

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MANFREDO M. SALINAS,)
)
) Petitioner,)
)
) v.) No. 19-199
)
) UNITED STATES RAILROAD RETIREMENT)
)
) BOARD,)
)
) Respondent.)
)

Pages: 1 through 64
Place: Washington, D.C.
Date: November 2, 2020

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MANFREDO M. SALINAS,)
Petitioner,)
v.) No. 19-199
UNITED STATES RAILROAD RETIREMENT)
BOARD,)
Respondent.)
- - - - -

Washington, D.C.

Monday, November 2, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:13 a.m.

APPEARANCES:

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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-199, Salinas versus United States Railroad Retirement Board.

Ms. Harris.

ORAL ARGUMENT OF SARAH M. HARRIS

ON BEHALF OF THE PETITIONER

MS. HARRIS: Mr. Chief Justice, and may it please the Court:

Because Congress, in Section 355(f), subjected any final decision of the Railroad Retirement Board to judicial review, all final decisions, including reopening denials, are reviewable.

The government is incorrect that 355(f) limits review only to decisions under 355(c).

First, the government reads 355(f) to say parties aggrieved by any final decision under 355(c) may challenge any such final decision. That impermissibly adds the word "such." 355(f) says any final decision, full stop. Any final decision tracks the broad language of Section 231g, the RRA's parallel

1 judicial review provisions governing claims like
2 Mr. Salinas's.

3 Second, only our reading makes sense
4 of both the RUIA and the RRA. Section 355(c)
5 mandates hearings or Board appeals for specific
6 RUIA decisions. If Congress wanted to limit
7 judicial review across both statutes, the RRA
8 should parallel 355(c). But it doesn't. The
9 RRA doesn't mandate any hearing. The RRA
10 mandates Board appeals for different decisions
11 than 355(c).

12 And Section 231g extends judicial
13 review beyond decisions entitled to Board
14 appeal. It's not plausible that Congress can
15 find judicial review under both statutes to
16 decisions with no similar significance under the
17 RRA, which applies to 96 percent of
18 beneficiaries.

19 And, third, limiting judicial review
20 to decisions under 355(c) would foreclose review
21 of all other decisions, like refusals to modify
22 or terminate benefits.

23 To avoid that result, the government
24 tries to bend 355(c) to fit most of these
25 decisions. But, if the text is that broad,

1 there's no principled basis for excluding
2 reopening denials from 355(c).

3 CHIEF JUSTICE ROBERTS: Counsel, let's
4 begin with 231g since this is an RRA case, and
5 it says that what's subject to judicial review
6 are "decisions of the Board determining the
7 rights or liabilities of any person under the
8 Act."

9 Now Board determinations -- the Act is
10 just chock full of them. They're -- they're
11 determining substantive things like who's
12 eligible for how much money, who's eligible for
13 annuity, what are the benefits for spouses,
14 where does the money come from. Nothing like a
15 decision about whether to reopen.

16 So shouldn't we look at that under the
17 RRA in determining whether or not such
18 procedural questions are subject to judicial
19 review?

20 MS. HARRIS: Well, no. I think the
21 text of 231g and its use of the phrase
22 "determining the rights or liabilities of any
23 person" is more than capacious enough to fit a
24 decision like a denial of reopening, which is
25 the agency's last word in denying the claim for

1 benefits.

2 CHIEF JUSTICE ROBERTS: So maybe in
3 the -- maybe in the abstract, you can say, well,
4 this is a determination of a right.

5 But the phrase "determinations of the
6 Board," it's almost a term of art in the
7 statute. They're -- and they're talking about
8 rights and liabilities in a substantive way.

9 MS. HARRIS: Well, I think the rest of
10 231g actually refutes an interpretation that
11 it's limited to the initial substantive benefits
12 determination, because, if you look at the
13 "except" clause of 231g, it says "except at the
14 time within which proceedings for review of a
15 decision with respect to an annuity or other
16 listed benefits may be commenced."

17 So that phrase is clearly narrower
18 than the phrase "decisions determining rights or
19 liabilities," which signals that things like
20 reopening denials would certainly fit within the
21 first clause.

22 CHIEF JUSTICE ROBERTS: Well, the only
23 type of determinations that are reviewable are,
24 even if you're right about rights or
25 liabilities, the rights or liabilities under the

1 Act. And the reopening right isn't under the
2 Act. It's under a regulation.

3 MS. HARRIS: But, as I think the Court
4 noted in *Kucana versus Holder*, the word "under"
5 is a bit of a chameleon and it depends on
6 context. And it would be strange to think that
7 the RRA only means under the statute and not
8 under the different regulations that the Board
9 might promulgate when we have a statute here
10 where Congress was pretty clear that it was
11 delegating to the Board a lot of power to make
12 --

13 CHIEF JUSTICE ROBERTS: Well, but
14 that's like --

15 MS. HARRIS: -- those decisions.

16 CHIEF JUSTICE ROBERTS: -- that's like
17 saying just because Congress has delegated
18 authority under the Constitution to enact
19 statutes, that every violation of a statute is a
20 constitutional violation. And that doesn't make
21 sense.

22 MS. HARRIS: Well, I think there's
23 also a problem then. If you -- if you think
24 that it has to be under the statute only, then
25 you also have a weird asymmetry with the RUIA

1 because there are some decisions that are
2 mentioned in the text of the RUIA but not under
3 the text of the RRA, like --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas. Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief
8 Justice.

9 Ms. Harris, what is the statutory or
10 regulatory basis for the reopening? Do you --
11 and what I'm getting at is whether or not you
12 have a stated right to a reopening.

13 MS. HARRIS: There is a regulatory
14 basis for reopening in, for instance, 20 C.F.R.
15 261, and it's something that the Board
16 understood as early as 1939 would always be part
17 and parcel of its decisionmaking because of the
18 importance of checking errors and preventing
19 arbitrariness in a complex benefits scheme.

20 JUSTICE THOMAS: So why is it when a
21 -- an agency -- the agency decides not to reopen
22 a case, it's simply deciding not to decide that
23 again or to reconsider it, as opposed to again
24 deciding sort of indirectly the underlying
25 substantive issue?

1 MS. HARRIS: So I think there's a key
2 distinction that underlies a lot of this Court's
3 cases and explains why there's such a strong
4 tradition of judicial review for reopening
5 denials, especially when they involve new
6 evidence, like the case here.

7 And that reason is, when you have
8 something where a litigant is, for instance,
9 asking for reopening on the basis of new
10 evidence or new circumstances, that does make
11 the claim different and makes it something
12 that's possible for courts to review in a way
13 that's different from maybe a pure rehash.

14 So, in Brotherhood of Locomotive
15 Engineers, for instance, the Court distinguished
16 between those two things and said it would be
17 fundamentally unfair to deny someone the
18 opportunity to present new evidence and that the
19 agency hadn't considered before. And that also,
20 I think, distinguishes Sanders, which did
21 involve that kind of rehashing claim.

22 And the Court has thus considered the
23 rehashing-type claim as potentially committed to
24 agency discretion but has always allowed
25 judicial review of denials of reopening like

1 this one that are based on new evidence. And I
2 think that reflects that it's such an important
3 safeguard to keep the agency accountable in this
4 context.

