No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations, Social Security Administration,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Sixth Circuit held in this case that federal courts "lack[] jurisdiction to review the Appeals Council's dismissal of [an] untimely request for review." Pet. App. 15a. As we showed in our principal brief (at 13-16), that holding cannot be squared with Section 405(g)'s plain text, which confers jurisdiction over "*any* final decision of the Commissioner of Social Security." 42 U.S.C. § 405(g) (emphasis added). A dismissal by the Appeals Council, even on untimeliness grounds, concludes the administrative review process and thus fits that description.

The Sixth Circuit's holding is contrary not only to the statute's text, but also to several of this Court's cases, which have held that the only jurisdictional prerequisite for judicial review under Section 405(g) is "the requirement that a claim for benefits shall have been presented to the Secretary," followed by "some decision by the Secretary." *Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986) (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976)). The agency's determination that a claimant has not properly exhausted administrative remedies, by contrast, is a waivable and excusable affirmative defense. *Ibid*. That conclusion aligns with the standard rule in other administrative-law contexts.

So obvious is the inconsistency of the holding below with the statute's language, this Court's cases, and general principles of administrative law that the Solicitor General has confessed error and will no longer defend the lower court's judgment. The government thus agrees (U.S. Br. 22, 26-28) that Section 405(g)'s unambiguous text authorizes judicial review of the Appeals Council's untimeliness dismissal in this case. And it concedes (U.S. Br. 41) that the SSA's contrary

regulations exceed the authority conferred by Section 405(a) and therefore are not entitled to deference.

The contrary arguments advanced by the court-appointed amicus are not persuasive. Unable to blunt the plain meaning of the words "any final decision," he shifts principal focus (Br. 27-36) to a different statutory phrase, "after a hearing." But his position on that score is equally out of step with the statutory text and this Court's cases—including *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977), which held that that Section 405(g) authorizes judicial review after the kind of "hearing" before an ALJ required by Section 405(b)(1). Petitioner had such a hearing.

Chevron deference does not call for a different result. As an initial matter, the government has now disclaimed the legality of the agency's regulations. It would buck common sense to defer to those regulations nevertheless. Aside from that, the canon favoring judicial review forecloses the agency from interpreting Section 405(g) so narrowly.

For these reasons, and all those given in our principal brief and in the pages that follow, the judgment of the court of appeals should be reversed.

A. Petitioner obtained a final decision within the meaning of Section 405(g)

1. Exhaustion of administrative remedies is not a jurisdictional requirement under Section 405(g)

a. We demonstrated in our principal brief (at 14-16) that the words "any final decision" encompass an Appeals Council decision denying review on untimeliness grounds. That follows from the ordinary meaning of the word "final" and the broadening effect of the word "any." It follows also from general principles of administrative law, which provide for judicial review of

any agency decision that conclusively determines a person's legal rights or obligations. It means, at bare minimum, that a federal district court has jurisdiction to review whether the Appeals Council's untimeliness dismissal was an abuse of discretion.

Amicus responds (Br. 22-23) not with an analysis of the statute's text, but by pointing to dicta from this Court's cases. He thus cites the Court's statement in *City of New York*, 476 U.S. at 482, that "[o]nly a claimant who proceeds through all three stages [of administrative review] receives a final decision"; and in *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000), that "[i]f a claimant fails to request review from the Council, there is no final decision and, as a result, no judicial review in most cases." Amicus acknowledges (Br. 23) that these statements are non-binding dicta but describes them as evidence "that it is natural to read 'final decision' in this statute as referring to decisions on the merits after an exhaustion of remedies."

Although these statements favor amicus's position, dicta cannot override holdings. And both *City of New York* and *Eldridge* held explicitly that a "final decision" under Section 405(g) "consists of two elements, only one of which is purely 'jurisdictional.'" *City of New York*, 476 U.S. at 483 (quoting *Eldridge*, 424 U.S. at 328). The nonwaivable, jurisdictional element "is the requirement that a claim for benefits shall have been presented to the Secretary," followed by "some decision by the Secretary." *Eldridge*, 424 U.S. at 328. That requirement is satisfied in this case. The "waivable" element—the element that does *not* bear on the federal court's jurisdiction under Section 405(g)—is "the requirement that the administrative remedies prescribed by the Secretary be exhausted." *City of New York*, 476 U.S. at 483 (quoting *Eldridge*, 424 U.S. at 328).

