No.

In the Supreme Court of the United States

WILLIE EARL CARR AND KIM L. MINOR,
PETITIONERS,

v.

COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether claimants seeking disability benefits under the Social Security Act must exhaust Appointments Clause challenges before the Administrative Law Judge as a prerequisite to obtaining judicial review.

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Petitioners Willie Earl Carr and Kim L. Minor respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit below. Under Rule 12.4, petitioners file this petition covering the judgments in both of their cases, as the Tenth Circuit consolidated their cases and issued a single decision.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at --- F.3d ----, and available at 2020 WL 3167896; *see* Pet.App.1a-31a, *infra*. Both parties consented to a proceeding before a magistrate judge in lieu of the district court. *See* 28 U.S.C. §§ 636(c)(1) &

(3). The opinion and order of the magistrate judge in *Willie Earl C v. Saul* is unreported and is available at 2019 WL 2613819. Pet.App.32a-56a. The opinion and order of the magistrate judge in *Kim L. M. v. Saul* is unreported and is available at 2019 WL 3318112. Pet.App.57a-83a.

JURISDICTION

The judgments of the court of appeals were entered on June 15, 2020. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

STATEMENT

This case presents an optimal vehicle for resolving a pressing and acknowledged circuit conflict over whether Social Security claimants must raise Appointments Clause challenges before an Administrative Law Judge (ALJ) to preserve them for judicial review. This Court in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044, held that the Securities and Exchange Commission's Administrative Law Judges are inferior officers within the meaning of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, who cannot be appointed by agency

staff. In the wake of *Lucia*, the Commissioner of the Social Security Administration (SSA) ratified the appointments of the agency's 1,600-plus ALJs to cure widespread, undisputed Appointments Clause violations.

That left thousands of cases in which unconstitutionally appointed ALJs had denied claimants' requests for disability benefits. In many of those cases, claimants did not raise Appointments Clause challenges before the agency. This Court has held that Social Security claimants—who are often unrepresented, unsophisticated, and debilitated—categorically do not forfeit judicial review of any type of issue by failing to raise it before the Appeals Council, the final stage of SSA review. *Sims v. Apfel*, 530 U.S. 103, 107 (2000). But many claimants did not press (or know to press) an Appointments Clause challenge before their ALJs, either. Now, by the government's own estimates, over a thousand such claimants have already sought relief for that conceded constitutional violation in federal district courts nationwide, with more suits to come. And there is no question what that relief would entail if claimants need not have pressed the issue before the ALJ. Under *Lucia*, claimants must receive a new hearing before a new, properly appointed adjudicator.

But the courts of appeals have intractably divided over whether claimants' failure to raise Appointments Clause objections before their ALJs should stop courts from reviewing that claim now. All agree that the Social Security Act and accompanying agency regulations impose no such issue-exhaustion requirement. The Third Circuit has refused to superimpose a judge-crafted exhaustion mandate, relying on the non-adversarial, claimant-friendly nature of Social Security ALJ proceedings, the nature of Appointments Clause challenges, and claimants' enormous interest in proceeding before constitutionally appointed adjudicators. Within the Third Circuit,

dozens of claimants are already receiving remands to the agency so they can pursue their disability benefits claims before new, constitutionally appointed adjudicators.

In other circuits, however, claimants are out of luck. In the decision below, the Tenth Circuit expressly disagreed with the Third Circuit and created an issue-exhaustion requirement for Appointments Clause claims, concluding that claimants should be expected to develop these challenges before ALJs. The Eighth Circuit just agreed with the Tenth Circuit. And the First and Ninth Circuits have long espoused a categorical issue-exhaustion rule. In all of those circuits, petitioners and thousands of similarly situated claimants have suffered conceded constitutional violations but have no further recourse.

Only this Court can resolve this widely acknowledged and entrenched split, and now is the time. There is no point in waiting further for the dozens of appeals pending in other circuits in the face of this already clear disagreement. The split was outcome-determinative in this case, which is a clean vehicle for its resolution. This Court should act immediately to restore uniformity on a hugely important issue central to the administration of a vast federal program.

Waiting to resolve this split would also impose an intolerable price. The agency requires the ALJ, not the claimant, to raise issues for review. And the agency's rules and practices encourage claimants to believe the agency's promises of non-adversarial proceedings. Punishing claimants for not challenging the appointments of the very ALJs before whom they appear and who are powerless to correct the error is perverse. And there is a conceded constitutional violation here, making an issue-exhaustion rule especially harsh. Receiving a new hearing before a different ALJ can make all the difference in the

world to the ultimate benefits determination, and Social Security disability claimants are uniquely needy.