5 JUSTICE THOMAS: But how far do you go
6 with that, Ms. Harris? The -- what if we denied
7 cert or denied petition for rehearing of cert in
8 a case that totally involves state law?

9 Are you saying that we actually --
10 that we went back or that we reached a state law
11 issue simply by denying cert or by denying the
12 petition for rehearing?

13 MS. HARRIS: No, I'm definitely not
14 saying that. What I'm saying is those types of
15 decisions might constitute final agency action
16 in a technical sense, but those would involve a
17 rehashing of the same record that was always
18 before the Court in your -- in your sort of
19 parallel hypothetical, unlike a situation here,
20 where there is new evidence.

21 And I think that's why Brotherhood of
22 Locomotive Engineers actually used the rehearing
23 en banc hypothetical to distinguish and
24 illustrate the distinction between new evidence,
25 reopening-type claims, which are judicially

1 reviewable, and rehashing claims, which are
2 generally committed to agency discretion.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.

6 JUSTICE BREYER: Well, my question was
7 basically the same as the Chief Justice's, and
8 it seems to me on that question you have going
9 against you, first, the language of it, of
10 rights and liabilities, read in light of what we
11 said in two cases. It's both Your Home Visiting
12 Nurse and also Califano v. Sanders.

13 Then you have the fact that nobody --
14 no lower court decided in your favor, I think,
15 maybe there was an exception, I don't know --
16 since the 1960s or 1970s, and since then, the
17 cases have gone the other way in the lower
18 courts, and it would make a kind of hash of the
19 statute of limitations. Otherwise, you have the
20 presumption of judicial review in your favor.

21 So I want to see if there's anything
22 you want to add on the negative part.

23 MS. HARRIS: Sure. I'd like to take
24 Your Home and Califano first, because I think
25 that Your Home, when it said that there is a

1 sort of -- that reopening seemed like a refusal
2 to make another decision --

3 JUSTICE BREYER: Yeah.

4 MS. HARRIS: -- Your Home, again, is
5 sort of talking about the situation where
6 there's a rehash claim. And if you took Your
7 Home to be foreclosing judicial review of all
8 sorts of reopening claims based on new evidence,
9 that would be a sea change in the way the Court
10 has considered them.

11 Now Califano --

12 JUSTICE BREYER: Well, what I don't
13 see is how we can do the one without the other.
14 We have language here that the Chief cited. How
15 -- how do we do that? How do we get to that
16 point in your view?

17 MS. HARRIS: Well, I think, if you
18 thought that a reopening denial was never a
19 decision that determined rights or liabilities,
20 you'd have serious questions about why it was
21 ever considered a final decision. And there are
22 so many contexts in which it is considered a
23 final decision, including countless immigration
24 decisions and also the interstate commerce
25 context.

1 And I think Califano, which you
2 mentioned, actually shows exactly why the
3 statutory language is so much in our favor. The
4 language in Califano involved a statute, it's
5 Section 405(g), that says judicial review is
6 confined to final decisions made after a
7 hearing.

8 And in Smith versus Berryhill, the
9 Court emphasized that while reopening could be a
10 final decision, it certainly wasn't one made
11 after a hearing in that context.

12 The other part of Califano that's
13 important is that statute also had an express
14 provision saying there is no judicial review of
15 other provisions unless herein provided in
16 405(g). So, if you didn't involve a hearing, no
17 review under the statute.

18 And, here, you have the opposite. You
19 have no express language barring judicial review
20 of decisions like reopening, and it would be
21 extraordinary to say that that alone was
22 sufficient to overcome the presumption of
23 review, especially given the long tradition of
24 reviewing denials of reopening that do present
25 new evidence.

1 And then your final point, there is --
2 obviously, the D.C. Circuit held in 2016 that
3 denials of reopening in the Railroad Retirement
4 Act context and RUIA are judicially reviewable.
5 And the -- the D.C. Circuit in that case noted
6 that courts have been reviewing these decisions
7 for some 50 years.

8 There's no flood of -- no flood of
9 abuse of litigation and no apparent
10 circumvention of the limitations period because
11 these are new types of decisions that aren't
12 simply rehashes of what happened before.

13 JUSTICE BREYER: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Alito.

15 JUSTICE ALITO: I'm interested in the
16 interplay between the Railroad Retirement Act
17 and the Railroad Unemployment Insurance Act.
18 This is a case under the former.

19 Is there any reason why we can't
20 decide it simply by looking at the language of
21 that provision, Section 231g?

22 MS. HARRIS: Well, you could -- you
23 could do it that way, but, of course, that
24 language then says that -- it does tie judicial
25 review to the RUIA itself. So I think that

1 means that you should at least consider whether
2 there would be anomalies created between, you
3 know, circumscribing review under one statute
4 versus the other.

5 JUSTICE ALITO: Well, is that true
6 under the language of the provision? It says:
7 "Decisions of the Board determining the rights
8 or liabilities of any person under this
9 subchapter shall be subject to judicial review."
10 That tells us what is subject to judicial
11 review.

12 Then it goes on to say, in the same
13 manner, subject to the same limitations, et
14 cetera, as the RUIA. That tells us how the
15 review takes place.

16 Why do you think that specifies what
17 is reviewable?

18 MS. HARRIS: I think you could read
19 the corresponding rights and liabilities
20 language as suggesting that. But, in all
21 events, if you just wanted to look at 231g,
22 reopening denials do determine rights or
23 liabilities of any person because they are a
24 denial of someone's entitlement to benefits.

25 And it would be very strange to think

1 that that language alone would be foreclosing
2 judicial review of other decisions when there's
3 no sort of express bar to reviewability in
4 there.

5 JUSTICE ALITO: Well, what takes me
6 aback in approaching the case in this way is
7 that both you and the government, who are more
8 immersed in this than we are, have spent a lot
9 of time debating judicial review under the
10 provisions of the Railroad Unemployment
11 Insurance Act.

12 So do you think that unacceptable
13 anomalies would occur if we were to decide the
14 review question here without considering or
15 deciding the review question under the Railroad
16 Unemployment Insurance Act?

17 And because my -- my time is -- is
18 going to expire, let me fold in one other
19 question. How often does review occur under
20 these two different acts? Is there a big
21 difference in the number of cases?

22 MS. HARRIS: There isn't a lot of
23 difference in the number of cases. It both does
24 -- it's pretty rare to get review under -- a
25 reopening under both. And I think the only

1 anomaly that would happen with respect to the
2 two statutes is probably the employer coverage
3 determination.

4 So there are some questions that are
5 common in the two schemes, and so there could
6 potentially be anomalies with respect to those
7 but not with respect to the particular case
8 here.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor.

12 JUSTICE SOTOMAYOR: I'd like to
13 continue with Justice Alito's question because,
14 yes, there might be differences, but you haven't
15 explained to me why those differences are
16 important. You just mentioned the employer
17 determination.

18 But wouldn't that basically be a
19 determination, an initial determination, of
20 entitlement to -- to benefits?

21 MS. HARRIS: So why is it important --
22 well, it could be under 355(c), but the RRA
23 doesn't actually even mention employer
24 determinations as something under the statute.
25 It just says the definition of an employer is

1 the same under both statutes.

2 But just to sort of back up and think
3 through why would it be very strange to
4 superimpose, say, the limitation of 355(c)
5 across the whole statute, 355(c) is a pretty
6 specific rule under the RUIA that pertains to
7 who is entitled to appeals or hearings under
8 that particular short-term benefits statute.

