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Supreme Court Report

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This *Report* summarizes opinions issued on January 14, 2020 (Part I); and cases granted review on January 10 and 17, 2020 (Part II).

I. Opinions

● *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 18-938. The Court unanimously held that the adjudication of a creditor's motion for relief from the Bankruptcy Code's automatic stay provisions constitutes a final, appealable order. Ritzen Group sued Jackson Masonry in state court for breach of contract. Days before the state trial was to begin, Jackson filed for Chapter 11 bankruptcy. By operation of law, the Bankruptcy Code's automatic stay provision put the state court litigation on hold. 11 U.S.C. §362(a). Ritzen filed a motion in the bankruptcy court seeking relief from the automatic stay on the ground that Jackson had filed for bankruptcy in bad faith. The bankruptcy court denied the motion, but Ritzen did not appeal. After the bankruptcy court later confirmed Jackson's plan for reorganization, Ritzen filed a notice of appeal challenging the denial of relief from the automatic stay. The district court rejected the appeal as untimely, finding that the 14-day statutory period in which to appeal ran from the date the bankruptcy court denied the motion for relief from the automatic stay. The Sixth Circuit affirmed, finding that the denial of the motion to lift the stay was a final order that triggered the 14-day appeal clock. In an opinion by Justice Ginsburg, the Court affirmed.

The Court explained that finality has a different meaning in bankruptcy proceedings than in ordinary civil litigation. In ordinary civil litigation, a "final decision" is "normally limited to an order that resolves the entire case." 28 U.S.C. §1291. By contrast, "[a] bankruptcy case encompasses numerous individual controversies, many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor." (Quotation marks omitted.) And "[d]elaying appeals from discrete, controversy-resolving decisions in bankruptcy cases would long postpone appellate review of fully adjudicated disputes." Congress took this into account in the statutory provision governing appeals from bankruptcy courts to U.S. district courts, 28 U.S.C. §158(a). The provision authorizes an appeal of right from "final judgments, orders, and decrees" entered by bankruptcy courts in "cases and proceedings." The Court reasoned that, by providing for appeals from final decisions in bankruptcy "proceedings," as distinguished from bankruptcy "cases," Congress made "'orders in bankruptcy cases . . . immediately appeal[able] if they finally dispose of discrete disputes within the larger [bankruptcy] case'" (quoting *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015)).

The Court then applied those principles to this case. It concluded that a motion for relief from the stay initiates a discrete procedural process that is separate and apart from proceedings on the merits of creditors' claims and thus is immediately appealable. In reaching that conclusion, the Court explained that "[a]djudication of a stay-relief motion . . . occurs before and apart from proceedings on the merits of creditors' claims: The motion initiates a discrete procedural sequence, including notice and a hearing, and the creditor's qualification for relief turns on the statutory standard, *i.e.*, 'cause' or the presence of specified conditions." Ritzen countered that denial of the stay-relief motion merely determined the forum for claim adjudication. Rejecting that argument, the Court noted that, even were that so, "[o]rders denying a plaintiff the opportunity to seek relief in its preferred forum often qualify as final and immediately appealable, though they leave the plaintiff free to sue else-

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where." Finally, the Court rejected Ritzen's contention that deeming the denial a final order "will encourage piecemeal appeals and unduly disrupt the efficiency of the bankruptcy process." To the contrary, found the Court, its rule allows "creditors to establish their rights expeditiously outside the bankruptcy process," which may then affect the relief sought and awarded later in the bankruptcy case.

● *Retirement Plans Committee of IBM v. Jander*, 18-1165. In a *per curiam* opinion, the Court remanded to the Second Circuit for that court to decide whether to entertain the parties' new arguments concerning whether the Employee Retirement Income Security Act (ERISA) imposes a duty on the fiduciary of an Employee Stock Ownership Plan (ESOP) to disclose inside information. In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), the Court held that "[t]o state a claim for breach of the duty of prudence" imposed on plan fiduciaries by ERISA "on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." The Court here granted certiorari to resolve "[w]hether *Fifth Third*'s 'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time."