In light of this clear precedent, the dicta from *Sims* and *City of New York* cannot support the notion that the words "final decision" in Section 405(g) incorporate administrative exhaustion as an element of jurisdiction. The same goes for the dictum from *Heckler* v. *Ringer*, 466 U.S. 602, 627 (1984).[1]

That follows not only from *City of New York* and *Eldridge*, but also from ordinary administrative-law standards. According to "the usual practice under the Federal Rules," "exhaustion is an affirmative defense" that must be raised by the defendant, not an element of jurisdiction that must be pleaded by the plaintiff. *Jones* v. *Bock*, 549 U.S. 199, 212 (2007) (collecting cases). See also, *e.g.*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (timely exhaustion of EEOC remedies "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). Thus, a claimant's failure to exhaust ordinarily may be waived in the government's discretion or excused in the court's discretion. *City of New York*, 476 U.S. at 483-485; *McCarthy* v. *Madigan*, 503 U.S. 140, 146-149 (1992), superseded by statute as recognized in *Booth* v. *Churner*, 532 U.S. 731, 740 (2001). Cf. 5 U.S.C. § 704 (failure to exhaust is not a bar to judicial review under the APA).

Bowen v. *Massachusetts*, 487 U.S. 879 (1988), cited at page 17 of amicus's brief, is not to the contrary. The

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[1] Amicus repeatedly wraps his contrary arguments in the words of Solicitor General Bork. *E.g.*, Br. 2, 22, 32, 43. That is a puzzling strategy; Solicitor General Bork made the same basic arguments in *Eldridge*, and this Court squarely rejected them. Compare U.S. Supp. Br. 7, *Mathews* v. *Eldridge*, No. 74-204 (contending that "exhaustion of administrative remedies" is a "jurisdictional requirement" under Section 405(g)), with *Eldridge*, 424 U.S. at 328 (rejecting the argument).

Court's holding there was simply that, when Congress has already provided an independent scheme of judicial review, Section 704 does not provide "additional judicial remedies." 487 U.S. at 903. Our point is not that if Section 405(g) falls short, Section 704 should make up the difference. It is instead that Section 704 embodies general, long-standing principles of administrative law with which Section 405(g) can and should be interpreted consistently. As this Court has said, "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Jones*, 549 U.S. at 212.

b. Amicus says (Br. 19 n.5) that it makes no difference whether exhaustion is jurisdictional or an affirmative defense; "[t]he bottom line," he insists, "is that, under a correct interpretation of the statute, Mr. Smith is not entitled to judicial review."

That is fundamentally wrong. It should go without saying that "an affirmative defense[] goes to the merits of a dispute." *Iames* v. *Commissioner of Internal Revenue*, 850 F.3d 160, 164 n.2 (4th Cir. 2017). And the question whether the claimant is entitled to relief on the merits is, perforce, one that "the district court can decide only after it has assumed jurisdiction over the controversy." *Bell* v. *Hood*, 327 U.S. 678, 683-684 (1946). Accord *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). That means that federal courts necessarily must have jurisdiction under Section 405(g) even when the agency concludes that the claimant failed to exhaust his administrative remedies.

That does not mean that the nature of the Appeals Council's decision—here, a dismissal on untimeliness grounds—plays no role in the court's subsequent consideration of the case. Assuming the government does not waive exhaustion, the threshold issue for the district court will be whether to overrule the Council's

dismissal of petitioner's request for review as untimely, or (if it does not) whether to disregard or set aside the failure to exhaust—as we explain in further detail at pages 17-19, *infra*.

c. Amicus contends (Br. 16) that "Section 405(g) cannot be properly interpreted without due regard for [its] context." In his view (Br. 16-18), the "massive" system necessary for "adjudicating millions of small social security claims" indicates that Congress intended Section 405(g) to be narrower than the "much broader" review provisions of the APA. Thus, by his lights (Br. 18), "[t]he structure of the Social Security Act reflects" a need for limited judicial review to avoid "a potentially intolerable burden on the federal courts."