9 And it really doesn't have any
10 counterpart in the RRA in toto. The only thing
11 the RR -- RRA provides is that in
12 Section 231f(c)(3), someone can obtain a right
13 of appeal to the Board based on a decision on
14 their application for an annuity.

15 So you would expect that if 355 --
16 that if 355(c) were sort of controlling
17 throughout that scheme, the RRA would at least
18 attach significance to all the types of
19 decisions that were being listed.

20 And I would also push on the
21 definition of an initial determination with
22 respect to, you know, what -- what exactly you
23 can fit into it.

24 JUSTICE SOTOMAYOR: I -- I -- I guess
25 I'm still a little troubled, and I'm sorry for

1 my denseness, but it seems to me that all of
2 those questions under 355 that you speak about
3 go to the initial determination of rights or
4 liabilities of any person. It's basically
5 saying this kind of employer is liable or not
6 liable to you.

7 That's a clear determination of rights
8 or liabilities under the Act, and so it still
9 would be subject to judicial review. But
10 hearkening back to what Justice Thomas said, at
11 least in Home Services, we thought of or could
12 think of -- and I understand it was because of
13 the regulatory scheme -- that a motion to reopen
14 was not a new determination of rights or
15 benefits, that it was a decision not to
16 reconsider that question.

17 So why shouldn't we think of it that
18 way here?

19 MS. HARRIS: Because, if you thought
20 of it that way, I think you would have to
21 override a really long tradition of judicial
22 review in cases like *Kucana versus Holder* and
23 *Brotherhood of Locomotive Engineers* that holds
24 the contrary and says denials of reopening that
25 are based on new evidence are judicially

1 reviewable because they're final agency actions.

2 And the situations in which there is a
3 sense that there is a rehash, that there is no
4 new evidence presented, that was also the case
5 in Your Home. So Your Home actually cites
6 Brotherhood of Locomotive Engineers at the end,
7 and the case would make not very much sense if
8 you thought, you know, denials of reopening can
9 never be final decisions, can never be
10 reviewable, because the second half of that
11 opinion is all about, well, yeah, it might not
12 be a final determination under the regulation at
13 issue, but is it still judicially reviewable?

14 And the Court said no based on the
15 jurisdiction-stripping language of the Medicare
16 statute and also cited Brotherhood of Locomotive
17 Engineers and said this is just the kind of
18 rehash claim that we don't generally review.

19 JUSTICE SOTOMAYOR: Counsel, I've well
20 run out of my time, so -- but thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan.

22 JUSTICE KAGAN: Ms. Harris, could I
23 ask you a little bit more about this distinction
24 you're making between new evidence claims and
25 rehashed claims? And this really goes back to

1 Justice Breyer's question.

2 And I wasn't quite sure I understood
3 your answer to him, because he said, well, I
4 understand the distinction you're making -- the
5 distinction you're making and -- and -- and --
6 but where do we get that distinction from the
7 statutory language? Why is one determining
8 rights and liabilities and the other is not?

9 MS. HARRIS: So the distinction, I
10 think, comes from the idea that they are both
11 final decisions that deny someone benefits or
12 deny someone whatever they're asking on a
13 reopening claim.

14 The reason why the new evidence or
15 changed circumstances claim is reviewable and
16 has long been reviewable in multiple contexts is
17 that it is not something that is unmanageable
18 for courts to figure out. It's not committed to
19 agency discretion by law.

20 And the reason is you can figure out
21 that there's something that hasn't been
22 presented to the agency before that might change
23 the outcome, and it would be inequitable not to
24 let someone litigate that and get judicial
25 review of that type of decision, whereas the

1 rehash type of claim does, as in Sanders, raise
2 potential concerns about circumvention of the
3 limitations period.

4 So it's sort of a combination of the
5 sense of what is a final decision, but also the
6 other step of is it the kind of final decision
7 that courts can review in a meaningful sense?
8 And that, I think, is the distinction, again,
9 that Brotherhood of Locomotive Engineers mostly
10 drew.

11 JUSTICE KAGAN: Okay. Can I ask you a
12 question about 355, go back to where you
13 started? I guess I don't quite understand your
14 argument there.

15 If I could just sort of simplify 355,
16 it would read like this: Any claimant, any
17 railway labor organization, any base-year
18 employer, or any other party aggrieved by a
19 final decision under subsection (c).

20 Why wouldn't the "under subsection
21 (c)" language apply to each of those three
22 identified and one catch-all party?

23 MS. HARRIS: So I think there are
24 three reasons why the last-antecedent rule
25 remains the default and wouldn't be overcome

1 there.

2 First of all, if the government were
3 right, I don't think Congress would have let all
4 of the parties challenge any final decision.
5 Congress would presumably say those parties
6 could challenge such final decision, because
7 it's strange to have "any final decision," full
8 stop, if there's no one who could challenge
9 anything else.

10 And, second of all, I think there's
11 contextual reasons why "other" in that phrase is
12 a word that's differentiating between meaningful
13 classes of litigants. The first three listed
14 parties -- claimants, labor organizations, and
15 base-year employers -- are very differently
16 situated for purposes of the RUIA than the
17 residual parties. And what I mean by that is
18 the first three parties can be aggrieved by all
19 kinds of decisions, whether or not they're
20 listed in 355(c).

21 But the residual parties are people
22 who are described in 355(c) itself who can only
23 be aggrieved by decisions that are described in
24 355(c). And one example of that would be the
25 non-base-year employers under the RUIA.

1 They're mentioned --

2 JUSTICE KAGAN: Thank you, Ms. Harris.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Good morning,
6 Ms. Harris.

7 Let me pick up right there. Let --
8 let -- let's suppose for the purposes of this
9 question that I agree with you that under
10 355(f), reopening petitions could be reviewed
11 under the RUIA. But let's also suppose that the
12 language in 231g suggests that reopening
13 petitions under the RRA cannot.

14 And that -- that leads to kind of an
15 anomaly, I think we'd all agree, and I'm not
16 sure I could understand the rational reason for
17 the distinction, which makes me wonder what
18 about 355(g), which, as you know, suggests that
19 findings of fact and conclusions of law by the
20 Board in their determination of claims are final
21 and conclusive on all persons?

22 And let -- you know, it makes me
23 wonder whether Congress ever anticipated the
24 idea of reopening decisions or even authorized
25 them. And if Congress didn't authorize them, if

1 they were never anticipated, if they just simply
2 weren't permitted under 355(g), what should that
3 tell us about both (f) -- 355(f) and 231g?

4 MS. HARRIS: Well, a couple of points
5 on that.

6 First of all, with respect to the text
7 of 355(g), that is a review exclusivity
8 provision under the RUIA, and it says -- it is
9 talking about the determination of any claim for
10 benefits or refunds.

11 And our argument in the first instance
12 is that's certainly capacious enough to include
13 reopening. And one clue that that might be the
14 case is that the delegation to the Board with
15 respect --

16 JUSTICE GORSUCH: Well, let -- let --
17 let's put that aside for the moment. Let's say
18 I just disagree with you on that. Then what?

19 MS. HARRIS: Then I think you'd still
20 be looking at the broad delegation of power that
21 Congress gave to the Board and said in the
22 delegation of power that the Board was supposed
23 to create regulations for "all controversial
24 matters under the Act," which is extremely
25 broad.