The parties' merits briefs, however, focused on a different issue about the scope of an ESOP fiduciary's duty to disclose inside information. "The petitioners argued that ERISA imposes no duty on an ESOP fiduciary to act on inside information." The Government argued that an ERISA-based duty to disclose inside information not otherwise required by the federal securities laws would conflict with the objectives of the securities laws. Because the parties had not previously raised those arguments, and the Second Circuit had not addressed them, the Court remanded for the Second Circuit's consideration.

Justice Kagan wrote a concurring opinion that Justice Ginsburg joined. She emphasized that the Second Circuit could find that the parties had forfeited their new arguments by failing to raise them earlier. But if not forfeited, Justice Kagan said, petitioner's argument is foreclosed by *Fifth Third*, which (in her view) requires fiduciaries to disclose inside information in certain circumstances. She likewise maintained that *Fifth Third* also defeats the Government's argument, for it envisioned a "conflict-free zone" where disclosure of inside information is neither required nor barred by securities law but "might fall within an ESOP fiduciary's duty." The key question then is whether "a prudent fiduciary would think the disclosure more likely to benefit than to harm the fund."

Justice Gorsuch also wrote a concurring opinion. He disagreed with Justice Kagan that *Fifth Third* definitively rejected petitioner's and the Government's arguments. In his view, *Fifth Third* simply held that "suits requiring fiduciaries to violate the securities laws cannot proceed"; the decision was silent on the duty-to-disclose arguments because that issue was not raised by the parties. Justice Gorsuch contended that *Fifth Third* did not "promis[e] that a case may proceed anytime a plaintiff is able to conjure a hypothetical helpful action that would've been consistent with the securities laws."

II. Cases Granted Review

● *Little Sisters of the Poor v. Pennsylvania*, 19-431; *Trump v. Pennsylvania*, 19-454. The Court will review a Third Circuit decision upholding a nationwide preliminary injunction preventing implementation of a federal regulation extending the religious exemption to the Affordable Care Act's (ACA) contraceptive mandate. The Women's Health Amendment to the ACA requires women's health plans to include coverage for "preventive care" without "any cost sharing requirements." But the law does not define "preventive care." Instead, the ACA requires the Health Resources and Services Administration (HRSA) to issue comprehensive guidelines delineating services to be covered. In 2011, HRSA issued guidelines that defined "preventive care" to include all contraceptive methods approved by the Food and Drug Administration. At the same time, HHS and other federal agencies promulgated a rule exempting churches from compliance with the contraceptive mandate. In 2013, the agencies promulgated an "accommodation" for religious not-for-profit organizations which allowed them to opt out of contraceptive coverage by notifying the insurer or third-party administrator of their objection to such coverage. The insurer or administrator would then provide or arrange contraceptive coverage for plan participants. Many religious non-profits objected to that accommodation, insisting that it violated their rights under the Religious Freedom Restoration Act (RFRA). In making that argument, they relied heavily on *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), which held that RFRA prohibited applying the contraceptive mandate to closely held for-profit corporations with religious objections. The Supreme Court heard argument on religious non-profits' objection to the accommodation in *Zubik v. Burwell*, 136 S. Ct. 444 (2015), but declined to resolve the merits, instead directing the parties to try to resolve the dispute. In October 2017, the federal agencies issued two interim final rules, without notice and public comment, expanding the religious exemption that churches received to a broad range of additional employers with moral or religious objections. In November 2018, the agencies issued virtually identical final rules after notice and comment. Pennsylvania and New Jersey challenged the interim and then final rules on the grounds that they violated the Administrative Procedure Act and were unlawful. The district court found the interim and final rules invalid and issued a nationwide preliminary injunction barring their implementation. The Third Circuit affirmed. 930 F.3d 543.

