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IN THE SUPREME COURT OF THE UNITED STATES
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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 hearings. 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 is
11 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 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 --

3 JUSTICE BREYER: Yeah.

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

12 Now Califano --

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

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

1 context.

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

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

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

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

1 new evidence.

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

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

14 JUSTICE BREYER: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

23 MS. HARRIS: Well, you could -- you
24 could do it that way, but, of course, that
25 language then says that -- it does tie judicial

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

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

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

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

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

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

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

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

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

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

1 reopening under both. And I think the only
2 anomaly that would happen with respect to the
3 two statutes is probably the employer coverage
4 determination.

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

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

13 JUSTICE SOTOMAYOR: I'd like to
14 continue with Justice Alito's question because,
15 yes, there might be differences, but you haven't
16 explained to me why those differences are
17 important. You just mentioned the employer
18 determination. 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. That's a clear determination of
7 rights or liabilities under the Act, and so it
8 still would be subject to judicial review.

9 But hearkening back to what Justice
10 Thomas said, at least in Home Services, we
11 thought of or could think of -- and I understand
12 it was because of the regulatory scheme -- that
13 a motion to reopen was not a new determination
14 of rights or benefits, that it was a decision
15 not to reconsider that question.

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

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

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

1 potential concerns about circumvention of the
2 limitations period.

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

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

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

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

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

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

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

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

1 JUSTICE KAGAN: Thank you, Ms. Harris.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch.

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

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

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

21 And let -- you know, it makes me
22 wonder whether Congress ever anticipated the
23 idea of reopening decisions or even authorized
24 them. And if Congress didn't authorize them, if
25 they were never anticipated, if they just simply

1 weren't permitted under 355(g), what should that
2 tell us about both (f) -- 355(f) and 231g?

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

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

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

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

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

25 The other things I'd point you to are

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

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

17 MS. HARRIS: Well, two points there.

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

25 JUSTICE GORSUCH: Well, let's stick to

1 the Railroad Retirement Act and -- and -- and
2 maybe even the RUIA. What -- what -- what harm
3 would there be in that?

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

6 JUSTICE GORSUCH: Right.

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Good morning,
25 Ms. Harris.

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

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

13 MR. RAYNOR: And that --

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

20 Do you need a decision that covers
21 355(f) to decide this case?

22 MR. RAYNOR: No, Your Honor. I agree
23 with you that the determination of rights or
24 liabilities language in Section 231g is a gating
25 mechanism. And if you didn't think that a

1 reopening denial qualified as a determination of
2 rights or liabilities, which, in our view, would
3 be correct under Your Home, then judicial review
4 would not be available under the RRA.

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, you say

1 just a plain meaning approach with, it sounds, a
2 little bit of disdain, but why -- the -- the RRA
3 program is the vast majority of rail -- railroad
4 benefits, right? I mean, the RUIA is just a
5 tail on the dog, right?

6 MR. RAYNOR: That's correct.

7 CHIEF JUSTICE ROBERTS: Okay. Thank
8 you, counsel.

9 Justice Thomas.

10 JUSTICE THOMAS: Thank you, Mr. Chief
11 Justice.

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

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

22 JUSTICE THOMAS: If that's the case,
23 how could it be then that it's a final decision
24 if it's purely discretionary? I think the hard
25 connection for me to make is, how do you get

1 from a discretionary decision with respect to
2 reopening to the underlying issue of benefits?

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

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

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

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

23 MR. RAYNOR: Your Honor, it wasn't
24 clear to me if counsel for Petitioner was
25 conceding that mere rehash cases would not be

1 reviewable. If so, we certainly agree with
2 that. Our fallback position here is that the
3 Locomotive Engineers background rule of
4 "committed to agency discretion by law" would at
5 the very least foreclose mere rehash cases.

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

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

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer.

21 JUSTICE BREYER: Thank you.

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

1 read Judge Henry -- Henry Friendly, it's a
2 pretty good argument.

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

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

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

18 JUSTICE BREYER: Maybe. But why isn't
19 it?

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

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

1 MR. RAYNOR: In -- in cases like Your
2 Home --

3 JUSTICE BREYER: It doesn't say -- it
4 doesn't say no review.

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

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

21 And, in particular, reopening, by
22 definition, is attempting to reopen a prior
23 decision that the claimant will have had an
24 opportunity to seek judicial review of. And so
25 there's not the same pressing need for judicial

1 review here that there would be if we were
2 talking about a case involving primary
3 exhaustion of a benefits claim.

4 JUSTICE BREYER: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

1 language alone could preclude review in this
2 case.