1 The other things I'd point you to are
2 the fact that reopening, since 1939, in -- in
3 the view of the Board is something that the
4 Board thought that it absolutely had to do. And
5 so I think there is -- there's a good reason the
6 government hasn't argued that reopening simply
7 isn't authorized under the statute. Its --

8 JUSTICE GORSUCH: Why doesn't it
9 suggest, though, that this is purely a matter of
10 regulatory grace and it isn't -- it isn't
11 contemplated, required, or maybe even authorized
12 by statute, but it's something the executive can
13 do and -- and that we really have no role in?
14 It can only benefit a claimant to have a
15 reopening. It can't harm a claimant. And at
16 that point, we have nothing to say on the
17 matter.

18 MS. HARRIS: Well, two points there.

19 I mean, first of all, the idea that
20 discretionary determinations that only help
21 claimants are -- would be immune from judicial
22 review on that basis would be a sea change in
23 all the other contexts, like, for instance,
24 immigration, where reopening for about 80 years
25 only stood --

1 JUSTICE GORSUCH: Well, let's stick to
2 the Railroad Retirement Act and -- and -- and
3 maybe even the RUIA. What -- what -- what harm
4 would there be in that?

5 MS. HARRIS: What harm would there be
6 in not having judicial review of reopenings?

7 JUSTICE GORSUCH: Right.

8 MS. HARRIS: I think there would be
9 massive harm here. I mean, it's a critical
10 safety valve that ensures reasoned
11 decisionmaking for decisions that can have
12 life-changing consequences for people.

13 And judicial review really has a
14 strong in forum effect in this context for
15 agencies to keep them accountable. And, you
16 know, I think that it would be extraordinary to
17 think that there's a situation where the
18 agency -- you know, you have to explain the
19 benefits of judicial review, the -- the reason
20 for the presumption is --

21 JUSTICE GORSUCH: Counsel, thank you.
22 My -- my time's expired.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh.

25 JUSTICE KAVANAUGH: Good morning,

1 Ms. Harris.

2 I want to pick up on something Justice
3 Breyer brought up about the history of this
4 issue and case law, because my understanding's
5 very different from his and I just wanted to get
6 that out there. And you can respond.

7 So here's my understanding of what's
8 happened on this issue over the years: In 1966,
9 Judge Friendly issued an opinion for the Second
10 Circuit that said there was judicial review of
11 these kinds of reopenings, and that's been law
12 in the Second Circuit for 54 years now. It's in
13 a "but see" in the government's brief, but
14 that's been the law in -- in the Second Circuit.

15 Then along comes Califano in 1977,
16 dealing, of course, with a different act with
17 different language and says no judicial review
18 there.

19 And then the courts of appeals
20 essentially pick up on Califano in this context
21 without paying attention, in my view, to the --
22 to the language difference in Califano, and you
23 see the Seventh Circuit and the Fifth, Fourth,
24 and Third all kind of go on the call -- Califano
25 road, also a little bit with the greater

1 includes the lesser point.

2 And Califano doesn't work, as I think
3 the government itself was going to have to
4 acknowledge here, and so they're back-filling
5 with textual arguments on 355(f), which you've
6 answered, and then 231g. And I just would point
7 out -- I think this is right, but you tell me if
8 I'm wrong -- the government has never argued in
9 this way the 231g point in all these cases.

10 You know, you go back and look at the
11 briefs and it's just not been part of that,
12 presumably, because they've long understood, the
13 Railroad Board at least, has long understood
14 that denials of reopening, just like grants of
15 reopening, obviously change your benefits if
16 it's a grant of reopening, and so a denial too
17 determines your rights and liabilities.

18 So I think that I guess my
19 understanding of the history of this is quite a
20 bit different in terms of the case law in going
21 back to Judge Friendly's opinion and what
22 Justice Breyer said. And you can -- I mean,
23 that's a favorable question to you, obviously.
24 But, if you want to fill in any gaps there, go
25 ahead.

1 MS. HARRIS: Sure. I mean, I -- I
2 obviously agree with the recount of the history,
3 and I also think that your account of the
4 government's position is spot on.

5 The government's brief at pages 14 and
6 29, their position has never been that 231g's
7 determining rights or liabilities language, if
8 you untethered it from the RUIA, would exclude
9 denials of reopening.

10 Their position is those are just code
11 words for decisions under 355(c). And that
12 doesn't seem like a plausible view. And the
13 government, as you know, has also agreed that
14 the Railroad Retirement Board from its inception
15 has always thought that reopening was something
16 that the Board could and, indeed, should do in
17 certain circumstances.

18 And so I do think it would be
19 extraordinary to think that when there's such a
20 long history of the Board understanding its own
21 powers to include reopening, and when there's
22 language that is certainly at least capacious
23 enough to plausibly include this type of
24 decision, you would read in some sort of
25 exclusion of review when there is no express bar

1 in the statute saying there's no review of other
2 decisions, which, again, distinguishes this case
3 from Califano and the Social Security statute.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett.

7 JUSTICE BARRETT: Good morning, Ms.
8 Harris.

9 So, in thinking about the 231g
10 question and whether the denial of a motion to
11 reopen determines rights or liabilities, I
12 think, when you look at 261.2 and the
13 regulations, if you're thinking about 261.2(b),
14 you know, if a denial is essentially a
15 conclusion that there was no new or material
16 evidence of error, then I can see how that might
17 qualify as a determination of a right or a
18 liability.

19 But what about in Mr. Salinas's case?
20 I mean, is it fair to -- to characterize his
21 motion here as a motion to reconsider the denial
22 of his motion to reopen (b)(4)?

23 MS. HARRIS: Yes. I think it would be
24 absolutely fair, and, indeed, that is the
25 provision the Board mentions below when it's

1 thinking about it. And that's at pages 7A to 8A
2 of the petition appendix.

3 And the reason is Mr. Salinas's claim
4 is that he wanted to present and was not able to
5 present important medical evidence in 2006 about
6 his depression and anxiety that would have
7 affected the -- the Board's understanding of
8 whether it should find good cause to excuse his
9 late filing in that 2000 -- 2006 claim. So
10 that's really in the heartland of the kind of
11 new evidence type claim to be looking for.

12 JUSTICE BARRETT: But it's new
13 evidence that bears on his motion to reopen, not
14 on the underlying determination of his
15 entitlement to benefits, right?

16 MS. HARRIS: Well, I think it bears on
17 both here. The -- the -- it bears on, first of
18 all, why he was not allowed to pursue his 2006
19 claim, which was the Board said we're not going
20 to excuse you for not proceeding further when he
21 failed to file in a timely fashion to continue
22 litigating it.

23 And he said, I'm really sorry. I
24 wasn't able to file within the 60-day period. I
25 have pretty serious depression. And at that

1 time, he wasn't able to get the new medical
2 evidence that would have allowed him to present
3 that argument to the Board and would have both
4 constituted good cause and obviously borne on
5 the underlying claim.

6 JUSTICE BARRETT: Let me expand it
7 beyond Mr. Salinas's motion here because what
8 I'm getting at is, even if you could consider
9 some grounds for not reopening a determination
10 of rights or liabilities, I'm not sure that's
11 true of all.