First, the Third Circuit held that the interim rules were procedurally defective under the APA because they were promulgated without notice and comment and the "good cause" exception to notice-and-comment rulemaking (see 5 U.S.C. 553(b)(B)), did not apply. According to the Third Circuit, this deficiency "tainted the Final Rules." The court rejected the argument that the notice and comment preceding the final rules cured the defect because the agencies did not display "a real open-mindedness" to amending the interim rules. *Second*, the court concluded the agencies lacked authority under either the ACA or RFRA to expand the exemption. The court interpreted the ACA as authorizing the agencies to designate the "type of services that are to be provided," but not "who must provide coverage for those services." Turning to RFRA, the court held that it did "not require the enactment of the [new rules]." Instead, the court explained, RFRA "provides a judicial remedy via individualized adjudication." Regardless, the court concluded, "RFRA does not require the broad exemption embodied in the Final Rule[s]" because "the status quo prior to the new Rule[s], with the Accommodation, did not infringe on the religious exercise of covered employers[.]" As to the scope

of the injunction, the court said that a nationwide injunction was "necessary to provide the States with complete relief" because, for example, residents who live in one state and work in another, or students who attend out-of-state universities, would remain unprotected absent a nationwide injunction. Finally, the court found that the states had standing because the final rules would cost them money when women who lose contraceptive coverage turn to other "state-funded programs and services" and use public funds "to cover the costs of [] unintended pregnancies." On the other hand, the court noted, Little Sisters had lost standing because a Colorado district court "permanently enjoined enforcement of the Contraceptive Mandate for benefit plans in which Little Sisters participates."

The Court granted certiorari to resolve whether (1) the regulation is valid under the APA; (2) federal agencies had authority under the ACA or RFRA to expand the exemption; (3) the nationwide injunction was proper; and (4) Little Sisters has standing. As for the APA, Little Sisters asserts there was "good cause" for bypassing notice and comment at the interim rules stage because a broader religious exemption was needed to address pending litigation and to comply with RFRA in the wake of *Hobby Lobby* and its progeny. Even if "good cause" was not satisfied, Little Sisters maintains, any procedural defect was "cured" by "subjecting the Final Rules to notice and comment." Indeed, Little Sisters argues, if a procedurally defective interim rule "necessarily invalidates the resulting final rule," the contraceptive mandate is also invalid "for that mandate is itself the product of [interim rules] issued without notice and comment." Next, Little Sisters argues that the Third Circuit wrongly interpreted the ACA and RFRA to preclude the agencies from promulgating the final rules. It reasons that the "contraceptive mandate is not a statutory command" in the ACA, but a "product of the 'comprehensive guidelines' that HRSA was left to develop." Since the agencies had the authority to create the mandate, Little Sisters contends, they had the authority to limit it. And the guidelines "never guaranteed all employees all services mentioned in those guidelines." Instead, "churches and their integrated auxiliaries have always been exempt from the requirement to provide contraceptive services." Further, Little Sisters contends, RFRA "'applies to all Federal law and the implementation of that law.' . . . Agencies are thus duty-bound to ensure that even generally applicable laws do not substantially burden religious exercise unless RFRA's compelling-interest and least-restrictive means test are satisfied." The nationwide injunction, Little Sisters argues, was "especially inappropriate when litigation in different courts over the course of nearly a decade has produced vastly different results" and subjected the agencies to a "patchwork of competing injunctions[.]" Finally, on standing, Little Sisters asserts that it need not establish independent standing as an intervenor, and in any event, its harm was not eliminated by the Colorado injunction because the regulation provided greater protection than the injunction. The federal government makes many of the same points, and asserts that a nationwide injunction is an "inequitable one-way ratchet" that "transgresses fundamental Article III and equitable principles."