We agree that Section 405(g) must be read in light of the statutory structure and the Social Security Act's broader context—but amicus turns those factors on their heads.

Consider first the Act's historical context and purpose. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 633 n.13 (1984) (statutory text "cannot be read in isolation from its history and purposes"). Contrary to amicus's ungenerous telling, "Congress designed [the Social Security Act] to be 'unusually protective' of claimants." *City of New York*, 476 U.S. at 480 (quoting *Heckler* v. *Day*, 467 U.S. 104, 106 (1984)). Thus, the administrative review process is "inquisitorial rather than adversarial," and "[i]t is the ALJ's duty to investigate the facts and develop the arguments" on behalf of claimants. *Sims*, 530 U.S. at 111. This is the description of an adjudicatory scheme that, although large, is unusually accommodating of claimants.

These "powerful protections for claimants" (Amicus Br. 18) do not expire at the courthouse door. For example, Congress conferred broad "remand powers" on

the federal courts, placing them "not in their accustomed role as external overseers of the administrative process, * * * but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council." *Sullivan* v. *Hudson*, 490 U.S. 877, 885 (1989). Thus, if Section 405(g) is "somewhat unusual" and "alien to traditional review of agency action under the Administrative Procedure Act," it is because it is *more* solicitous of judicial involvement, not less so. *Ibid.* Amicus is thus simply wrong that context indicates that Section 405(g) should be read narrowly.

Take next Section 405's specific design and structure. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) (courts must consider "the particular statutory language at issue, as well as the language and design of the statute as a whole"). According to amicus's interpretation of the statute (Br. 2, 22), claimants who are found not to have sought timely Appeals Council review will never receive a "final decision" within the meaning of Section 405(g). See also U.S. Br. 19, 34.

That would conflict with the broader statutory scheme in two ways. First, as the Solicitor General notes (U.S. Br. 34-35), amicus's position would collide with Section 405(b)(1), which "direct[s]" the Commissioner, without exception, to issue "decisions as to the rights of any individual applying for a payment."

Second, it would conflict with Section 405(i), which instructs the Commissioner, upon reaching a "final decision" that grants benefits, to make the necessary certifications for the issuance of payment. 42 U.S.C. § 405(i). When claimants receive partially favorable decisions, however, they are entitled to *both* payment *and*

appeal.[2] Yet, on amicus's reading of the statute, claimants who accept a partial win and decline to seek further administrative review would never receive a "final decision" within the meaning of the statute, and thus would never be entitled to the certifications necessary for payment under Section 405(i), even with respect to the favorable portions of their claims.

2. Judicial review is available under Section 405(g) regardless of whether the Appeals Council addresses the merits

a. We explained in our principal brief (at 16) that it is immaterial for purposes of Section 405(g) whether the Appeals Council's order terminating a request for benefits is based upon procedure or substance. Either way, the result is to leave standing (and render binding) the ALJ's rejection of the underlying claim for benefits. See 20 C.F.R. § 416.1455.

That is the case here: The Appeals Council's order conclusively terminated petitioner's application for benefits, effectively disposing of all issues involved in the case. It was therefore a "final decision" within the meaning of Section 405(g). The Solicitor General agrees. See U.S. Br. 26-30.

Amicus rejoins (Br. 23) that the "structure" of the Social Security Act indicates that "final decision" refers to "decisions on the merits." He notes (*ibid.*) that "the Social Security Act does not refer to," let alone require, the Commissioner to grant relief from procedural defaults. The "more natural reading" of Section 405(g), in his view (*ibid.*), is that it refers only "to the kinds of 'final decisions' required by the statute," meaning "decisions on the merits of claims for benefits."

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[2] There were over 51,000 such dispositions in FY 2018. See perma.cc/83A4-G3UP (select "See the Screenshot View").