In sum, this case is an ideal vehicle for resolving a profoundly important and entrenched split on an issue that affects thousands of vulnerable claimants in over a thousand pending cases so far. Only this Court's intervention can solve this problem and create uniform rules for the Nation's largest federal program.

A. Legal Background

1. Since its enactment in 1935, the Social Security Act has helped millions of vulnerable Americans stay afloat. "Today the Social Security Act provides disability benefits under two programs, known by their statutory headings as Title II and Title XVI." *Smith v. Berryhill*, 139 S. Ct. 1765, 1772 (2019) (citing 42 U.S.C § 401 *et seq.* (Title II); § 1381 *et seq.* (Title XVI)). Title II affords monthly benefits to disabled individuals who have contributed to the program through payroll deductions, "irrespective of financial need." *Id.* (internal quotation marks omitted). Title XVI extends benefits "to financially needy individuals who are aged, blind, or disabled" regardless of whether they contributed to the program. *Id.* (internal quotation marks omitted). Congress designed this statutory scheme to be "unusually protective of claimants." *Id.* at 1776 (internal quotation marks omitted).

For both programs, regulations promulgated by the Social Security Administration (SSA) prescribe a materially identical "four-step process" that claimants must follow to obtain a final decision reviewable in federal court. *Id.* at 1772; 42 U.S.C. § 405(g) (providing for judicial review of "any final decision of the Commissioner ... made after a hearing").

First, employees at Social Security offices or at state agencies authorized by SSA make initial determinations

on claimants' benefits applications. 20 C.F.R. §§ 404.603, 404.614, 416.305, 416.325; *see Smith*, 139 S. Ct. at 1776 n.14.

Second, claimants dissatisfied with SSA's initial determination may seek reconsideration of that decision. 20 C.F.R. §§ 404.907, 416.1407.

Third, dissatisfied claimants may request a hearing before an ALJ. *Id.* §§ 404.929, 416.1429. ALJs must issue a "written decision that gives the findings of fact and the reasons for the decision" based "on the preponderance of the evidence offered at the hearing or otherwise included in the record." *Id.* §§ 404.953(a), 416.1453(a).

Fourth, claimants "may request that the Appeals Council review" the ALJ's decision. *Id.* §§ 404.967, 416.1467. "The Appeals Council's review is discretionary: It may deny even a timely request without issuing a decision," *Smith*, 139 S. Ct. at 1772, in which case the ALJ's denial of the claim becomes the SSA's final decision, *see Sims*, 530 U.S. at 107.

Although the SSA regulations prescribe detailed exhaustion rules with respect to benefits determinations, neither the Social Security Act nor the SSA regulations require claimants to have raised in administrative proceedings every *issue* they wish to litigate in court. *Id.* at 106-07. Agency regulations inform claimants that if they fail timely to invoke every step of the administrative process, "you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure." 20 C.F.R. §§ 404.900(b), 416.1400(b). But the regulations omit any similar warning about the consequences (if any) of failing to raise particular issues before the agency.

2. The administrative process for seeking Social Security disability benefits is "inquisitorial rather than adversarial," and does not rely on claimants to raise the issues to be reviewed. *Sims*, 530 U.S. at 110-11 (plurality op.). Agency regulations reassure claimants that "we conduct the administrative review process in an informal, non-adversarial manner." 20 C.F.R. §§ 404.900(b), 416.1400(b). Claimants fill out a one-page form to request an ALJ hearing or Appeals Council review. The agency instructs that filling out the forms should take just 10 minutes. The ALJ hearing request form gives claimants four lines to summarize why "I disagree with the determination," and the Appeals Council form provides three lines to make the case for further review. Neither form tells claimants whether their failure to raise issues now could preclude judicial review of those issues later.[1]

The above regulations and procedures accordingly impose on ALJs and Appeals Council judges the "duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims*, 530 U.S. at 111 (plurality op.); *see* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1302, 1325 (1997). While the SSA permits claimants to raise or object to the issues to be decided, the regulations provide that ALJs can consider new issues that claimants did not raise. 20 C.F.R. §§ 404.939, 404.946, 416.1439, 416.1446. The regulations do not require claimants to provide briefing or oral arguments before ALJs. *Id.* §§ 404.949, 416.1449. "[T]here is no counsel for the

[1] Soc. Sec. Admin., Form No. HA-501, Request for a Hearing by Administrative Law Judge (Jan. 2015), https://www.ssa.gov/forms/ha-501.pdf; Soc. Sec. Admin., Form No. HA-520, Request for Review of Hearing Decision/Order (Jan. 2016), https://www.ssa.gov/forms/ha-520.pdf.

government," and "[e]ven in cases where claimants are represented, the ALJ typically conducts questioning of the claimant and all witnesses." Dubin, *supra*, at 1303; *see* 20 C.F.R. §§ 404.944, 416.1444. Indeed, claimants do not even need to appear at the hearing unless the ALJ determines their appearance and testimony is necessary. *See* 20 C.F.R. §§ 404.950, 416.1450.

