No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

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The government's opening brief explains that, when the Social Security Administration (SSA) Appeals Council dismissed petitioner's request for review as untimely, the agency issued its "final decision * * * after a hearing" on petitioner's claim for benefits, and the Appeals Council dismissal order is therefore subject to judicial review under 42 U.S.C. 405(g). That result follows from the undisputed facts that the dismissal order marked the agency's last word on petitioner's application for Social Security benefits, that an Administrative Law Judge (ALJ) held a hearing on petitioner's application, and that SSA was not required to conduct another oral hearing to resolve the timeliness of petitioner's request for Appeals Council review. The text of Section 405(g), its place in the structure of the Social Security Act, this Court's precedents, and basic principles of administrative law all confirm that the

Appeals Council's dismissal order was a reviewable final decision.

The Court-appointed Amicus Curiae (Amicus) urges, at bottom, that "[t]he agency and this Court have always understood the statute to require 'exhaustion of the administrative remedies provided.'" Br. 14 (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 327 (1976)). But that observation shows why an Appeals Council order dismissing a request for review as untimely is judicially reviewable: the question for the courts in petitioner's case is *whether* he properly attempted to exhaust his administrative remedies, and that type of question is ordinarily resolved by courts, not by agencies in their unreviewable discretion. See Gov't Br. 30-31. Notably, several courts have reviewed administrative exhaustion determinations pursuant to other statutes that, like the Social Security Act, authorize judicial review only after the agency's "final" decision. *Ibid.* The Amicus does not identify any statutory text that compels a departure from standard administrative practice and forecloses judicial review of the limited question whether a claimant properly exhausted administrative procedures. Section 405 does empower SSA to determine the steps that precede the agency's final decision. See *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). But it does not authorize the agency to determine by regulation that, because of its own conclusion regarding an untimely filing, its decision will *never* become final. See *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983) (if Appeals Council dismissal orders were not reviewable, then "the claimant would never have a 'final' decision" and would be left "permanently in limbo").

The Amicus's concern (Br. 36) that authorizing judicial review of Appeals Council dismissal orders would

open the "floodgate" on federal courts is unfounded, because Section 405(g) and standard administrative-law principles establish that judicial review in petitioner's case would be limited to the ground the agency gave for its decision, and would be highly deferential, asking only whether the agency made findings supported by substantial evidence and did not abuse its discretion. See Gov't Br. 29-30. Contrary to petitioner's contention (Br. 24-25), a court's authority in this case would not include review of his ultimate entitlement to benefits. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); cf. 42 U.S.C. 405(g) ("the court shall review only the question of conformity with [the agency's] regulations"). Those limitations on judicial review are likely to dissuade many claimants from pursuing litigation over Appeals Council dismissal orders. And indeed, experience in the Eleventh Circuit, which has allowed judicial review of Appeals Council dismissal orders since *Bloodsworth* in 1983, has not shown an unusual volume of Social Security cases.

The Amicus's fallback argument (Br. 40-47) is that the Court should defer to SSA's existing regulations. But for all the reasons given here and in the government's opening brief, accepting judicial review when an ALJ held a hearing and the agency's proceedings are indisputably over is the only reasonable construction of Section 405(g).

I. A SOCIAL SECURITY APPEALS COUNCIL ORDER DISMISSING A REQUEST FOR REVIEW AS UNTIMELY IS JUDICIALLY REVIEWABLE UNDER 42 U.S.C. 405(g)

The government's opening brief explains (at 26-28, 33-37) why the Appeals Council dismissal order in petitioner's case was a "final decision * * * made after a hearing," and therefore subject to judicial review under 42 U.S.C. 405(g). Applying the straightforward meaning of the statutory text, SSA's decision was final because it is undisputed that the agency will take no further action on petitioner's benefits application. And that decision was made after a hearing by an ALJ regarding petitioner's entitlement to benefits. The Amicus essentially urges a unique construction of the terms in Section 405(g), on the ground that SSA processes a very large number of claims each year. But that policy rationale ultimately has no foothold in the statutory text.