That argument proves too much. If amicus were correct that Section 405(g) covers only those statutorily mandated decisions that actually reach and resolve the merits of a claim, then claims that conclude with Appeals Council orders *denying* review—like those that conclude with orders *dismissing* review—would never receive final decisions.

Merits review by the Appeals Council is discretionary. 20 C.F.R. § 416.1467. And it is elemental that a discretionary denial of appellate review "imports no expression of opinion upon the merits of the case." *Teague* v. *Lane*, 489 U.S. 288, 296 (1989) (quoting *United States* v. *Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)). For example, a grant of Appeals Council review could reflect the Commissioner's determination that the case involves "a broad policy or procedural issue that may affect the general public interest." 20 C.F.R. § 416.1470(a)(4). A denial of review may reflect merely the absence of that factor.

In the 86% of cases in which the Appeals Council declines review for any reason,[3] the final order issued by the agency is one that technically does not reach the merits. By extension of amicus's logic (Br. 2, 23), there would be no judicial review in any such case. Indeed, by his logic (Br. 26), the Commissioner could unilaterally allow or foreclose judicial review of any case by simply exercising her discretion to refuse Appeals Council review. That plainly is not the scheme that Congress envisioned for Section 405(g).

The upshot is clear: The Appeals Council decision conclusively resolving petitioner's request for benefits does not lose its character as "final" simply because it is based on procedure rather than the merits.

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[3] See perma.cc/H25X-9TUT.

b. Even if the Court were to accept amicus's premise (that Section 405(g) confers jurisdiction to review only decisions on the merits), it still would have to reject his conclusion (that judicial review is foreclosed when the Appeals Council dismisses a request for review as untimely).

Several of the circuits that agree with amicus that judicial review is limited to merits decisions have held, as we just suggested, that denials of review by the Appeals Council (not just dismissals) are "non-final agency action[s] not subject to judicial review" because they do not resolve the merits of the claimant's case. *Taylor* v. *Commissioner of Soc. Sec. Admin.*, 659 F.3d 1228, 1231 (9th Cir. 2011). Accord, *e.g.*, *Damato* v. *Sullivan*, 945 F.2d 982, 988 (7th Cir. 1991).

But these circuits have not then concluded that there is no final decision and that the claimant cannot seek judicial review. Rather, they have reasoned that, if the Appeals Council refuses to take up a claimant's case on the merits, "the ALJ's decision becomes the final decision of the Commissioner." *Taylor*, 659 F.3d at 1231. Accord, *e.g.*, *Brown* v. *Colvin*, 825 F.3d 936, 939 (8th Cir. 2016) ("The Appeals Council's denial of Brown's request for review made the ALJ's decision the final decision of the Commissioner."); *Damato*, 945 F.2d at 988 (similar). Cf. 20 C.F.R. § 416.1400(a)(5). Were it otherwise, the vast majority of claimants would never receive final, judicially-reviewable decisions.

This reasoning applies equally to Appeals Council dismissals, which share the same basic character as denials. See 20 C.F.R. § 404.968(b). Thus, even if amicus were correct that such decisions are themselves unreviewable under Section 405(g), it would mean only that the ALJ's decision becomes the final, reviewable decision of the Commissioner.

In fact, that is precisely how the agency itself appears to understand the issue. The ALJ informed petitioner that, "[i]f you do not appeal and the Appeals Council does not review my decision on its own, my decision will become final." JA6-7. See also JA7 (notifying petitioner that the ALJ decision would become a "final decision" if the Appeals Council did not review the case).