● *Chiafalo v. Washington*, 19-465; *Colorado Dep't of State v. Baca*, 19-518. The Court will resolve whether Article II or the Twelfth Amendment prohibits a state from requiring its presidential electors to follow the state's popular vote when casting Electoral College ballots. The Court will also consider whether a presidential elector who is prevented from casting an Electoral College ballot that violates state law has standing to sue his or her appointing state.

Colorado and Washington both have statutes mandating that presidential electors cast Electoral College votes for the candidate who wins that state's popular vote for President and Vice-President. In Washington, an elector who violates this requirement may be fined $1,000; in Colorado, such an elector can be removed and replaced. Petitioners in the Washington case are Levi Guerra, Esther John, and Peter Chiafalo, who were all nominated as presidential electors by the Washington State Democratic Party in 2016, but none cast their Electoral College votes for Clinton/Kaine. Each was fined $1,000. They appealed the fine to an administrative law judge and the superior court, but both affirmed. Petitioners took a direct appeal to the Washington Supreme Court, which also affirmed. 441 P.3d 807. The Colorado case concerns respondents Micheal Baca, Polly Baca, and Robert Nemanich, who were presidential electors appointed by the Colorado State Democratic Party. Each took an oath to vote for the candidate who won that state's popular vote for president. Despite doing so, Mr. Baca cast his Electoral College vote for John Kasich, whereupon the Colorado Secretary of State removed Mr. Baca as an elector, nullified his Electoral College vote, and replaced him with a substitute elector who voted for Hillary Clinton. After witnessing these events, Ms. Baca and Mr. Nemanich "felt intimidated and pressured to vote against their determined judgment" and cast their Electoral College votes for Clinton/Kaine. They filed a lawsuit in district court under 42 U.S.C. §1983, alleging that Colorado's mandate violated Article II and the Twelfth Amendment. Finding that the electors lacked standing and that the Constitution did not prohibit states from binding electors to vote for the candidate who won that state's popular vote, the district court granted Colorado's motion to dismiss. In a 2-1 decision, the Tenth Circuit reversed in relevant part. 935 F.3d 887.

The Washington Supreme Court and the Tenth Circuit both agreed that presidential electors perform a "federal function" when they cast Electoral College votes. Despite this agreement, the Washington Supreme Court held that "nothing under article II, section 1 or the Twelfth Amendment to the Constitution grants to the electors absolute discretion in casting their votes and the fine does not interfere with a federal function." For that reason, the court upheld Washington's efforts to require its electors to vote for the candidate winning that state's popular vote and upheld the fines. In contrast, after determining that only Mr. Baca had standing, the Tenth Circuit held that "Article II and the Twelfth Amendment provide presidential electors the right to cast a vote for President and Vice-President with discretion." Accordingly, that court struck down Colorado's attempt to direct a presidential elector's vote.

Petitioners in the Washington case argue that a penalty imposed by Washington upon so-called faithless electors is unconstitutional. They claim that Article II and the Twelfth Amendment provide detailed guidance concerning the electoral vote process and that as electors they constitute "independent constitutional officers." Imposing additional requirements outside those set forth in Article II and the Twelfth Amendment therefore interferes with "the manner in which the federal function is carried out." In their view, however, "[i]t is bedrock law in our federal system that a state may not dictate the manner in which the federal function is carried out." (Quotation marks omitted.) The text and framework of Article II and the Twelfth Amendment, they say, permits electors to vote without interference, equivalent to the same freedoms other electors (such as U.S. Senators before and after the Seventeenth Amendment) may have in other elections. The electors also contend that penalizing

them solely because they cast a vote in a way disapproved by the state amounts to unconstitutional "retaliation amounting to viewpoint discrimination."