A. Section 405(g) Does Not Prohibit Courts From Reviewing Whether A Claimant Exhausted Administrative Remedies

The Amicus repeatedly emphasizes that, due in part to the size of the Social Security program, Congress required claimants to exhaust administrative remedies before filing in court. Amicus Br. 1-2, 4-6, 14, 16-19. The Amicus argues that Congress in Section 405(g) placed limitations on judicial review in order to avoid a "dual * * * or duplicate administration of the law," *id.* at 5-6 (quoting legislative history of the Social Security Act) (citation omitted), and to prevent "overly casual or premature judicial intervention" in the administrative system, *id.* at 18-19 (quoting *Heckler* v. *Ringer*, 466 U.S. 602, 627 (1984)). But those premises are not at issue in this case, which is instead about a court's authority to decide a dispute over administrative exhaustion.

Petitioner's claim for judicial review does not raise any prospect of dual or duplicate administration, or premature judicial intervention, because the agency's proceedings on his benefits application are complete. Nor does the government's interpretation of Section 405(g) call into doubt the need for Social Security claimants to exhaust administrative remedies. Petitioner sought a ruling by the district court that he *did* properly exhaust his remedies in the agency. See J.A. 46-47. In *Ringer*, this Court rejected judicial review because three of the plaintiffs "stood the chance of prevailing in administrative appeals," and a fourth had not yet submitted a reimbursement claim to the agency. 466 U.S. at 627. Petitioner, by contrast, submitted and pursued his claim for benefits through SSA, and at this point—as all agree—he cannot obtain administrative relief without a court's vacatur of the Appeals Council's dismissal order. The Amicus's argument is not that petitioner sought judicial review too soon; it is that petitioner has no opportunity *at all* to have a court review whether he properly pursued administrative relief.

The Amicus's rule would be an outlier. He does not dispute the government's showing (Gov't Br. 30-31) that courts have routinely undertaken judicial review of administrative findings of untimeliness, including pursuant to other statutes that, like the Social Security Act, authorize judicial review only after the agency's "final" decision. See also, *e.g.*, *Ramey* v. *Merit Sys. Prot. Bd.*, 476 Fed. Appx. 253, 255-256 (Fed. Cir. 2012) (per curiam) (reviewing decision of Merit Systems Protection Board finding that petitioner's administrative appeal was untimely, pursuant to statute authorizing judicial review of "a final order or decision of" the Board, 5 U.S.C. 7703(a)(1)); *Herchak* v. *U.S. Dep't of*

Labor, 125 Fed. Appx. 102, 103-107 (9th Cir. 2005) (reviewing decision of Labor Department Administrative Review Board finding that petitioner's administrative appeal from ALJ decision was untimely, pursuant to statute authorizing judicial review of "a final order" of the agency, 49 U.S.C. 42121(b)(3) and (4)). In fact, the Amicus does not identify any instance outside of Section 405 (or other statutes incorporating it) in which courts have interpreted a provision for judicial review of an agency's "final decision" to bar review of an agency's timeliness conclusion. And the Amicus provides no persuasive basis for concluding that Congress intended the term "final decision" in Section 405(g) to mean something different from how that term is used throughout administrative law.

Contrary to the Amicus's contention (Br. 18-19), this Court's decision in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), does not support giving Section 405(g)'s text a uniquely narrow construction that would bar judicial review of "disputes over the rules of" SSA's administrative process even after the agency's decision is final. The Amicus invokes *Hudson*'s observation that Congress created a "somewhat unusual" provision for judicial review of SSA decisions. 490 U.S. at 885. But that observation concerned the availability of attorney's fees under the Equal Access to Justice Act (EAJA) and the unusual terms of sentence six of Section 405(g), which creates a specialized procedure for an interlocutory remand to the agency for further fact finding or proceedings while the district court retains jurisdiction over the case. See *Shalala* v. *Schaefer*, 509 U.S. 292, 299-300 (1993) (*Hudson*'s allowance of EAJA fees was limited to a "narrow class" of cases in which the district court may remand and retain jurisdiction). *Hudson*

does not support the Amicus's position in this case, which does not involve sentence-six remands or attorney's fees under the EAJA.