To be clear, this is not the better approach. The more logical view, we submit, is that Appeals Council dismissals and denials are themselves independently reviewable "final decisions." And judicial review of such a decision permits a look-through to the earlier decision of the ALJ under the general rule that interlocutory orders merge into final decisions. See pages 17-19, *infra*. Our point for present purposes is only that, even if amicus were correct that Section 405(g) confers jurisdiction to review only decisions addressing the merits (Br. 25-26), petitioner would be entitled to seek judicial review of the ALJ's decisions denying him benefits, notwithstanding that the Appeals Council dismissed his appeal as untimely.

c. Neither *Califano* v. *Sanders*, 430 U.S. 99 (1977), nor *Your Home Visiting Nurse Services* v. *Shalala*, 525 U.S. 449 (1999), suggests otherwise. Those cases stand for the unremarkable proposition that once an agency has issued a final decision on a claim for benefits triggering judicial review, a subsequent discretionary denial of administrative reopening is not also judicially reviewable. That makes sense, because judicial review of reopening denials would allow for second bites at the apple, "frustrat[ing] the statutory purpose of imposing a 60-day limit on judicial review of the Secretary's final decision on an initial claim for benefits" and effectively "permitting requests to reopen to be reviewed indefinitely." *Your Home*, 525 U.S. at 454.

The same cannot be said here, where the question is whether petitioner is entitled to judicial review of the agency's final decision on his *initial* claim for benefits. Indeed, amicus's position would create the inverse of the problem present in *Sanders* and *Your Home*, foreclosing even *one* opportunity for judicial review. We made this point in the principal brief (at 18-19), but amicus does not address our reasoning.

B. Section 405(g)'s "after a hearing" requirement is satisfied in this case

Unable to make headway with the words "any final decision," amicus retreats to the phrase "after a hearing." See Br. 27-36. But his arguments on this score are equally unpersuasive.

1. Judicial review is available to challenge "any final decision of the Commissioner of Social Security *made after a hearing*." 42 U.S.C. § 405(g) (emphasis added). *Sanders* held that "hearing" means a hearing required by the statute itself. 430 U.S. at 108. The only hearing required by the statute is a "hearing before an administrative law judge" pursuant to Section 405-(b)(1). *Id.* at 101. Thus, the phrase "after a hearing" means after a Section 405(b)(1) hearing before an ALJ. *Id*. at 108-109.

That is not an obstacle in this case, because petitioner had a Section 405(b)(1) video-conference hearing before an ALJ. See JA8-9; 20 C.F.R. § 416.1436(b) (providing for hearings by video conference). There accordingly cannot be any question that the Appeals Council's final disposition of petitioner's claim for benefits came "after a hearing" within the meaning of Section 405(g).

2. Amicus disagrees. Br. 31-34. While his reasoning is somewhat opaque, he appears to analogize an un-

timeliness dismissal by the Appeals Council to a denial of a motion to reopen, which *Sanders* held is not a decision "after a hearing." See 430 U.S. at 108-109. But again, a dismissal for untimeliness is fundamentally different from a denial of reopening.

Section 405(b)(1) hearings are made available to claimants as an element of the agency's consideration of their initial claims, not otherwise. In this way, Section 405(g)'s hearing requirement reflects "Congress' determination to limit judicial review to the original decision denying benefits." *Sanders*, 430 U.S. at 108.

As we explained in our principal brief (at 18-19), however, motions to reopen ask the agency to "reopen final decisions [already reached]." *Sanders*, 430 U.S. at 108. Such a motion accordingly cannot be resolved "after a hearing" in the Section 405(g) sense because statutorily required hearings are available only for consideration of initial claims. Because the Act "does not [otherwise] require a hearing for requests to reopen" (*Stovic* v. *Railroad Ret. Bd.*, 826 F.3d 500, 503-504 (D.C. Cir. 2016) (Kavanaugh, J.)), orders on motions to reopen cannot come "after a hearing" within the meaning of Section 405(g).

The difference is readily apparent: Unlike reopening, a request for Appeals Council review is the final step in the agency's *initial* resolution of the claimant's application for benefits. *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1237 (11th Cir. 1983). That is no less true when the Appeals Council dismisses a request as untimely rather than denying or granting it.

3. Amicus disputes this yet further. In his view (Br. 34), Section 405(g) can refer only "to a 'final decision' reached 'after a hearing' *on that decision*." As the

Ninth Circuit has suggested, because "the Appeals Council may deny a request for an extension without a hearing" required by the statute, an untimeliness dismissal cannot come "after a hearing" within the meaning of Section 405(g). *Matlock* v. *Sullivan*, 908 F.2d 492, 493-494 (9th Cir. 1990).