Given the cost of obtaining counsel, the claimant-protective nature of SSA proceedings, and the ALJ's duty to develop arguments for claimants, "a large portion of Social Security claimants either have no representation at all or are represented by non-attorneys." *Sims*, 530 U.S. at 112 (plurality op.).

B. Factual and Procedural Background

1. Petitioner Willie Earl Carr is a 49-year-old resident of Tulsa, Oklahoma. He has a high school education. He worked as an electrician until his disability made that work impossible. Pet.App.34a-35a.

For nearly 20 years, Mr. Carr has suffered from multiple medical conditions that have compromised his ability to earn a living. Gov't C.A. App.10-11. He seriously injured his neck and back; doctors have diagnosed him with herniated cervical disks, herniated lumbar disks, cervical disk bulge, and severe and constant pain in his neck, back, legs, wrist, and fingers. *Id.* He has undergone six back surgeries, including lumbar laminectomy surgery, lumbar fusion surgery, and cervical fusion surgery. Gov't C.A. App.7, 10-11. Mr. Carr also suffers from high blood pressure, high cholesterol, and obesity. Pet.App.35a. Still, Mr. Carr worked through the pain until 2008, when his injuries worsened too much for him to continue work.

In January 2014, Mr. Carr filed his application for Title II disability benefits. Gov't C.A. Addendum (Add.) 19. Over a year later, on February 13, 2015, the SSA made an

initial determination denying benefits. *Id.* Mr. Carr timely sought reconsideration, and the SSA again denied his claim on August 28, 2015. *Id.* On October 7, 2015, he timely requested a hearing before an ALJ, but did not raise an Appointments Clause challenge. *Id.*

A year and a half later, on April 10, 2017, an ALJ held a hearing on Mr. Carr's claim. *Id.* The ALJ "was not appointed by the Commissioner of Social Security, but rather, by [a] lower-level official[]." Gov't C.A. Br. at 6. On June 15, 2017, the ALJ denied Mr. Carr's claim, concluding that while he had many severe impairments, he could still perform some occupations with his limitations. Pet.App.35a-37a. On March 16, 2018, the Appeals Council denied Mr. Carr's timely request for further review. Pet.App.33a n.2.

2. Petitioner Kim L. Minor is a 63-year-old resident of Tulsa, Oklahoma. She has a two-year college degree in secretarial science. She worked as a bus driver until January 2010, when the combined toll of numerous surgeries and other serious medical conditions left her unable to continue. Pet.App.59a-60a. In a two-year span, Ms. Minor suffered a herniated disk in her back, then required surgery on both knees to repair tears, lumbar decompression surgery, and another back surgery for spinal stenosis. Gov't C.A. App.58-59. On top of that, doctors diagnosed her with chronic pain, anxiety, hypertension, irregular heart rhythm, and arthritis. Gov't C.A. App.60.

On December 10, 2014, Ms. Minor filed her application for Title II disability benefits. Add.56. On May 11, 2015, the SSA made an initial determination denying benefits. *Id.* She timely sought reconsideration, and the SSA again denied her claim on August 26, 2015. *Id.* On September 17, 2015, she timely requested a hearing before an ALJ, but did not raise an Appointments Clause challenge. *Id.*

A year and a half later, on March 29, 2017, Ms. Minor received her hearing, and that ALJ too "was not appointed by the Commissioner of Social Security." Gov't C.A. Br. at 6. On June 7, 2017, the ALJ denied her claim, determining that although she suffered from many "severe impairments," she was still capable of work. Pet.App.60a-61a. On March 16, 2018, the Appeals Council denied Ms. Minor's timely request for further review. Pet.App.58a n.2.

3. On June 21, 2018, after the Appeals Council had denied both petitioners' requests for review, this Court in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), held that ALJs of the Securities and Exchange Commission are inferior "Officers of the United States" under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, who must be subjected to Senate confirmation or appointed by "only the President, a court of law, or a head of department." *Id.* at 2051 & n.3. Because SEC staff, not the Commission, appointed the ALJ in *Lucia*, the Court found an Appointments Clause violation and ordered "a new hearing before a properly appointed official." *Id.* at 2055 (internal quotation marks omitted). The Court further held that the original ALJ could not rehear the case "even if he has by now received (or receives sometime in the future) a constitutional appointment" because "[h]e cannot be expected to consider the matter as though he had not adjudicated it before." *Id.*