B. The Agency Issued A Final Decision After A Hearing

1. *SSA's decision was final.* The Amicus does not dispute that SSA's proceedings in petitioner's case are over, and instead contends that "ordinary usage" and "judicial usage" indicate that the term "final decision" in Section 405(g) is limited to SSA decisions after complete exhaustion of administrative remedies. Amicus Br. 21-23 (citing, *e.g.*, *Bowen* v. *City of New York*, 476 U.S. 467, 482 (1986); *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000); Gov't Br. at 18-19, *Mathews* v. *Sanders*, No. 75-1443 (Sept. 1976)). But each of those authorities simply stated (correctly) that a claimant must proceed through the entire administrative process in order to receive judicial review of the "*merits*" of his "claim for benefits." Gov't Br. at 18, *Sanders*, *supra* (No. 75-1443) (emphasis added). Petitioner's request for judicial review is consistent with that requirement because the appropriate question for the district court in this case is whether his request for Appeals Council review was timely, not whether he is entitled to benefits. None of the authorities cited by the Amicus suggested that an Appeals Council order conclusively resolving a benefits application on a procedural ground is something other than a "final decision." See *id.* at 19 (arguing that the term "final decision" does not include "post-adjudication refusals by the Secretary to reopen closed matters").[1]

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[1] The government's brief in *Sims*, *supra*, No. 98-9537 (Feb. 2000), cited by the Amicus (Br. 25-26), similarly concerned the requirements necessary to obtain judicial review on the merits. The Amicus also cites (Br. 25-26) the government's brief in *City of New York*,

The Amicus defends his interpretation of the term "final decision" by arguing (Br. 20-21 & n.6) that finality is an "'intensely practical' concept," citing this Court's decision in *Eldridge*, 424 U.S. at 331 n.11, among others. But most of the cases cited concerned whether an administrative decision was "final" notwithstanding the absence of an ALJ hearing or review by the Appeals Council, or else whether to excuse some other deficiency in the underlying proceedings. In *Eldridge*, for example, the Court considered whether SSA had issued a final decision before there was an ALJ hearing or Appeals Council review, thereby permitting a district court to consider the claimant's constitutional argument that he was entitled to an ALJ hearing before his benefits were terminated. See *id.* at 330-332. It was in that context that this Court considered "the consequences of deferment of judicial review." *Id.* at 331 n.11. The Amicus's position here, however, is not that judicial review should be *deferred*, but that judicial review should not be available to petitioner at all. And this case involves the availability of judicial review where the claimant has had an ALJ hearing and received a final disposition of his claim for benefits after requesting Appeals Council review.

The Amicus also relies heavily (Br. 1-2, 24-25, 41) on SSA's authority, recognized by this Court, to specify exhaustion requirements for the administrative process. But again, petitioner does not challenge those requirements; the relevant question in this case is instead whether petitioner complied with them. The

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supra, No. 84-1923 (Dec. 1985), but that case concerned whether to excuse incomplete exhaustion for certain claimants, and this Court held that exhaustion should be treated as waived under the particular circumstances presented there. See 476 U.S. at 482-486.

authority that Congress granted the agency "to determine *when* finality has occurred," Amicus Br. 24 (quoting *Eldridge*, 424 U.S. at 330) (emphasis added), does not include the authority to cut off a claimant's statutory right to judicial review by saying that SSA's decision in a particular case will never become final. See *Bloodsworth*, 703 F.2d at 1239.