That position again proves too much. No hearing of any kind is ever statutorily required of the Appeals Council, regardless whether the Council grants review, denies review, or dismisses the request. By amicus's logic (Br. 34), no decision of the Appeals Council would ever constitute a decision "after a hearing" under Section 405(g) because an Appeals Council decision is never reached after a statutorily required hearing "*on that decision*." That would foreclose judicial review of all properly exhausted claims altogether.

4. Amicus's stingy construction of "after a hearing" also creates practical difficulties. It was settled in *Salfi* and *Sanders* that Section 405(g)'s hearing requirement does not bar judicial review of questions on which the Commissioner concludes that no hearing is required. *Weinberger* v. *Salfi*, 422 U.S. 749, 767 (1975); *Sanders*, 430 U.S. at 109. This includes, at a minimum, hearings to entertain constitutional challenges over which the Commissioner lacks adjudicative authority. *Ibid*.

Construing "after a hearing" narrowly thus would encourage claimants to route their claims through this carve-out for constitutional arguments by introducing constitutional challenges to the administrative scheme. "Making jurisdiction turn on the presence of a constitutional argument not only lacks support in the text of [Section] 405(g) but also would lead claimants to present unnecessary constitutional arguments." *Boley* v. *Colvin*, 761 F.3d 803, 807 (7th Cir. 2014). A construc-

tion of a statute that affirmatively invites "unnecessary constitutional litigation" is not one that should be favored. *Id*. at 808.

5. We further explained that, under the Court's reasoning in *Salfi* and *Sanders*, the phrase "any final decision * * * after a hearing" can be read to mean a decision reached by "whatever process the Social Security Administration deems adequate to produce a final decision." Pet'r Br. 24 (quoting *Boley*, 761 F.3d at 805). The government agrees. U.S. Br. 28-29. Thus, if the Commissioner "considers a hearing to be useless" and issues a decision without one (as does the Appeals Council in virtually every decision it issues, no matter its character), review is not foreclosed. U.S. Br. 35.

If the Court agrees that petitioner's hearing before the ALJ satisfies Section 405(g)'s hearing requirement, however, it need not reach this issue.

C. *Chevron* deference does not apply in these circumstances

Amicus chides us (Br. 3, 42) for not dedicating more of our principal brief to the question of *Chevron* deference. In his view, deference is warranted because the phrase "any final decision" is "'left undefined by the Act' and delegated to the agency to 'flesh out by regulation.'" Br. 42 (quoting *Salfi*, 422 U.S. at 765-766). As he sees it, "[t]he statute [thus] gives the agency 'complete authority' to specify its meaning 'as [it] deems serve [its] own interests in effective and efficient administration.'" Br. 43 (quoting same).

But amicus ignores the elephant in the room: The government has abandoned the agency's prior interpretation of Section 405(g), acknowledging (U.S. Br. 30) that "SSA's regulations providing that an Appeals Council order dismissing a request for review as un-

timely is not subject to judicial review are inconsistent with the Act and should not be given effect." It would be anomalous, indeed, for this Court to defer to a regulation that the government is no longer willing to defend as lawful.

Besides that, the agency's interpretation is flatly inconsistent with this Court's precedents. Its reading of "final decision" would elevate exhaustion to a jurisdictional requirement—one that the agency alone has the authority to decide. That view cannot be squared with *Eldridge* or *City of New York*. Although the agency is free to establish procedural rules that "serve [its] own interests in effective and efficient administration" (Amicus Br. 43 (quoting *Salfi*, 422 U.S. at 765-766)), it is not free to erect jurisdictional barriers to judicial review that Congress did not intend.