12 So, for example, what if it's just
13 flatly that somebody came forward beyond the
14 four years permitted in 261.2(b) and they just
15 said, sorry, it's late? That's not really --
16 doesn't fit neatly into the definition
17 determination of rights or liabilities.

18 MS. HARRIS: Well, I think, if you
19 thought that a determination that raises new
20 evidence in general is about your rights and
21 liabilities because there's a denial of your
22 benefits claim and you're being denied an
23 opportunity to present that new evidence, the
24 question would sort of be, is that regulation as
25 applied in this circumstance arbitrary in

1 cutting that off?

2 And the other piece of it is the Board
3 obviously has the discretion to say that, yes,
4 you know, even though four years have passed,
5 you presented new evidence and we're willing to
6 consider that here.

7 And the question is always going to
8 be, was the Board acting reasonably in excusing
9 that or not? So I think we kind of end up in
10 the same place, which is maybe this all just
11 underscores why denials of reopening that
12 present new evidence have for so long in so many
13 contexts been considered judicially reviewable.

14 JUSTICE BARRETT: Thank you. My
15 time's expired.

16 CHIEF JUSTICE ROBERTS: A minute to
17 wrap up, Ms. Harris.

18 MS. HARRIS: Thanks, Chief Justice.
19 Thanks, Chief Justice.

20 I just want to circle back on some of
21 the points with respect to why is this different
22 from Your Home and Sanders, and I think it is
23 really critical to think about that because
24 Sanders for so long had been -- it really is
25 focused on a very different text about the

1 Social Security Act, and I think that's a
2 classic case of, if Congress, in the Railroad
3 Retirement Act or the RUIA, had intended to
4 preclude judicial review and seal it off, it
5 would have -- it would have chosen a structure
6 like this.

7 You have 26 U.S.C. 405(b) that says,
8 in the Social Security context only, you know,
9 here's what you have to do to get a hearing.
10 You have 405(g) that then says there's only
11 judicial review of final decisions made after a
12 hearing. And then, in 405(f), the Act says you
13 can't have any other kind of decision reviewed
14 except for through 405(g).

15 And that's the kind of sealing off of
16 review that is actually missing here. Even if
17 you had questions with respect to whether 231g
18 does or does not plausibly encompass denials of
19 reopening and in what context, there is nothing
20 that takes away judicial review under the RRA.
21 And so --

22 CHIEF JUSTICE ROBERTS: Thank you, Ms.
23 Harris.

24 Mr. Raynor.

25

1 ORAL ARGUMENT OF AUSTIN RAYNOR
2 ON BEHALF OF THE RESPONDENT

3 MR. RAYNOR: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 This case is about a narrow issue,
6 whether the Railroad Retirement Board's refusal
7 to reopen a prior benefits determination is
8 judicially reviewable. Every tool of statutory
9 interpretation indicates that the answer to that
10 question is no.

11 First is the text. Section 355(f) of
12 the RUIA provides for judicial review only of
13 those decisions made under subsection (c).
14 Subsection (c) is the RUIA's exhaustion
15 provision, and it provides for internal review
16 of certain particularly significant Board
17 decisions. Reopening determinations are not
18 listed in subsection (c) and, therefore, are not
19 judicially reviewable.

20 The RUIA's structure confirms this
21 reading. The RUIA's exhaustion, judicial
22 review, and review exclusivity provisions all
23 work together to ensure that the most important
24 Board decisions receive internal and judicial
25 review through the mechanisms specified in

1 subsection (f). Those provisions are
2 interlocking and each covers the same basic
3 category of core substantive determinations
4 enumerated under subsection (c).

5 Lastly, the government's reading also
6 accords with the policies underlying the
7 relevant statute. Congress chose not to require
8 reopening at all, much less judicial review of
9 reopening.

10 The agency's decision in its
11 discretion to offer reopening does not entitle a
12 claimant to yet another opportunity for judicial
13 review.

14 Petitioner reaches a contrary
15 conclusion only by dismissing context and
16 reading certain words and phrases in the statute
17 in isolation. His interpretation would cause
18 dislocations throughout the statutory scheme.

19 The Court should reject that
20 interpretation and affirm the judgment below.

21 CHIEF JUSTICE ROBERTS: Mr. Raynor, I
22 don't think I heard you mention 231g. Maybe I
23 -- I missed it. But you don't get to it in the
24 arguments section of your brief until 13 pages
25 into it.

1 The -- the question is judicial review
2 under the RRA. There is a provision in the RRA
3 that talks about judicial review.

4 Why -- why don't -- why are you so shy
5 about that one?

6 MR. RAYNOR: Your Honor, the way that
7 we think the statute works is that 231g makes
8 decisions under the RRA reviewable to the same
9 extent a court's bonding decision under the RUIA
10 would be reviewable.

11 CHIEF JUSTICE ROBERTS: Well, it
12 limits -- it -- it makes some decisions
13 reviewable to the same extent as under the RUIA,
14 but you have to go through its discussion of
15 what decisions are. It's determination of
16 rights or liabilities. They have to be under
17 the Act.

18 Do you need a decision that covers
19 355(f) to decide this case?

20 MR. RAYNOR: No, Your Honor. I agree
21 with you that the determination of rights or
22 liabilities language in Section 231g is a gating
23 mechanism. And if you didn't think that a
24 reopening denial qualified as a determination of
25 rights or liabilities, which, in our view, would

1 be correct under Your Home, then judicial review
2 would not be available under the RRA.

3 CHIEF JUSTICE ROBERTS: Is there -- is
4 there some problem in terms of the practical
5 administration having arguably or perhaps
6 different standards or different scope of
7 reviewability under one Act rather than the
8 other?

9 MR. RAYNOR: I don't think there would
10 be huge practical problems, Your Honor. And, in
11 fact, our position is that the -- the types of
12 decisions made under subsection (c) are
13 substantive determinations of rights or
14 liabilities.

15 And so that language in 231g,
16 interpreted according to its plain meaning,
17 would pick up the decisions under subsection
18 (c.). so even if you wanted to go just on the
19 basis of a plain meaning approach to
20 determinations of rights or liabilities, that
21 would allow conformity between 231g and
22 Section 355.

23 CHIEF JUSTICE ROBERTS: Well, you say
24 just a plain meaning approach with, it sounds, a
25 little bit of disdain, but why -- the -- the RRA

1 program is the vast majority of rail -- railroad
2 benefits, right? I mean, the RUIA is just a
3 tail on the dog, right?

4 MR. RAYNOR: That's correct.

5 CHIEF JUSTICE ROBERTS: Okay. Thank
6 you, counsel.

7 Justice Thomas.

8 JUSTICE THOMAS: Thank you, Mr. Chief
9 Justice.

10 Mr. Raynor, the -- I, with the Chief
11 -- I agree with the Chief Justice in wondering
12 why you're so reluctant to argue 231g, but let
13 me ask you this: The -- could the agency do
14 away with the whole process of reopening?

15 MR. RAYNOR: Yes, Your Honor. And I
16 don't -- the Petitioner doesn't dispute that.
17 Reopening is clearly a matter of grace. The
18 statute doesn't require it, and the agency could
19 repeal its reopening regulations tomorrow.

20 JUSTICE THOMAS: If that's the case,
21 how could it be then that it's a final decision
22 if it's purely discretionary? I think the hard
23 connection for me to make is, how do you get
24 from a discretionary decision with respect to
25 reopening to the underlying issue of benefits?