2. *SSA's decision was made after a hearing.* The Amicus acknowledges (Br. 34) that the Appeals Council order dismissing petitioner's request for review was issued after a hearing by an ALJ on petitioner's benefits application. The Amicus's response (Br. 34-35) is that Section 405(g) does not permit judicial review of "collateral" orders that occur after an ALJ hearing. But the text of Section 405(g) depends on whether the agency's decision after a hearing is *final.* And in any event, when petitioner sought Appeals Council review after an ALJ hearing, the Appeals Council's finding of untimeliness was the basis for its final disposition of petitioner's claim, not collateral to it. This Court can resolve this case by holding simply that, when an ALJ has held a hearing on an application for Social Security benefits, judicial review is available after the agency renders its final decision.

The Amicus objects (Br. 34) that the Appeals Council did not hold an *oral* hearing like the one presided over by an ALJ before dismissing petitioner's request for review as untimely. The Amicus contends that Section 405(g)'s "'after a hearing' requirement must be interpreted as referring solely to hearings *required by statute*," and that the statute compels a hearing "'only'" when the claimant timely requests a hearing before an ALJ after an adverse initial determination. Amicus Br.

28 (citation omitted); see 42 U.S.C. 405(b). That argument, based on the absence of a mandatory ALJ-type hearing by the Appeals Council, would bar judicial review of all Appeals Council decisions, on whatever ground. Consider a case where an ALJ determines that a claimant is entitled to benefits, but the Appeals Council overturns that decision on the merits based on its review of the record. See 20 C.F.R. 416.1470(b), 416.1475; see also, *e.g.*, *Townsend* v. *Secretary of Health & Human Servs.*, 762 F.2d 40, 41 (6th Cir. 1985). Surely the Appeals Council's final decision in that case would be subject to judicial review under Section 405(g), see *id.* at 43-44, notwithstanding the fact that the Appeals Council was not required by statute to hold an oral hearing to come to its decision. See 20 C.F.R. 416.1476(b) (Appeals Council has discretion whether to permit oral argument). Presumably the Amicus would also agree that the Appeals Council's decision in such a case would be binding and unreviewable "except as * * * provided" in Section 405(g), even though those requirements are triggered when SSA's "findings and decision" were made "after a hearing," 42 U.S.C. 405(h). See Amicus Br. 16 (emphasizing the limits on judicial review imposed by Section 405(h)).

The Act vests in the Commissioner the authority to determine what procedures should be used by the Appeals Council in making its decision. See 42 U.S.C. 1383(c)(1)(A) (The Commissioner is "authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper."); see also 42 U.S.C. 405(a) and (b). Those discretionary choices do not disturb the claimant's entitlement to judicial review after the agency gives its final decision.

The Amicus argues (Br. 24, 28-34) that its interpretation of Section 405(g), which turns on whether a hearing was required by statute, is supported by this Court's decisions in *Califano* v. *Sanders*, 430 U.S. 99 (1977), and *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999), as well as the court of appeals' decision in *Cappadora* v. *Celebrezze*, 356 F.2d 1 (2d Cir. 1966) (Friendly, J.). But none of those cases addressed whether a court is barred from reviewing an Appeals Council decision on a non-merits, procedural ground like timeliness when the claimant has had no prior opportunity for judicial review. Instead, all three cases involved claimants who, having previously declined to take advantage of their opportunity for judicial review of an adverse decision, later sought unsuccessfully to *reopen* their cases before the agency. See *Sanders*, 430 U.S. at 102-103; *Your Home*, 525 U.S. at 451; *Cappadora*, 356 F.2d at 2-3. This Court held that a discretionary denial of reopening, after the claimant has already been afforded an opportunity for judicial review, is not a "final decision * * * made after a hearing," 42 U.S.C. 405(g), but is instead "the *refusal* to make a new determination," *Your Home*, 525 U.S. at 453; see *Sanders*, 430 U.S. at 108-109. Central to the Court's analysis was the fact that the statutes at issue did not require the agency to provide a reopening procedure at all. See *Sanders*, 430 U.S. at 108; *Your Home*, 525 U.S. at 454 (noting that "[t]he right of a provider to seek reopening exists only by grace of the Secretary"); see also *Cappadora*, 356 F.2d at 4-5.[2]