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

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

13 That being said, the government's view
14 is that the best reading of these statutes is
15 that 231g effectively piggybacks on 355 and is
16 designed to pick up the same kind of decisions
17 under 355(c) that would be reviewable under
18 355(f). So the government does read the two
19 statutes together in that respect.

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, your
24 answer gives me great pause. I'm loath often to
25 go off on grounds that the parties haven't

1 really defended or argued. And you say you
2 don't think there will be serious anomalies.

3 Can you guarantee there aren't? Are
4 you absolutely sure?

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

10 JUSTICE SOTOMAYOR: So you've answered
11 my question, counsel.

12 You argue that we need not decide, at
13 least in your brief, whether adopting your
14 interpretation would foreclose challenges to the
15 denial of reopening on constitutional grounds.

16 But, in the brief he submitted during
17 his administrative appeal, Salinas appeared to
18 make sort of a due process argument, claiming he
19 lacked the mental capacity to understand the
20 procedures for requesting review.

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

24 MR. RAYNOR: No, Your Honor, for two
25 reasons.

1 First, he -- he forfeited that
2 argument. That's not something that he's raised
3 here.

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

11 JUSTICE SOTOMAYOR: Thank you,
12 counsel.

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

1 JUSTICE KAGAN: Okay. Could I ask you
2 about how this cross-reference really works?
3 Because it's quite confusing to me. You know,
4 it says "decisions of the Board determining
5 rights and liabilities." And then it, you know,
6 gets you over to 355 because it says, "as though
7 the decision were a determination of
8 corresponding rights or liabilities under the
9 RUIA."

10 But the RUIA never uses this language
11 of "rights or liabilities." So how do you
12 exactly know what decisions are reviewable --
13 you know, what -- what -- how the RUIA treats
14 decisions of rights or liabilities when the RUIA
15 uses the term "final decision"?

16 MR. RAYNOR: Your Honor, in many
17 cases, there's going to be a direct parallel
18 between decisions under the two acts. For
19 example, there's reopening under the RUIA.
20 There's also reopening under the RRA. So the
21 translation principle won't be very difficult to
22 apply in those sorts of cases.

23 And in looking at --

24 JUSTICE KAGAN: So is that to say, Mr.
25 Raynor, that you're reading this as essentially

1 just a synonym for the final decision language
2 in 355? In other words, that you would say as
3 though the decision were a determination of
4 corresponding rights or liabilities under the
5 RUIA means the same thing as -- as though the
6 decision were a final decision under the RUIA?

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

12 JUSTICE KAGAN: Okay. That's all.
13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: Good morning,
17 counsel.

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

1 If we were to adopt your view either
2 on 231 or 355(c), there would be -- appear to be
3 no statutory basis to allow judicial review of
4 any reopening decision. Where does this special
5 exception for constitutional challenges come
6 from and how do we know what a good one -- a
7 garden-variety one is compared to a really --
8 the merits would determine our jurisdiction? I
9 guess I'm just curious how all that follows.

10 MR. RAYNOR: Your Honor, in Sanders,
11 the Court articulated that the presumption in
12 favor of judicial review is stronger for
13 constitutional claims. And so it could be --

14 JUSTICE GORSUCH: Yeah, I understand
15 -- I understand that, counsel. I'm talking
16 about the statute. Can you help me there?

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

23 And so one doctrinal way to approach
24 this would be to say that a substantial
25 constitutional claim is collateral to the

1 agency's mission and is not covered by 355(g).

2 But, again, he's not pressing that
3 here. And, as in Tyryv, the Court could simply
4 leave that open for a future case.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh.

8 JUSTICE KAVANAUGH: Thank you.

9 Thank you, Mr. Raynor.

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

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

22 What's your response to that?

23 MR. RAYNOR: Your Honor, the special
24 thing about reopening here is that unlike other
25 discretionary decisions, for example, in Hawkes,

1 this -- this is something that's a free benefit
2 above and beyond the main exhaustion process,
3 the substantive entitlement to benefits.

4 And the Court has recognized this
5 graves principle in both Sanders and Your Home,
6 which are the most on --

7 JUSTICE KAVANAUGH: Let me --

8 MR. RAYNOR: -- point precedent --

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

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

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

23 And that's all that the statute --

24 JUSTICE KAVANAUGH: But the whole
25 point -- sorry to interrupt, but the whole point

1 of these is that there is often new evidence
2 that could not have been presented at the time.
3 That's the point. It's not a rehash. There's
4 new evidence that shows that the initial
5 determination was wrong.

