No A, B, or other C," and "any costs … for A, B, C, D, E, and any other F," are straightforward lists involving another modifier ("no" or "any") that already applies to everything. But section 355(f) uses "any A, or any B, or any C, or any other D"—syntax suggesting separation. Further, section 355(f)'s list is replete with other modifiers (like "a railway organization organized in accordance with the provisions of the

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[3] *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016) (cited at U.S. Br. 18), concerns the Hobbs Act's definition of "commerce" and does not discuss the last-antecedent rule. That definition lists types of commerce, closing with "all other commerce over which the United States has jurisdiction." *Id.* (quoting 18 U.S.C. § 1951(b)(3)). Congress cannot regulate commerce over which the United States *lacks* jurisdiction, so of course that language applies globally.

Railway Labor Act…"). The government never explains how its preferred modifier ("aggrieved by a final decision under [section 355(c)]") extends to the whole list of potential litigants, when other modifiers do not. Br. 32.

Section 355(f) also features none of the policy or constitutional concerns animating the government's counterexamples. The government cites none, instead (at 26-27) suggesting disregarding the last-antecedent rule whenever a modifier could apply to all terms on a list without producing absurdity. That would demote the last-antecedent rule to an infrequent exception. Overriding the last-antecedent rule would be particularly inappropriate here given the presumption of reviewability and the separation-of-powers concerns the government's reading raises.

3. **Structural incoherence.** The government (at 20-23, 29-30) asserts that Congress subjected the same set of decisions to mandatory exhaustion rules, judicial review, and review-exclusivity rules. All roads lead to section 355(c), the government says—Congress just used different shorthand each time in sections 355(f), (g), and 231g. But Congress does not accomplish harmonization by employing multiple different complex formulations to say "decisions under section 355(c)." "[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Antonin Scalia & Bryan A. Garner, *Reading Law* 170 (2012). And limiting judicial review to decisions under section 355(c) makes a mess of the statutory scheme.

Section 355(g). Section 355(g) makes section 355(f) the only avenue for reviewing findings of fact and legal conclusions in three types of RUIA decisions: "determination[s] of any claim for benefits or refund,"

"determination[s] of any other matter pursuant to [section 355(c)]," or "determination[s] … that [certain] unexpended funds … are available" to pay claims. Section 355(g) refutes the government's reading because those listed decisions encompass, but plainly extend beyond, decisions under section 355(c)—and Congress would hardly mandate an exclusive judicial-review process for unreviewable decisions. Br. 34-36.

The government's solution (at 22-23)—that section 355(g) is "limited to decisions under Section 355(c)"—defies credulity. The government (at 22 n.4) concedes that section 355(g) determinations about unexpended funds fall outside section 355(c), yet deems their unreviewability unimportant. But the fact that one of section 355(g)'s three listed categories falls outside section 355(c) is proof certain that section 355(g) is *not* listing the same decisions as section 355(c).

Further, the government's limitation of "any claim for benefits or refund" in section 355(g) to determinations under section 355(c) is preposterous. The government hypothesizes that the mid-list modifier "pursuant to [section 355(c)]" applies to its last antecedent ("other matters") and to "any claim for benefits or refund." But the government concedes that modifier cannot modify the final item on the list, unexpended-fund determinations—and there is no grammatical basis for selectively applying a modifier to half a list. The government's reading also produces massive surplusage. Section 355(c)(7) already makes section 355(f) the exclusive channel for reviewing "[a]ny issue determinable pursuant to [section 355(c)]," and section 355(c)(5) gives conclusive effect to "[f]inal decision[s] of the Board" described in section 355(c). Why would Congress use different words to repeat the same thing in section 355(g)?

Section 231g. The government (at 29-30) agrees that the same scope of decisions are reviewable under the RUIA and RRA, but that creates another problem for its interpretation. Section 231g authorizes review of "[d]ecisions … determining the rights or liabilities of any person under [the RRA]." That comprehensive phrase sounds nothing like section 355(c)'s hyper-specific description of RUIA decisions subject to mandatory exhaustion rules. The government (at 30) asserts that section 231g "distill[s] and summarize[s] the *kinds* of decisions reviewable under Section 355(c)." But just because section 231g encompasses decisions listed in section 355(c) does not mean *only* those decisions are reviewable.