1 MR. RAYNOR: Yes, Your Honor. So we
2 certainly agree with you that a mere denial of
3 reopening doesn't determine benefits. It
4 doesn't determine rights or liabilities.

5 Of course, if the agency reopens the
6 decision and readjudicates the merits, that
7 would be a different matter. But that's not at
8 issue here.

9 JUSTICE THOMAS: So that would be a
10 final decision. And I think the other side of
11 that argument, though, would be the decision not
12 to reopen would be a denial of the benefit, even
13 if you don't reconsider or hear more evidence.

14 What -- what do you make of
15 Ms. Harris's distinction between rehearing or
16 reopening petitions in cases of -- where there's
17 just a rehash of the underlying evidence, as
18 opposed to the cases -- or as compared to the
19 cases or distinguished from the cases involving
20 additional evidence?

21 MR. RAYNOR: Your Honor, it wasn't
22 clear to me if counsel for Petitioner was
23 conceding that mere rehash cases would not be
24 reviewable. If so, we certainly agree with
25 that. Our fallback position here is that the

1 Locomotive Engineers background rule of
2 "committed to agency discretion by law" would at
3 the very least foreclose mere rehash cases.

4 But, as Justice Breyer pointed out
5 with respect to the text of 355 and 231g, the
6 statute doesn't make any such distinction. And
7 so the question here is, across the board, are
8 reopening deniables -- denials reviewable or
9 not?

10 And so, to the extent that Petitioner
11 is conceding that rehashed cases allow
12 circumvention of the statute of limitations,
13 ruling in Petitioner -- Petitioner's favor in
14 this case would, of course, open up that can of
15 worms.

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer.

19 JUSTICE BREYER: Thank you.

20 It -- it doesn't say there isn't
21 review. There is a very, very strong
22 presumption of judicial review. Both briefs
23 make good arguments on 355(c). And I bet when I
24 read Judge Henry -- Henry Friendly, it's a
25 pretty good argument.

1 And I guess you could interpret rights
2 and liabilities -- I mean, there is language
3 certainly in your favor in that Your Home case.
4 But you might interpret it as being a final
5 decision in respect to rights and liabilities
6 because he wants the rights and liabilities rule
7 changed because of dah-dah-dah.

8 Okay. So why isn't there enough
9 ambiguity and no forbidding of it that you just
10 get under regular judicial review? The APA.
11 Final decision, unlawful, dah-dah.

12 MR. RAYNOR: Your Honor, Petitioner
13 has not asserted that review under the APA would
14 be permissible here. He's never attempted to
15 proceed under the APA.

16 JUSTICE BREYER: Maybe. But why isn't
17 it?

18 MR. RAYNOR: 355(g) is what would
19 preclude APA review under case --

20 JUSTICE BREYER: But then you get back
21 to my point, which is that, look, if there is
22 any ambiguity here or any significant ambiguity,
23 go with the normal presumption.

24 MR. RAYNOR: In -- in cases like Your
25 Home --

1 JUSTICE BREYER: It doesn't say it --
2 it doesn't say no review.

3 MR. RAYNOR: Correct, Your Honor,
4 although, in cases like Erika, Inc., the Court
5 has held that you can -- there can be structural
6 negative implications that preclude other forms
7 of review. And our position is that the statute
8 here precludes other forms of review.

9 As to your presumption question, in
10 both Your Home and Sanders, the Court declined
11 to mention the across-the-board presumption.
12 And in both of those cases, as here, reopening
13 was a matter of agency grace. And it makes
14 sense in a large benefits program, where
15 reopening is a matter of agency grace that the
16 agency could withdraw at will, not to apply the
17 presumption in the same way it's applied in
18 other contexts.

19 And, in particular, reopening, by
20 definition, is attempting to reopen a prior
21 decision that the claimant will have had an
22 opportunity to seek judicial review of. And so
23 there's not the same pressing need for judicial
24 review here that there would be if we were
25 talking about a case involving primary

1 exhaustion of a benefits claim.

2 JUSTICE BREYER: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Alito.

4 JUSTICE ALITO: There are people in
5 the government who understand these schemes very
6 well, and, therefore, I assume there is a reason
7 why you led off with the argument based on the
8 Railroad Unemployment Insurance Act rather than
9 just the provision of the Railroad Retirement
10 Act. What is that?

11 MR. RAYNOR: Again, Your Honor, the
12 reason is that 231g makes determinations of
13 rights or liabilities under the RRA subject to
14 judicial review, only to the same extent as
15 corresponding rights or liabilities under the
16 RUIA and subject to the same limitations under
17 the RUIA.

18 So that's why we started with the
19 RUIA. But just to be clear, we're not running
20 away from 231g. We think 231g is strongly
21 confirmatory of our interpretation of 355. And,
22 as the Chief Justice pointed out, the
23 "determination of rights or liabilities"
24 language alone could preclude review in this
25 case.

1 JUSTICE ALITO: Well, I'm not sure I
2 understand the answer. Is -- is the answer that
3 you really think that it would be a mistake --
4 it would be -- it would be wrong as a matter of
5 law or it would create anomalies if we were to
6 decide the case based solely on 231g?

7 MR. RAYNOR: I don't think that it
8 would be wrong as a matter of law, Your Honor,
9 and I don't think that it would create serious
10 anomalies.

11 That being said, the government's view
12 is that the best reading of these statutes is
13 that 231g effectively piggybacks on 355 and is
14 designed to pick up the same kind of decisions
15 under 355(c) that would be reviewable under
16 355(f). So the government does read the two
17 statutes together in that respect.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor.

21 JUSTICE SOTOMAYOR: Counsel, your
22 answer gives me great pause. I'm loath often to
23 go off on grounds that the parties haven't
24 really defended or argued. And you say you
25 don't think there will be serious anomalies.

1 Can you guarantee there aren't? Are
2 you absolutely sure?

3 MR. RAYNOR: Your Honor, again, our
4 position is that that language, "determination
5 of rights or liabilities," tracks the kind of
6 decisions that are made under subsection (c),
7 so --

8 JUSTICE SOTOMAYOR: So you've answered
9 my question, counsel.

10 You argue that we need not decide, at
11 least in your brief, whether adopting your
12 interpretation would foreclose challenges to the
13 denial of reopening on constitutional grounds.
14 But, in the brief he submitted during his
15 administrative appeal, Salinas appeared to make
16 sort of a due process argument, claiming he
17 lacked the mental capacity to understand the
18 procedures for requesting review.

19 Let's say we found Salinas's claim to
20 be colorable. Would there be jurisdiction for
21 judicial review?

22 MR. RAYNOR: No, Your Honor, for two
23 reasons.

24 First, he -- he forfeited that
25 argument. That's not something that he's raised

1 here.

2 And, second, at the very least I think
3 the constitutional claim would have to be
4 substantial. Tyryv, for example, left open the
5 possibility of extraordinary cases. And it
6 wouldn't be sufficient for a Petitioner just to
7 recharacterize a run-of-the-mill reopening
8 denial as a due process violation.

9 JUSTICE SOTOMAYOR: Thank you,
10 counsel.

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Mr. Raynor, has the
13 government ever before made an argument of the
14 kind that you're hearing here, that this is
15 resolvable only on the 231 section and not by
16 reference to 355?