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

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

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

15 You said earlier that there was no --
16 and you've just reiterated, I guess -- no
17 pressing need for judicial review here. I guess
18 I'm not sure about that, given the example I
19 just gave.

20 But, on the flip side, the burden on
21 the courts seems to be almost nil. In the D.C.
22 Circuit, at least, in the last five years,
23 trouble finding any case that involved judicial
24 review of a denied reopening in this context.

25 The floodgates concern does not seem

1 to be a -- a real one, but you can correct me if
2 that's wrong.

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

7 JUSTICE KAVANAUGH: Okay. Let's --

8 MR. RAYNOR: -- it's a practical
9 problem.

10 JUSTICE KAVANAUGH: -- sneak one last
11 one in.

12 On 231g, I understood your answer to
13 Justice Kagan to be actually that's right, the
14 government has never argued before in the many
15 decades of this that you could resolve this on
16 231g alone. Indeed, 231g did not really appear
17 in a lot of the government's position in arguing
18 these cases over the decades. Is that accurate?

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

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

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett.

1 JUSTICE BARRETT: Thank you.

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

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

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

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

24 And that's an anomaly that might be
25 surprising to think that Congress intended that,

1 but it probably wouldn't be a practical problem
2 per se.

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

8 MR. RAYNOR: Under the R --

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

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

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

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

1 claims?

2 MR. RAYNOR: Certainly, we would agree
3 that interpreting the statutes in harmony and
4 creating symmetry between the two provisions is
5 the most plausible understanding of
6 congressional intent.

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

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: We have time
12 for additional questioning of Mr. Raynor if any
13 members of the Court have questions they'd like
14 to ask.

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

17 MR. RAYNOR: Thank you, Mr. Chief
18 Justice.

19 One thing I would just like to touch
20 on is counsel for Petitioner's point that this
21 is a new evidence case rather than a rehash
22 case. I want to just reiterate that there's no
23 basis in the statute for that distinction.

24 And Sanders and Your Home don't
25 distinguish between new evidence and rehash

1 cases. And even on the facts of this case,
2 Petitioner argued below that there was an error
3 on the face of the record. That was his basis
4 for reopening in the Fifth Circuit.

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

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

17 In closing, I would just like to note
18 that at the end of the day, Petitioner's
19 argument boils down to two presumptions: the
20 last-antecedent rule and the presumption in
21 favor of judicial review. And to the extent
22 they apply here at all, both of those
23 presumptions have diminished force and are
24 easily overcome.

25 Instead of focusing on the

1 presumptions, this Court should focus on the
2 text and structure. Section 231g says that only
3 determinations of rights or liabilities are
4 reviewable. That language tracks 355, which
5 only allows review of decisions under subsection
6 (c), which, again, are substantive
7 determinations about a party's entitlement to
8 rights or benefits or coverage under the
9 statutes.

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

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

18 This Court should affirm the judgment
19 below. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Ms. Harris, three minutes for
23 rebuttal.

24
25

1 REBUTTAL ARGUMENT OF SARAH M. HARRIS
2 ON BEHALF OF THE PETITIONER

3 MS. HARRIS: Thank you, Mr. Chief
4 Justice. Three points.

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

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

22 They are the people who have these
23 benefits for potentially a long time or need
24 them for a long time. And while the government
25 doesn't seem to see any anomalies in this

1 scheme, I do think there are at least some
2 because the definition of an employer is the
3 same across the statutes.

4 And so I take the government's
5 position to be, well, perhaps if all final
6 decisions under the RUIA are reviewable, then
7 employers could get reopening with respect to
8 whether or not they are covered by the RUIA.

9 For instance, if they could show that
10 an initial coverage determination was wrong for
11 some reason or they had new evidence about --
12 that wasn't considered, or changed
13 circumstances.

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

19 And if you thought that reopening
20 isn't a right or liability under the RRA because
21 it's not a change from the status quo, you'd
22 also have real concerns about other
23 determinations that suddenly wouldn't seem to be
24 reviewable either under that scheme, for
25 instance, denials of modifications of benefits

1 or terminations of benefits, where, for
2 instance, let's say the employer found fraud and
3 wanted to reopen a long-term annuity decision
4 and alert the Board to it. That wouldn't be
5 subject to reopening either, or where someone
6 has a much graver disability and wants to modify
7 their benefits on that basis.

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

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

22 And our explanation, I think, explains
23 standards in Your Home which is that, while the
24 reopening denials in those cases might have been
25 final decisions, they are not ones that the

1 agency has manageable standards for reviewing.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:16 p.m., the case
5 was submitted.)

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