Other mismatches. Congress harmonized the scope of judicial review under the RRA and RUIA, but prescribed different exhaustion and exclusivity rules in the two statutes for different classes of decisions. Imposing artificial uniformity on the exhaustion, judicial-review, and exclusivity-of-review rules in the RUIA would thus be pointless. Even under the government's reading, Congress created non-uniform rules across the statutory scheme.

Take exhaustion: the RUIA requires the three-member Board to review three specific types of challenges, *see* 45 U.S.C. § 355(c)(2)-(4); *supra* p. 6. The RRA instead contains a broad mandate: "Any person aggrieved by a decision on his application for an annuity or other benefit shall have the right to appeal to the Board." *Id.* § 231f(b)(3). Thus, the RRA confers a right to Board review upon many parties who would only have the right to a hearing, not Board review, for equivalent RUIA decisions. *Id.* § 355(c)(1). Conversely, the RRA, unlike the RUIA, confers no right for employers to appeal coverage determinations to the three-member Board. *Compare id.*

§ 231f(b)(3), *with id.* § 355(c)(4). The Board already used its regulatory powers to harmonize the RRA and RUIA's exhaustion rules, by providing that the three-member Board reviews virtually everything. 20 C.F.R. §§ 260.9(a)-(b), (h), 320.35, 320.38. There is no need to rewrite statutes to accomplish that end.

As for section 355(g)'s exclusivity-of-review provision, the RRA has no analogue. RRA provisions merely parallel section 355(g) by providing that certain determinations have conclusive effect. But the RRA uses different language than section 355(g) to describe those determinations. *Compare* 45 U.S.C. § 355(g), *with id.* § 231f(b)(1) ("[d]ecisions by the Board upon issues of law and fact relating to annuities or death benefits" unreviewable within Executive Branch).

The RRA's and RUIA's divergent limitations periods also refute the government's harmonization theory. Litigants must challenge all decisions under the RUIA within 90 days. *Id.* § 355(f). Yet the RRA gives litigants one year to challenge "decision[s] with respect to an annuity." *Id.* § 231g. If Congress was bent on harmonizing the rest of the statutory scheme, why destroy uniformity with such different limitations periods?

4. **Agency grace.** The government (at 14, 16, 34-38) says that since Congress did not require a reopening process, litigants cannot question the Board's "generosity" in offering reopening as "a matter of agency grace," and should avoid "disincentiv[izing]" such munificence. But there is no Lady Bountiful principle of administrative law. Just because Congress left the agency discretion over reopening does not mean an agency's refusal to reopen certain decisions is never arbitrary or capricious. *E.g.*, *Service v. Dulles*, 354 U.S. 363, 388 (1957) (discretionary agency determinations arbitrary or capricious if agency

departs from its own regulations). As the government acknowledges (at 37 n.7), courts have reviewed denials of reopening in the immigration context for over a century, even though reopening was a matter of agency grace until Congress codified reopening in 1996. *Kucana*, 558 U.S. at 242. And here, the Board from its inception believed certain benefit decisions "*must* be reopened." Legal Op. 39-527 at 1, 2, 18 (Aug. 16, 1939); *cf.* U.S. Br. 35 n.4.

The government (at 37-38 & n.7) rightly disclaims any categorical rule that Congress insulates all agency-created procedures from review by failing to legislatively mandate them. The government (at 38) whittles its position to the proposition that only non-statutorily-mandated agency decisions that do not "constrict a claimant's ability to claim a statutory entitlement" or "directly affect a claimant's statutory entitlement to benefits" are unreviewable. But those gerrymandered limitations just beg the question why denials of reopening alone should be categorically unreviewable. There is no principled difference between Board decisions declining to modify or terminate benefits (which the government seemingly deems reviewable, U.S. Br. 38) and denials of reopening. Both reject an asserted basis for changing the status quo benefits determination.