In contrast, petitioner Colorado contends that the Constitution allows a state to pass a law requiring that presidential electors vote for the candidate that wins that state's presidential popular vote. Colorado relies upon Article II, §1, which in relevant part states that "[e]ach state shall appoint, *in such manner as the Legislature thereof may direct*, a number of electors[.]" (Emphasis added). Colorado argues that the authority of the states to choose the "manner" in which electors are selected necessarily allows states to attach conditions to the appointment. Contrary to the Tenth Circuit's decision, Colorado insists that a state's plenary authority over an elector does not cease after appointment. Colorado also maintains that the Twelfth Amendment neither allows electors to cast an electoral vote based upon their personal preference nor restricts a state's authority to require its electors to vote for the candidate who won that state's popular vote. Colorado points to the historical practice of binding electors and the broad state authority states have over electors. Lastly, Colorado contends that the Tenth Amendment provides an alternative source for the states' authority, including "the power to regulate elections." *Shelby County, Alabama v. Holder*, 570 U.S. 529, 543 (2013). According to Colorado, presidential electors are subordinate state officers whose "sole function" is to "transmit the vote of the state" appointing them. *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890). Finally, argues Colorado, because electors are bound to vote for the candidate who won the state's popular vote and not express their own viewpoint, the electors are not personally affected by the statute and therefore lack standing to challenge it.

● *Rutledge v. Pharmaceutical Care Mgmt. Ass'n*, 18-540. The Court will resolve whether the Employment Retirement Income Security Act (ERISA) preempts state statutes regulating reimbursement rates charged by pharmacy benefit managers (PBMs). PBMs are middlemen between pharmacies and benefit plans. Thirty-six states have enacted statutes to regulate PBMs, including their reimbursement programs. PBMs, in turn, have sued various states claiming that those state statutes are preempted by ERISA. In one of those cases, the First Circuit held that a Maine law placing fiduciary duties and administrative regulations on PBMs was not preempted by ERISA because the state law (1) did not prevent the PBMs from administering or structuring their plans as they would have elsewhere and so did not make national uniformity impossible; and (2) did not apply exclusively to ERISA plans and so did not rely on ERISA plans for the law's operation. *See Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005). By contrast, the Eighth Circuit here held that an Arkansas statute regulating PBMs, including provisions regulating reimbursement rates for pharmacies and creating an administrative appeal procedure, was preempted by ERISA. 891 F.3d 1109. The court applied its precedent, *Pharmacy Care Mgmt. Ass'n v. Gerhart*, 852 F.3d 722 (8th Cir. 2017), which found a similar Iowa statute was preempted by ERISA because it "interfered with national uniform plan administration." Relying on *Gerhart*, the Eighth Circuit here reasoned that the Arkansas statute was also preempted because PBMs' customers included entities that were subject to ERISA. The D.C. Circuit, taking a different approach than either the First or Eighth Circuit, has found that some types of regulations over PBMs are preempted by ERISA but others are not. *See Pharmacy Mgmt. Care Ass'n v. Dist. of Columbia*, 613 F.3d 179 (D.C. Cir. 2010).

Petitioner Arkansas argues that the Eighth Circuit's decision directly conflicts with *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), which held that a New York law requiring hospitals to collect surcharges from commercial insurers but not Blue Cross/Blue Shield plans was not preempted. Arkansas urges that, under *Travelers*, "ERISA does not preempt state regulation of the *rates* that ERISA plans pay for medical services." Nor, argues Arkansas, does its law impermissibly reference ERISA plans. It maintains that the "upshot" of applicable Supreme Court authority is that laws regulating a class of entities that merely include ERISA plans or a class of entities whose customers include ERISA plans are not preempted. Yet "the Eighth Circuit has twice held just the opposite: that so long as *some of the class of customers* of a class of regulated entitles are ERISA plans, their regulation impermissibly refers to ERISA." The United States filed an amicus brief at the invitation with the Court that agrees with Arkansas.