17 MR. RAYNOR: Your Honor, the
18 government's traditional argument that Justice
19 Kavanaugh pointed out has been based on 355(c).
20 And as our briefing reflects, that -- that
21 remains our primary argument in this case. And
22 we view 231g as confirmatory of that traditional
23 argument.

24 JUSTICE KAGAN: Okay. Could I ask you
25 about how this cross-reference really works?

1 Because it's quite confusing to me. You know,
2 it says "decisions of the Board determining
3 rights and liabilities." And then it, you know,
4 gets you over to 355 because it says, "as though
5 the decision were a determination of
6 corresponding rights or liabilities under the
7 RUIA." But the RUIA never uses this language of
8 "rights or liabilities."

9 So how do you exactly know what
10 decisions are reviewable, you know, what -- what
11 -- how the RUIA treats decisions of rights or
12 liabilities when the RUIA uses the term "final
13 decision"?

14 MR. RAYNOR: Your Honor, in many cases
15 there's going to be a direct parallel between
16 decisions under the two acts. For example,
17 there is reopening under the RUIA. There is
18 also reopening under the RRA.

19 So the translation principle won't be
20 very difficult to apply in those sorts of cases.
21 And in looking at --

22 JUSTICE KAGAN: So is that to say, Mr.
23 Raynor, that you're reading this as essentially
24 just a synonym for the final decision language
25 in 355? In other words, that you would say as

1 though the decision were a determination of
2 corresponding rights or liabilities under the
3 RUIA means the same thing as -- as though the
4 decision were a final decision under the RUIA?

5 MR. RAYNOR: Not quite, Your Honor. We
6 -- we're saying that the determinations of
7 rights or liabilities is effectively a synonym
8 for final decisions under subsection (c) under
9 the RUIA.

10 JUSTICE KAGAN: Okay. That's all.
11 Thank you very much.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: Good morning,
15 counsel.

16 I want to follow up on Justice
17 Sotomayor's inquiry about constitutional
18 challenges. Page 15 and 16 of the brief, you
19 say, foreclosing garden-variety reopening
20 motions like the one here would not raise any
21 distinct issue of a rare case in which the
22 denial of reopening might be challenged on
23 constitutional grounds.

24 If we were to adopt your view either
25 on 231 or 355(c), there would be -- appear to be

1 no statutory basis to allow judicial review of
2 any reopening decision. Where does this special
3 exception for constitutional challenges come
4 from and how do we know what a good one -- a
5 garden-variety one is compared to a really --
6 the merits would determine our jurisdiction? I
7 guess I am just curious how all that follows.

8 MR. RAYNOR: Your Honor, in Sanders
9 the Court articulated that the presumption in
10 favor of judicial review is stronger for
11 constitutional claims. And there --

12 JUSTICE GORSUCH: I understand that,
13 counsel. I'm talking about the statute. Can
14 you help me there?

15 MR. RAYNOR: Yes. So 355(g) is the
16 preclusion provision here. And in Thunder Basin
17 the Court said that a preclusion provision like
18 this might not bar other forms of review for
19 issues that were truly collateral to the
20 agency's mission.

21 And so one doctrinal way to approach
22 this would be to say that a substantial
23 constitutional claim is collateral to the
24 agency's mission and is not covered by 355(g).

25 But, again, he is not pressing that

1 here. And as in *Tyryv*, the Court could simply
2 leave that open for a future case.

3 JUSTICE GORSUCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh.

6 JUSTICE KAVANAUGH: Thank you. Thank
7 you, Mr. Raynor.

8 On the greater includes the lesser
9 argument that I understand you to be making in
10 part; namely, that the government's -- they're
11 not required to grant reopening, so if they --
12 if they allow reopening, they can deny judicial
13 review. I mean, that's not usually how
14 administrative law works.

15 Yes, you have discretion whether to
16 provide this particular kind of avenue for
17 relief, but I'm not aware of examples like this
18 where, but if we do so, we can just cut off all
19 judicial review of it.

20 What's your response to that?

21 MR. RAYNOR: Your Honor, the special
22 thing about reopening here is that unlike other
23 discretionary decisions, for example, in *Hawkes*,
24 this -- this is something that's a free benefit
25 above and beyond the main exhaustion process,

1 the substantive entitlement to benefits.

2 And the Court has recognized this
3 graves principal in both Sanders and Your Home,
4 which are the most on --

5 JUSTICE KAVANAUGH: Let me --

6 MR. RAYNOR: -- point precedent --

7 JUSTICE KAVANAUGH: I'm sorry -- I'm
8 sorry to interrupt, but it's important, right?
9 So it is possible that the reopening petition,
10 the Board will mistakenly deny reopening, and
11 the rail -- railroad worker should have been --
12 should have received benefits.

13 And so I don't know about saying it's
14 above and beyond. In that case, the -- the
15 worker should have gotten the benefits, did not,
16 and you're saying no judicial review?

17 MR. RAYNOR: Your Honor, in any
18 reopening case, the claimant could have
19 exhausted his original claim and sought judicial
20 review at that time.

21 And that's all that the statute --

22 JUSTICE KAVANAUGH: But the whole
23 point -- sorry to interrupt, but the whole point
24 of these is that there is often new evidence
25 that could not have been presented at the time.

1 That's the point. It is not a rehash. There is
2 new evidence that shows that the initial
3 determination was wrong.

4 And you're saying even if the Board
5 makes a mistake on the reopening, mis-evaluates
6 the new evidence, no judicial review, forget
7 about it?

8 MR. RAYNOR: That's correct. And
9 there's nothing surprising about that from the
10 perspective of congressional intent because --

11 JUSTICE KAVANAUGH: No, that's -- I --
12 I understand your larger point on that.

13 You said earlier that there was no --
14 and you have just reiterated, I guess -- no
15 pressing need for judicial review here. I guess
16 I'm not sure about that, given the example I
17 just gave, but on the flip side, the burden on
18 the courts seems to be almost nil.

19 In the D.C. Circuit, at least, in the
20 last five years, trouble finding any case that
21 involved judicial review of a denied reopening
22 in this context.

23 The floodgates concern does not seem
24 to be a real one, but you can correct me if
25 that's wrong.

1 MR. RAYNOR: Your Honor, I agree that
2 the absolute number of reopening petitions is
3 low, and we're not really pushing the floodgates
4 argument. I think --

5 JUSTICE KAVANAUGH: Okay. Let's --

6 MR. RAYNOR: -- that it's a practical
7 problem.

8 JUSTICE KAVANAUGH: -- sneak one last
9 one in.

10 On 231g, I understood your answer to
11 Justice Kagan to be actually that's right, the
12 government has never argued before in the many
13 decades of this that you could resolve this on
14 231g alone.

15 Indeed, 231g did not really appear in
16 a lot of the government's position in arguing
17 these cases over the decades. Is that accurate?

18 MR. RAYNOR: I agree, Your Honor, that
19 the Board has not traditionally interpreted 231g
20 in isolation.

21 JUSTICE KAVANAUGH: Okay. Very
22 helpful, Mr. Raynor. Thank you very much.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett.

25 JUSTICE BARRETT: Thank you. So,

1 counsel, when the Chief Justice asked you if
2 there would be a practical problem in having a
3 different scope of review under the RRA and the
4 RUIA, you said: Well, it would be conforming to
5 our view of 355.