Finally, even if Congress intended the agency to define by regulation the limits of federal court jurisdiction, the agency's discretion would be bounded by established substantive canons of construction. See *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (substantive canons "necessarily constrain[] the possible number of reasonable ways to read an ambiguity in [a] statute"). Cf. *INS* v. *St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (deference is warranted only if an ambiguity remains after "applying the normal 'tools of statutory construction,'" including substantive canons). Here, the "strong presumption that Congress intends judicial review of administrative action" (*Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)) forecloses the agency from picking among the otherwise permissible readings of Section 405(g) the one that most constrains judicial review.

D. The district court may address the merits of petitioner's claim if it overrules or excuses petitioner's failure to exhaust

Although the Solicitor General agrees that orders dismissing Appeals Council review as untimely are reviewable under Section 405(g), he takes the position (U.S. Br. 30) that courts may review only the untimeliness decision itself and "may not go further and review now whether petitioner is entitled to benefits." That is incorrect.

1. As we explained in our principal brief (at 24-25), *Sims* held that judicial review of a "final decision" under Section 405(g) brings up all of the issues in the case, regardless of whether the claimant exhausted each issue before the agency. 530 U.S. at 112. Thus, the ordinary rule under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)—that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" (*id.* at 87)—does not apply in the special context of judicial review of final decisions of the Social Security Administration. *Sims*, 530 U.S. at 112.

Pursuant to the concept of merger, that holds true even if the Commissioner's "final decision" consists of a determination that the claimant failed to seek Appeals Council review within the time allowed.

The general rule is that, "when reviewing a final decision, [courts] have authority to review the interlocutory orders that preceded it based on the principle that such orders merge into the final decision." *LeFande* v. *District of Columbia*, 841 F.3d 485, 491 (D.C. Cir. 2016). Cf. *Energy Transfer Partners* v. *FERC*, 567 F.3d 134, 144 (5th Cir. 2009) (applying the merger rule to a "final decision" of an agency). This

Court has suggested that the rule of merger is a corollary of finality. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

If, as the Solicitor General concedes, the dismissal of petitioner's request for Appeals Council review is the final agency decision that brought the administrative review process to an end, then under the rule of merger, all of the agency's prior decisions—including the ALJ's rejection of his claim on the merits—merged into that decision, bringing them along for judicial review. Under *Sims*, all such orders are on the table before the district court. Claimants like petitioner may therefore seek review of both the dismissals of their appeals as untimely and the denials of their claims by the ALJ on the merits.

That said, when the Appeals Council dismisses a request for review as untimely, and the claimant later seeks judicial review under Section 450(g)—as did petitioner here—the finding that the claimant failed to exhaust his administrative remedies must be resolved at the threshold. If the government does not waive the issue, the court must decide (1) whether to overrule the Appeals Council's untimeliness decision and hold that administrative remedies were properly exhausted after all, or, if not, (2) whether to excuse or disregard the claimant's non-exhaustion. See *City of New York*, 476 U.S. at 483; *McCarthy*, 503 U.S. at 146-149.

But the court's authority to reach the merits of the underlying claim if the claimant's failure to exhaust is overruled, excused, or waived cannot be denied in light of the statute's express grant of "power to enter * * * judgment affirming, *modifying*, or reversing" the agency's decision (42 U.S.C. § 405(g) (emphasis added)), using "ground-level discretion of the same order as [the agency itself]." *Hudson*, 490 U.S. at 885.

Simply put, whatever the Appeals Council could have done, the district court can do, too.

The government's contrary position—that a court cannot reach the merits of the underlying application for benefits when the agency's final decision is an untimeliness dismissal—depends on the awkward notion (U.S. Br. 25-26) that petitioner actually *did* exhaust his administrative remedies, but only on the question of whether he exhausted his administrative remedies. Even if that oddly self-referential description were an accurate way of characterizing this case, it would make a difference only if petitioner were limited in the district court to pursuing those issues actually exhausted before the agency. But as *Sims* makes clear, that limitation does not apply in this context; once a Social Security claimant is before a federal judge under Section 405(g), he "need not" have exhausted any particular issues "in order to preserve judicial review of those issues." 530 U.S. at 112.