● *Barr v. American Ass'n of Political Consultants, Inc.,* 19-631. The principal issue is whether the government-debt exemption to the Telephone Consumer Protection Act of 1991 (TCPA) violates the First Amendment. As enacted, the TCPA prohibits the use of any "automatic telephone dialing system or an artificial or prerecorded voice" to "make any call" to "any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. §227(b)(1)(A)(iii). When enacted, the TCPA contained two exemptions: any "call made for emergency purposes or made with the prior express consent of the called party." *Id*. In 2015, Congress amended the TCPA to create a third exemption: calls "made solely to collect a debt owed to or guaranteed by the United States." *Id*. Respondents are the American Association of Political Consultants and various political organizations that use automated telephone dialing systems to solicit political donations and advise voters on political and governmental issues. They filed suit alleging that the debt-collection exception meant that the TCPA imposed a content-based restriction on speech in violation of the Free Speech Clause. The district court ruled that the debt-collection exemption was a content-based restriction but that it survived strict scrutiny. The Fourth Circuit vacated this decision, concluding that the exemption was a content-based restriction that did not pass strict scrutiny review. 923 F.3d 159. Having concluded that the exemption violated the First Amendment, the court of appeals determined that the debt-collection exemption was severable from the rest of the TCPA.

The Fourth Circuit reasoned that the debt-collection exemption "facially distinguishes between phone calls on the basis of their content." Whereas calls made to cellular phones "solely to collect a debt owed to or guaranteed by the United Sates" do not violate the TCPA and are legally permissible, automated telephone calls to cellular phones relating to other subject matters "do not qualify for the debt-collection exemption and are prohibited by the automated call ban." Because the debt-collection exemption authorized many of the intrusive calls that the TCPA was enacted to prohibit, the court held that the exemption was "underinclusive," "subverts the privacy protections underlying the ban," and was not narrowly tailored. In striking the exemption, the court observed that the TCPA contained a severability clause and that severing the offending provision from the remaining TCPA provisions was consistent with congressional intent to prohibit automated calls to cellular telephones.

The United States argues that the debt-collection exemption is not content-based, but rather is contingent on (1) the economic purpose of the call, *i.e.,* whether the call is "made solely to collect a debt," and on (2) the existence of an economic relationship with the federal government, i.e., whether the debt is "owed to or guaranteed by the United States." The government argues that different calls having precisely the same content would be treated differently depending upon the economic activity and the relationship the caller has with the United States. The government also argues that if the exemption is unconstitutional, the court of appeals correctly severed this provision from the TCPA.

● *Ford Motor Co. v. Montana Eighth District Court*, 19-368; *Ford Motor Co. v. Bandemer*, 19-369. The Court will address the extent of contacts required between a non-resident corporation and a forum state for the latter to exercise specific personal jurisdiction. Are certain business dealings and advertising in the forum state sufficient, or must there be some causal connection between the corporation's actions in the forum state and the plaintiff's injury? The supreme courts of Montana and Minnesota held that causation is not required.

Markkaya Gullett, a Montana resident, was driving a Ford Explorer on a Montana highway when one of the tires suffered a tread/belt separation. Gullett lost control of the Explorer, rolled into a ditch, and landed upside down. She died at the scene. Her representative sued Ford in Montana state court. Adam Bandemer, a Minnesota resident, was a passenger in a Ford Crown Victoria being driven on a Minnesota road by a Minnesota resident. The driver rear-ended a county plow truck and ended up in a ditch. The passenger-side airbags did not deploy and Bandemer suffered a severe brain injury. He sued Ford in Minnesota state court. Ford moved to dismiss both complaints for lack of specific personal jurisdiction. Ford argued that the vehicle involved in each crash was not designed, manufactured, or first sold by Ford in the forum states. Ford maintained that a causal connection between each plaintiff's causes of action and Ford's activities in the forum state was required. Both the Montana Supreme Court (unanimously) and Minnesota Supreme Court (5-2) rejected Ford's argument. They instead relied on the extent of Ford's business dealings in each state, such as selling, maintaining, and repairing vehicles, as well as advertising, to justify exercising specific personal jurisdiction over the company.