6 So, in other words, if we interpret
7 355 the way you would like us to, to cover
8 review only of claims under 355(c), then it's
9 the exact same for both.

10 But what if we disagree with you?
11 What if we say no, review under 355 is of any
12 final decision, and so then there may be a
13 different scope. What practical problems might
14 arise then?

15 MR. RAYNOR: Your Honor, I don't know
16 that it would be a practical problem so much as
17 sort of counterintuitive from the perspective of
18 congressional intent. And in that world, for
19 example, a claimant could obtain judicial review
20 of reopening under the RUIA, but wouldn't be
21 able to obtain judicial review of reopening
22 under the RRA.

23 And that's an anomaly that might be
24 surprising to think that Congress intended that,
25 but it probably wouldn't be a practical problem

1 per se.

2 JUSTICE BARRETT: Have there been many
3 cases in which courts -- I'm aware of one -- but
4 have courts ever held that motions for reopening
5 are reviewable as opposed to not reviewable
6 under the RUIA?

7 MR. RAYNOR: Under the R --

8 JUSTICE BARRETT: Or was all -- was
9 all the action in the RRA context?

10 MR. RAYNOR: Your Honor, most of these
11 cases arise in the RRA context. There is a far
12 greater number of beneficiaries. I don't know
13 the precise number of cases that pertain to the
14 RUIA, specifically.

15 And, of course, under the government's
16 approach, there is really no difference in the
17 analysis under either statute.

18 JUSTICE BARRETT: Is the reason why
19 the government would prefer for us to decide
20 this under 355 is that it then takes care of
21 narrowing -- making sure that the scope is the
22 same and the narrow one that you proposed for
23 purposes of both the RUIA and the RRA as opposed
24 to using 231g which narrows only RRA claims?

25 MR. RAYNOR: Certainly we would agree

1 that interpreting the statutes in harmony and
2 creating symmetry between the two provisions is
3 the most plausible understanding of
4 congressional intent.

5 Again, as a practical matter, the RRA,
6 there's a far greater number of beneficiaries
7 under the RRA.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: We have time
10 for additional questioning of Mr. Raynor, if any
11 members of the Court have questions they would
12 like to ask.

13 If not, Mr. Raynor, why don't you take
14 a couple of minutes for wrapping up.

15 MR. RAYNOR: Thank you, Mr. Chief
16 Justice.

17 One thing I would just like to touch
18 on is counsel for Petitioners pointed this is a
19 new evidence case rather than a rehash case.

20 I want to just reiterate that there is
21 no basis in the statute for that distinction.

22 And Sanders and Your Home don't
23 distinguish between new evidence and rehash
24 cases. And even on the facts of this case,
25 Petitioner argued below that there was an error

1 on the face of the record. That was his basis
2 for reopening in the Fifth Circuit.

3 And the reason for that is that there
4 is a four-year limitations period on raising new
5 evidence. And so his reopening application is
6 effectively dead in the water if he's attempting
7 to raise new evidence because he filed the
8 reopening motion far more than four years after
9 the original determination.

10 So if the Court ended up going in that
11 route and making that distinction, remand would
12 be appropriate to determine whether this
13 actually is new evidence and, if it is, whether
14 reopening is appropriate.

15 In closing, I would just like to note
16 that at the end of the day Petitioner's argument
17 boils down to two presumptions: The last
18 antecedent rule and the presumption in favor of
19 judicial review.

20 And to the extent they apply here at
21 all, both of those presumptions have diminished
22 force and are easily overcome.

23 Instead of focusing on the
24 presumptions, this Court should focus on the
25 text and structure. Section 231g says that only

1 determinations of rights or liabilities are
2 reviewable. That language tracks 355, which
3 only allows review of decisions under subsection
4 (c), which, again, are substantive
5 determinations about a party's entitlement to
6 rights or benefits or coverage under the
7 statutes.

8 Petitioner focuses on interpreting
9 certain words and phrases in isolation. He has
10 no explanation for how the different provisions
11 fit together in a sensible or coherent way.

12 The government's interpretation, in
13 contrast, harmonizes the different provisions
14 and reflects the orderly review scheme that
15 Congress intended.

16 This Court should affirm the judgment
17 below. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Ms. Harris, three minutes for
21 rebuttal.

22 REBUTTAL ARGUMENT OF SARAH M. HARRIS
23 ON BEHALF OF THE PETITIONER

24 MS. HARRIS: Thank you, Mr. Chief
25 Justice.

1 Three points: First of all, there is
2 absolutely no reason to go out on a limb that is
3 fairly untested and that I take the government
4 is not fully comfortable with, with respect to
5 231g, which is to treat rights and liabilities
6 as narrower than what it might mean to have all
7 final decisions reviewable under the RUIA.

8 And it would be really perverse to do
9 so. If you had a situation where short-term
10 beneficiaries under the RUIA were entitled to
11 reopening, yet long-term beneficiaries under the
12 RRA were not, it really would sort of put -- it
13 takes the statutory scheme upside down because
14 it is the long-term beneficiaries who are the
15 ones who are most in need of a check after that
16 initial denial or grant of benefits on changed
17 circumstances.

18 They are the people who have these
19 benefits for potentially a long time or need
20 them for a long time. And while the government
21 doesn't seem to see any anomalies in this
22 scheme, I do think there are at least some
23 because the definition of an employer is the
24 same across the statutes.

25 And so I take the government's

1 position to be, well, perhaps if all final
2 decisions under the RUIA are reviewable, then
3 employers could get reopening with respect to
4 whether or not they are covered by the RUIA.

5 For instance, if they could show that
6 initial coverage determination was wrong for
7 some reason or they had new evidence about --
8 that wasn't considered, or changed
9 circumstances.

10 But yet they somehow couldn't do that
11 under the RRA, even though that's the scheme
12 that tends to take the most -- tends to -- tends
13 to bear the heaviest burden on employers.
14 Again, that would be hugely perverse.

15 And if you thought that reopening
16 isn't a right or liability under the RRA because
17 it's not a change from the status quo, you would
18 also have real concerns about other
19 determinations that suddenly wouldn't seem to be
20 reviewable either under that scheme.

21 For instance, denials of modifications
22 of benefits or terminations of benefits, where,
23 for instance, let's say the employer found fraud
24 and wanted to reopen a long-term annuity
25 decision and alert the Board to it. That

1 wouldn't be subject to reopening either, or
2 where someone has a much graver disability and
3 wants to modify their benefits on that basis.

4 Second of all, with respect to
5 discretionary determinations, the agency brief
6 point, I think, fails. I do think this is the
7 same as Hawk, where the Court said there's no
8 count your blessing of principle. There was no
9 obligation under the statute and no mention in
10 the Clean Water Act of stand-alone
11 jurisdictional determinations, but they were
12 still reviewable once the agency did them.

13 And, third, the government has no
14 explanation for why reopening denials would ever
15 be reviewable. And we know they are reviewable
16 in so many contexts, including the immigration
17 context, for nearly a century.

18 And our explanation, I think, explains
19 standards in Your Home which is that, while the
20 reopening denials in those cases might have been
21 final decisions, they are not ones that the
22 agency has manageable standards for reviewing.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 12:16 p.m., the case
2 was submitted.)
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