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[2] *Stovic* v. *Railroad Retirement Board*, 826 F.3d 500 (D.C. Cir.) (Kavanaugh, J.), cert. denied, 137 S. Ct. 399 (2016), relied on by the Amicus (Br. 33-34), similarly concerned an administrative refusal to reopen a prior final decision. 826 F.3d at 501. The court of appeals

This Court's decision in *Sanders* stands for the proposition that, after a Social Security claimant has completed the administrative process and been afforded an opportunity for judicial review under 42 U.S.C. 405(g), the agency is permitted to create "an additional opportunity" for administrative proceedings that do not involve a hearing and do not come with a second chance at judicial review. 430 U.S. at 109. But this case is starkly different. Petitioner did not attempt to obtain the benefit of a second administrative process; the Appeals Council dismissal order was the final step in SSA's *first* adjudication of his claim for benefits. See 20 C.F.R. 416.1400(a). Because of that critically different posture, each of the reasons this Court gave for the results in *Sanders* and *Your Home* is inapplicable here. See Gov't Br. 38-40. Nothing in *Sanders* suggests that judicial review of a final decision on a benefits application—as opposed to a reopening request—is foreclosed simply because the Appeals Council ruled on a procedural ground.

3. *SSA's existing regulations do not warrant deference*. The Amicus contends (Br. 3, 12, 15, 40-47) that this Court should defer to the interpretation of 42 U.S.C. 405(g) in the agency's regulations under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As we have explained, however (Gov't Br. 20-21), after reexamining the issue, the government has concluded that the construction of Section 405(g) adopted by SSA's regulations and defended by the Amicus is "'inconsistent with the design and structure of the statute as a whole.'" *Utility*

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concluded that the agency's decision was reviewable in light of textual differences between the statute at issue and the Social Security Act. *Id.* at 503-505.

Air Regulatory Grp. v. *EPA*, 573 U.S. 302, 321 (2014) (citation and brackets omitted). "Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Ibid.* (citation omitted). The regulations' construction of 42 U.S.C. 405(g) depends on the propositions that SSA's decision in petitioner's case was not "final" even though the agency's proceedings were over, or that SSA's decision was not "made after a hearing" even though an ALJ held a hearing. The government has concluded that those are not reasonable constructions of Section 405(g), when read in the context of the statutory scheme and broader principles of administrative law.

C. Judicial Review Of Appeals Council Dismissal Orders Will Not Impose An Undue Burden On Federal Courts

The Amicus urges (Br. 1) that Section 405(g) should be construed to forbid judicial review of exhaustion questions in order to avoid "engulfing the federal courts" in Social Security cases (and Medicare cases, which also incorporate Section 405). See also Amicus Br. 4-5 (noting that SSA processes millions of claims each year), 9-10, 36-40, 44-45. That argument falls short because even as Congress balanced the need for efficiency and fairness in Social Security cases, it preserved judicial review as a backstop. The most important way by which SSA limits the number of Social Security cases that arrive in federal court is affording claimants an "unusually protective multi-step process for the review and adjudication of disputed claims." *Schweiker* v. *Chilicky*, 487 U.S. 412, 424 (1988) (brackets omitted) (quoting *Heckler* v. *Day*, 467 U.S. 104, 106 (1984)). That administrative process is conducted "in an informal, nonadversary manner," *Sims*, 530 U.S. at 111 (opinion of Thomas, J.) (quoting 20 C.F.R. 404.900(b)

(1999)), and includes the Appeals Council, which both exercises appellate-style review and can consider new evidence from the claimant in some circumstances. 20 C.F.R. 416.1470(a)(5); see also Amicus Br. 18 (noting that "the inquisitorial social security process boasts powerful protections for claimants"). In the rare case in which SSA's conclusion regarding the timeliness of a request for Appeals Council review is not supported by substantial evidence, the Amicus provides no persuasive reason why Congress would have barred a court from correcting that error so that the administrative process can resume.