The government (at 34-36) again invokes *Sanders* and *Your Home*, but neither treated the lack of a statutory mandate for reopening as dispositive. The government (at 36) emphasizes *Sanders'* statement that denials of reopening are generally "committed to agency discretion by law" under the APA, 5 U.S.C. § 701(a)(2). The APA's applicability is unclear given the government's position (at 24) that section 355(f) is the only avenue for judicial review. Regardless, as the government (at 36 n.6)

acknowledges, denials of reopening *are* judicially reviewable under the APA, at least when (as here) litigants identify new evidence or changed circumstances. *Locomotive Eng'rs*, 482 U.S. at 278-79; *Kucana*, 558 U.S. at 236-37, 242; *accord Vill. of Barrington v. Surface Transp. Bd.*, 758 F.3d 326, 328-29 (D.C. Cir. 2014); *Cappadora v. Celebrezze*, 356 F.2d 1, 5 (2d Cir. 1966) (Friendly, J.). The government (at 36 n.6) asks this Court to apply that APA principle as a fallback, but does not dispute doing so would be unnecessary to resolve the question presented.

5. **Separation-of-powers concerns.** By insulating denials of reopening and many other non-section 355(c) decisions from judicial review, the government's reading raises separation-of-powers concerns. Judicial review is a critical check on the Board's exercise of broadly delegated powers, and this Court should not conclude that Congress created an agency structure that confers carte blanche. Br. 34-40.

The government (at 43) concedes that its interpretation would insulate decisions beyond reopening from any judicial review. The government is wrong that this category is "narrow." The prospect of adopting an open-ended jurisdiction-stripping interpretation should "give the Court pause" regardless.

For instance, decisions terminating or modifying benefits would be unreviewable. Br. 35-36. The government portrays those decisions as "initial determination[s]" under section 355(c), which the government defines as "the first determination on a particular issue." U.S. Br. 44-45 (also citing "initial decisions" under Board regulations). But the government glosses over the type of "initial determination" section 355(c) covers, *i.e.*, the first determination *on whether to grant or deny a particular benefits application*. *See* 45 U.S.C. § 355(c)(1) (granting

hearings to claimants "whose claim for benefits has been denied in whole or in part upon an initial determination"); *id.* § 355(c)(2) (Board review for "claimant[s] whose claim for benefits has been denied in an initial determination" on certain grounds). Modifications and terminations are not initial determinations *on benefits applications*. They arise after claimants are granted benefits in initial determinations, and may not involve "claim[s] for benefits" at all (*e.g.*, the agency can terminate benefits if it uncovers evidence that a claimant's disability ended). Br. 35.

The government (at 44-45) concedes that some decisions involving service-compensation credits and repayments of erroneous payments would be unreviewable under its reading. Br. 36-37. But the government understates the problem, because it says most of those decisions are reviewable only if they fold into a later benefits determination. *Cf. Hawkes*, 136 S. Ct. at 1815-16 (finding standalone jurisdictional determinations immediately reviewable notwithstanding possible later review within a broader decision). That would be a sea change from the status quo of immediate review prevailing in many circuits. Br. 35-37.

The government's remaining objections (at 46) are meritless. The Board's concededly "unusual" insulation from Executive supervision (U.S. Br. 46) cuts off a primary avenue of agency accountability, making judicial review even more imperative. Br. 17. The government (at 46) hints that denials of reopening on constitutional grounds might be reviewable. But the government's reading still deprives litigants of any recourse for challenging regulations or statutory provisions implicated in individual reopening denials, among other decisions. Finally, the government faults petitioner for not citing real-world examples of egregious Board errors. Litigants do

not need to prove an agency is abusing its powers for this Court to reject a statutory interpretation that invites abuse. *See Kucana*, 558 U.S. at 252. Regardless, proof is elusive because individual cases are inaccessible to the public, and for its first 50 years, the Board declined to disclose its reopening criteria. *See* 60 Fed. Reg. 66,203 (Dec. 21, 1995). The impossibility of checking the Board's track record underscores the need for judicial scrutiny.

CONCLUSION

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

Respectfully submitted,

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