Ford argues a lack of specific personal jurisdiction because its contacts in each state did not give rise to the plaintiffs' claims. Quoting recent U.S. Supreme Court precedent, Ford contends that "the Due Process Clause requires both that the defendant 'have purposefully availed itself of the privilege of conducting activities within the forum State' *and* that the plaintiff's claim 'arise out of or relate to' the defendant's forum conduct." In its view, the plaintiff's claim does not "arise out of or relate to" the defendant's forum conduct unless the plaintiff's claim has "at least *some* causal connection to some act the defendant took in, or aimed at, the forum." But "[u]nder [each] decision below, a defendant will be subject to personal jurisdiction in any forum in which it advertises or sells the allegedly defective product, or a similar one, even if nothing the defendant did in the forum involved the particular product that allegedly injured the plaintiff." Respondent in the Montana case counters that "[t]he Montana Supreme Court's decision below is a straightforward application of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980), which holds that a forum may

assert 'personal jurisdiction over a corporation that delivers its products into the stream of commerce' as long as the sales arise from the corporation's efforts 'to serve, directly or indirectly, the market for its product in other states.'" It faults Ford for trying "to engraft a new element onto that test by importing a but-for or proximate causation requirement derived from tort law."

● *Salinas v. U.S. Railroad Retirement Bd.*, 19-199. The Court will resolve a 5-3 circuit split concerning whether federal appellate courts have jurisdiction to review the U.S. Railroad Retirement Board's denial of a request to reopen a prior benefits determination. The pertinent provision authorizing judicial review states: "Any claimant . . . or any other party aggrieved by a final decision under subsection (c) of this section, may . . . obtain a review of any final decision of the Board[.]" 45 U.S.C. §355(f) ("Section 5(f)"). Subsection (c) pertains to initial benefits determinations. The circuit split centers on whether Section 5(f)'s reference to subsection (c) identifies the *type of order* subject to judicial review or the *type of petitioner* who can seek review. Three circuits have held that the provision identifies the types of petitioner who can seek review while five circuits, including the Fifth Circuit here, have held that it identifies the type of order subject to review.

Manfredo Salinas was a former railroad employee whose application for disability benefits was denied by the Board. He later sought to reopen the Board's decision, but his request was denied. He then sought judicial review of that decision, but the Fifth Circuit held that it lacked jurisdiction to do so. 765 Fed. Appx. 79. Agreeing with a majority of other circuits, the Fifth Circuit read Section 5(f)'s reference to subsection (c) as identifying the type of order subject to judicial review, *i.e.*, a final order on initial benefits determinations made under subsection (c). As a result, the Fifth Circuit held that it lacked jurisdiction to review the Board's decision because it pertained to Salinas's request to reopen. A minority of circuits, including the D.C. Circuit in an opinion authored by then-Judge Kavanaugh, have found that jurisdiction exists. *See Stovic v. Railroad Retirement Bd.*, 826 F.3d 500 (D.C. Cir. 2016). The *Stovic* court read Section 5(f)'s reference to subsection (c) as identifying the type of petitioner who may seek review, *i.e.*, one aggrieved by a final decision under subsection (c). After engaging in a textual analysis, the *Stovic* court concluded that a plain reading of the statute means that "*any* final decision of the Board" is judicially reviewable. The Fifth Circuit declined to follow *Stovic* because it was constrained by its own precedent in *Roberts v. Railroad Retirement Bd.*, 346 F.3d 139 (5th Cir. 2003).

Salinas argues that the text of Section 5(f) plainly provides for judicial review of "*any* final decision of the Board." In finding a lack of jurisdiction, he submits, the Fifth Circuit and several other circuits conflated the categories of petitioners eligible to seek review with the types of decisions subject to review. Salinas also contends that those courts erroneously relied on *Califano v. Sanders*, 430 U.S. 99 (1977), which held that a provision of the Social Securities Act prohibited judicial review of agency refusals to reopen. According to Salinas, there are critical textual differences between the two provisions.

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