The Amicus's "floodgate concerns" (Br. 36) are also not supported by the experience of the Eleventh Circuit, which has held since 1983 that Appeals Council dismissal orders are subject to judicial review. *Bloodsworth*, *supra*. Statistics from the Administrative Office of the United States Courts show that, from 2001 to 2018, the percentage of Social Security cases filed in district courts in the Eleventh Circuit, as a percentage of all civil cases in that Circuit, was comparable to the national average.[3] For example, for the 12 months preceding June 30, 2017, Social Security cases comprised 6.69% of all civil cases filed within the Eleventh Circuit, and 6.98% of all cases nationwide.[4] The year before that, Social Security cases were 5.30% of the Eleventh

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[3] https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary. The Administrative Office's statistics are compiled twice annually and available online from 2001 onward. *Ibid.* For the "June" report in each year, Table C-3 shows "Civil Cases Filed, by Jurisdiction, Nature of Suit, and District" over the preceding 12 months. *Ibid.*

[4] https://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_630.2017.pdf

Circuit's civil filings, compared to 6.34% nationally.[5] The Eleventh Circuit simply has not seen the rush of additional Social Security claims predicted by the Amicus.

Whether judicial review would be available for any other type of SSA dismissal order (Amicus Br. 36-38), or for a decision of any other agency (Amicus Br. 38-40), depends on the particular features of the administrative ruling at issue and the particular text of the relevant statutory regime. Those questions are not before the Court in this case, and some are the subject of disagreement among the lower courts, as the Amicus acknowledges. In any event, where Section 405(g) applies, the government's submission is modest: when the agency has given its last word on an administrative claim, its decision is "final," and where an ALJ hearing occurred and an oral hearing is not required to resolve the particular procedural dispute at issue, the agency's decision was "made after a hearing." 42 U.S.C. 405(g).

The court of appeals erred, therefore, in concluding that petitioner's suit under Section 405(g) should be dismissed without any review of whether he properly exhausted administrative remedies.[6]

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[5] https://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_630.2016.pdf

[6] The government agrees with the Amicus (Br. 19 n.5) that, if the Court rejects the government's construction of Section 405(g), the judgment below should be affirmed, notwithstanding the court of appeals' erroneous statement that petitioner's case should have been dismissed for lack of jurisdiction. The government raised the point in its opening brief (at 24 n.12) in order to assist this Court, if necessary, in dispelling confusion among some lower courts that have treated exhaustion under Section 405(g) as a jurisdictional requirement.

II. JUDICIAL REVIEW OF AN APPEALS COUNCIL DISMISSAL ORDER IS LIMITED TO THE STATED RATIONALE FOR THE AGENCY'S DECISION

As the government's opening brief explains (at 29-30), Congress understood that some of SSA's final decisions will rest on a procedural failure by the claimant. Section 405(g) accordingly tailors the available scope of judicial review to the agency's rationale for its decision. Where the claimant completes the administrative process, "[t]he court shall have power to enter, * * * a judgment affirming, modifying, or reversing the decision of the Commissioner, * * * with or without remanding the cause for a rehearing." 42 U.S.C. 405(g). But where the agency's final decision is "adverse" to the claimant "because of failure of the claimant * * * to submit proof in conformity with any regulation prescribed under [42 U.S.C. 405(a)], the court shall review only the question of conformity with such regulations and the validity of such regulations." *Ibid.*

A. The latter sentence supports the government's position that, because the Appeals Council in this case issued an adverse decision based on petitioner's failure to submit his request for review in a timely manner, the statute does not entirely foreclose judicial review—as the Amicus contends—but instead limits judicial review to "only" whether petitioner "conform[ed] with" the timeliness regulation. 42 U.S.C. 405(g). Section 405(g) permits limited judicial review of an adverse decision resting on a failure "to submit proof in conformity with *any* regulation prescribed under subsection (a) of this section," *ibid.* (emphasis added), and Congress's use of the "expansive" term "'any'"—"that is, 'one or some indiscriminately of whatever kind'"—"'means what it says,'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)