2. The later sentence in Section 405(g), providing for *Chenery*-like review of claims concerning failures "to submit proof in conformity with any regulation," supports our position and not the government's. See U.S. Br. 29-30, 38.

The highlighted language is evidence that, when Congress intends to limit judicial review of particular SSA decisions exclusively to the grounds on which those decisions were resolved, it knows how to do so. Thus, if Congress had intended that result with respect to untimeliness dismissals, "it presumably would have said so," because elsewhere it "sp[oke] in just that way." *Descamps* v. *United States*, 570 U.S. 254, 267-268 (2013). Cf. *Jones*, 549 U.S. at 200 (when Congress means to "depart from the usual procedural requirements, it [does] so expressly"). Yet it did not.

E. A holding in favor of petitioner would have a very modest impact on the federal courts' caseload

Significant portions of amicus's brief (at 15-19) focus not on text, but on Congress's supposed concern about the size of the SSA and the number of claims it must process. That is neither here nor there if the text speaks for itself. And as we and the Solicitor General have shown, it does. Regardless, a reversal of the Sixth Circuit would have a limited effect on the Judiciary's caseload. Were it otherwise, the government surely would have said so.

The Eleventh Circuit has been operating under the rule that we advocate for the past 36 years. Yet its Social Security caseload, as a proportion of its overall civil caseload, is *lower* than the national average: Between June 2017 and June 2018, Social Security cases accounted for 1,755 (5.2%) of the 33,736 total civil cases filed there.[4] That compares with 6.8% of the 281,202 total civil filings throughout the country during the same period.[5] In the circuits where amicus's rule has prevailed, the aggregate share of civil cases filed that were Social Security cases was 6.1%.[6]

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[4] See perma.cc/M4QZ-LDAB (follow link for download).

[5] See *ibid*. In the Seventh Circuit, Social Security cases accounted for 6.9% of the federal courts' civil docket.

[6] Amicus seriously misreads the data when he asserts (Br. 44) that Social Security cases are "by far the largest category of cases filed each year" in the federal courts. In fact, among the 281,202 federal civil cases filed between June 2017 and June 2018, there were more private personal injury (56,186), state civil rights (39,055), and state prisoner civil rights (27,102) cases than Social Security cases (19,115). See perma.cc/M4QZ-LDAB (follow link for download).

These relatively modest numbers should come as no surprise. Although amicus is correct that the SSA processes "millions of claims every year" (Br. 26), few of those claims are challenged through the administrative review process. Social Security ALJs adjudicated approximately 760,000 challenges in 2018.[7] A modest proportion of those challenges were appealed: In 2018, the Appeals Council received about 153,000 new appeal requests[8] and disposed of about 156,000.[9] Among disposed appeals, the Council granted review in about 22,000 cases (14%) and denied or dismissed the rest.[10] But dismissals were a relatively uncommon form of disposition; the Appeals Council dismissed only about 4,000 cases (2.5%), and among those, only about 2,500 (1.6%) were for untimeliness.[11]

Just 12.5% of timely Appeals Council cases were appealed to the district courts in 2018 (about 19,000 of 153,000 cases). Assuming the same proportion of dismissals for untimeliness were appealed, the result would be slightly more than 300 additional Social Security cases filed nationwide each year.[12] For a judicial system that hears more than 280,000 civil cases annually, that is little more than a rounding error. A

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[7] See perma.cc/83A4-G3UP (select "See the Screenshot View").

[8] See perma.cc/PQ3P-9FZ5.

[9] See perma.cc/H25X-9TUT.

[10] *Ibid*.

[11] The government's certiorari-stage brief reports these non-public figures at page 29. Cf. perma.cc/75VQ-JXWL (slide 7, showing dismissal rate of 2.8% in 2008).

[12] The government observes (Br. 43 n.17) that there are approximately 6,000 untimeliness dismissals by ALJs each year. Although not an issue presented here, judicial review of those decisions would add perhaps an additional 750 annual court cases.

holding for petitioner accordingly will not "overrun" the federal courts with new Social Security filings (Amicus Br. 12), as the Eleventh Circuit's three decades of experience demonstrate.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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