(citations omitted). The Amicus does not dispute that Section 405(a) is the source of SSA's authority to adopt the Appeals Council timeliness regulation at issue in this case. See 42 U.S.C. 1383(d)(1) (Section 405(a) "shall apply * * * to the same extent" in Title XVI as in Title II); 45 Fed. Reg. 52,078, 52,097 (Aug. 5, 1980) (invoking Section 1383 as authority for 20 C.F.R. 416.1468).[7]

While it is admittedly somewhat awkward to describe a failure to submit a timely request for Appeals Council review as a failure "to submit proof" in conformity with applicable regulations, 42 U.S.C. 405(g), that statutory phrase makes sense in light of the text that it cross references, which refers to SSA's authority to "to make rules and regulations and to establish procedures, * * * and [to] adopt reasonable and proper rules and regulations to regulate and provide for *the nature and extent of the proofs and evidence* and the method of taking and furnishing the same in order to establish the right to benefits hereunder," 42 U.S.C. 405(a) (emphasis added). In other words, Congress referred in Section 405(g) to a failure "to submit proof" because in Section 405(a) it had described the administrative-adjudication process as one for claimants to furnish, and the agency to receive, "proofs and evidence" regarding entitlement to benefits. *Ibid.* The Appeals Council is part of that process, and a claimant's failure to seek Appeals Council review as required by SSA regulations constitutes a

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[7] The Amicus contends (Br. 26-27 n.7) that "the agency's own regulations" show that the failure-to-submit-proof sentence in Section 405(g) does not apply here, but the Amicus cites a regulation of the Center for Medicare & Medicaid Services—not SSA—that applies to a different benefits program. See 70 Fed. Reg. 11,420, 11,498 (Mar. 8, 2005).

failure to submit his case, based on the evidentiary record, to the Appeals Council. Indeed, the very same timeliness regulation at issue here also counsels claimants to "submit any evidence [they] wish to have considered * * * with [their] request for review [by the Appeals Council]," and provides that the Appeals Council "will consider the evidence" consistent with other SSA regulations. 20 C.F.R. 416.1468(a).

At a minimum, Section 405(g) clearly contemplates that at least some adverse final decisions resting on a procedural ground—those involving the failure to make a proper submission of proof—will be judicially reviewable, contrary to the Amicus's submission (Br. 28) that judicial review is foreclosed unless the agency's decision was reached after a hearing "*required by statute*." Even if the failure-to-submit-proof sentence in Section 405(g) does not strictly control here, the principle underlying it applies equally to petitioner's failure to comply with the regulations governing Appeals Council review.

B. Although the government agrees with petitioner that the Appeals Council's dismissal order is judicially reviewable, petitioner errs in contending (Br. 24-25) that if the district court concludes that the Appeals Council's conclusion regarding untimeliness is not supported by substantial evidence, the court could properly decide petitioner's ultimate entitlement to benefits.[8]

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[8] Petitioner contends (Br. 24) that the permissible scope of judicial review "is not presented here." But the answer to that question is directly related to why the correct interpretation of Section 405(g) is consistent with this Court's precedents holding that the Social Security Act requires complete exhaustion of administrative remedies before judicial review. See *City of New York*, 476 U.S. at 482. Moreover, the scope-of-review question implicates how the district

Lower courts commonly hold that, where an error in the administrative process prevented SSA from reviewing a claim properly, remand to SSA is the required disposition. See, *e.g.*, *Casey* v. *Berryhill*, 853 F.3d 322, 329 (7th Cir. 2017) (holding that, where the Appeals Council erroneously dismissed an administrative appeal on procedural grounds, "the underlying merits" are "for the agency to consider on remand"); *Quarles* v. *Colvin*, No. 15-572, 2016 WL 4250399, at *3 (S.D. Ala. Aug. 10, 2016) ("The parties * * * agree that, when the Appeals Council has dismissed a request for review, this Court may not review the merits of the underlying decision denying benefits" but only "'whether the Appeals Council abused its discretion in dismissing Plaintiff's tardy request for review.'") (citation omitted); *Whitzell* v. *Astrue*, 589 F. Supp. 2d 100, 109 (D. Mass. 2008) (holding that, where the Appeals Council had erroneously declined review of the claimant's case, Section 405(g) did not allow the court to review the claimant's entitlement to benefits).

Limiting judicial review in a case like this one to the procedural failure that was the basis for the agency's adverse decision is necessary to ensure that petitioner completes the *entire* administrative process—including giving the Appeals Council an opportunity to review the record—before a court considers his claim on the merits. See *City of New York*, 476 U.S. at 482 ("a claimant is required to exhaust his administrative remedies by proceeding through all three stages of the administrative appeals process"). That limitation on the scope of judicial review also accords with the "familiar principle[ ] of administrative law" that when an agency "has

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court should implement the remand order that both petitioner and the government seek from this Court.

chosen a particular legal rationale" for its decision, "its decision must stand or fall on that basis." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 455 (1986); see also *Chenery*, 318 U.S. at 87.

Petitioner's contrary arguments are without merit. Petitioner first invokes (Br. 24-25) *Sims*, *supra*, which he argues "holds that a court may address an issue in the absence of an Appeals Council determination regarding—or even Appeals Council consideration of—the issue." That overstates *Sims*'s rationale for declining to require issue exhaustion before the Appeals Council. Four Justices reasoned that SSA administrative proceedings operate "'in an informal, nonadversary manner'" whereby "[t]he [Appeals] Council, not the claimant, has primary responsibility for identifying and developing the issues." *Sims*, 530 U.S. at 111, 112 (opinion of Thomas, J.) (citation omitted).[9] But *Sims* does not say or suggest that the Appeals Council is so inconsequential that a court may review the merits without the Appeals Council even considering the benefits claim on the merits.

Reviewing the merits before the Appeals Council has had an opportunity to consider them would also conflict with this Court's "ordinary * * * requirement" that a court "should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *INS* v. *Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam); see also *Chenery*, 318 U.S. at 88 ("a judicial judgment cannot be made to do service for an administrative judgment"). In Social Security cases, SSA regulations charge the Appeals Council with

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[9] Justice O'Connor concurred in the judgment, on the ground that SSA had failed to notify claimants of an issue-exhaustion requirement. *Sims*, 530 U.S. at 113.

reviewing and clarifying, if needed, the agency's final administrative judgment regarding a claimant's entitlement to benefits, including by receiving new evidence. See 20 C.F.R. 416.1470. Completing that process is necessary before a federal court can appropriately exercise its review of whether the agency's findings on the merits are supported by "substantial evidence." 42 U.S.C. 405(g); see *Salfi*, 422 U.S. at 765 ("Exhaustion is generally required * * * so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review"); see also *T-Mobile S., LLC* v. *City of Roswell*, 135 S. Ct. 808, 815 (2015) ("courts cannot exercise their duty of [substantial-evidence] review unless they are advised of the considerations underlying the action under review") (citation omitted; brackets in original).

Finally, petitioner observes (Br. 25) that, under this Court's precedents interpreting the Social Security Act, full exhaustion can be waived, or deemed waived, in certain situations. But the Acting Commissioner has not waived the requirement in this case that petitioner complete the administrative process before a court reviews his entitlement to benefits. And this Court's precedents would not support treating that requirement as waived here. Were the district court to find that petitioner submitted a timely request for Appeals Council review, he has not shown "that full relief cannot be obtained" through a remand to the Appeals Council, *City of New York*, 476 U.S. at 483 (citation omitted), where petitioner would have an opportunity to present his objections to the ALJ's decision denying his claim for benefits.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Solicitor General

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