SSA ALJs and Appeals Council judges share many similarities with SEC ALJs. On January 30, 2018, while *Lucia* was pending before this Court, the SSA's Office of General Counsel issued an Emergency Message instructing SSA ALJs to note on the record any Appointments Clause challenges claimants might make, but not to "discuss or make any findings related to the Appointments

Clause issue," because the "SSA lacks the authority to finally decide constitutional issues such as these."[2] Similarly, on June 25—four days after this Court issued *Lucia*—the SSA reiterated its instruction that ALJs should note, but not address, any Appointments Clause challenges that claimants raised.[3]

On July 16, 2018, nearly a month after *Lucia* issued, the Acting Commissioner "ratified" the appointment of SSA ALJs and Appeals Council judges and "approved their appointments as her own in order to address any Appointments Clause questions involving SSA claims." On August 6, 2018, SSA revised its emergency instructions to SSA ALJs to reflect the Commissioner's ratification of ALJ appointments, but again instructed ALJs merely to note any Appointments Clause challenges raised before the July 16, 2018 ratification date.[4]

On March 15, 2019, the SSA instituted a policy for addressing Appointments Clause challenges to decisions that ALJs issued before the Acting Commissioner's July 16, 2018 ratification. *See* Social Security Ruling 19-1p; Titles II and XVI: Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) On Cases Pending

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[2] Soc. Sec. Admin., EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process [January 2018 Emergency Message] (2018).

[3] Soc. Sec. Admin., EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative-Law Judges in SSA's Administrative Process – UPDATE (June 25, 2018), https://bit.ly/2ZaDCbG.

[4] Soc. Sec. Admin., EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative-Law Judges in SSA's Administrative Process – UPDATE, (Aug. 6, 2018), https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM.

at the Appeals Council, 84 Fed. Reg. 9582. This policy applies only to cases where claimants timely requested Appeals Council review of decisions that ALJs had issued before July 16, 2018. *Id.* at 9583. If claimants had raised an Appointments Clause challenge before the ALJ and the case was pending before the Appeals Council, the agency ordered the Appeals Council to grant review, vacate the decision, and order new proceedings before different, properly appointed adjudicators regardless whether claimants also pressed the issue before the Appeals Council. *Id.* Claimants who failed to raise Appointments Clause challenges before ALJs but raised them before the Appeals Council likewise receive new adjudications before new, properly appointed adjudicators. *Id.*

4. Meanwhile, having exhausted their administrative remedies, Mr. Carr in May 2018 and Ms. Minor in August 2018 each timely sought judicial review of the denial of their disability benefits claims in the United States District Court for the Northern District of Oklahoma, where they agreed to proceed before the same magistrate judge. Pet.App.32a-33a, 58a; Gov't C.A. App.2, 54. Both petitioners challenged the ALJs' rationales for denying disability benefits, but also the ALJs' appointments under *Lucia*, arguing that "the decision in this case was rendered by an Administrative Law Judge whose appointment was invalid at the time she rendered her decision." Pet.App.37a, 62a. The agency conceded that in both cases, "the ALJ was not constitutionally appointed," but urged that "the court should not consider the argument because Plaintiff[s] did not raise the issue during the administrative proceedings on [their] claim for benefits." Pet.App.50a, 77a.

In both cases, the magistrate judge agreed with petitioners' Appointments Clause challenges and further held that claimants need not exhaust specific issues in Social

Security administrative proceedings to preserve them for judicial review. Pet.App.55a, 82a-83a. The judge relied on this Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000), which held that Social Security claimants must exhaust all administrative *remedies*, but need not preserve specific issues before the Appeals Council as a prerequisite to judicial review. The judge reasoned that "the reasons cited [in *Sims*] ... to reject an issue exhaustion requirement before the Appeals Council also apply to the other steps in the Social Security Administration process." Pet.App.55a, 82a-83a. He observed that in the two decades since *Sims*, neither the Social Security Act nor agency regulations have required issue exhaustion. He explained that the "[a]dministrative process remains nonadversarial and claimants, many of whom are unrepresented, are still not notified of any issue exhaustion requirement." Pet.App.54a, 82a. And he noted that "a ruling that *Sims* does not apply to the other steps in the administrative process would result in an issue exhaustion requirement at some steps of the process and not at subsequent steps." Pet.App.54a-55a, 82a.

Given the government's concession that the ALJs who adjudicated petitioners' claims were unconstitutionally appointed, the magistrate judge reversed the ALJs' decisions and remanded "for further proceedings before a different constitutionally appointed ALJ." Pet.App.55a, 83a.

5. On appeal, the Tenth Circuit consolidated petitioners' cases and reversed, holding that claimants forfeit Appointments Clause challenges if they do not raise them in administrative proceedings below. Pet.App.1a-31a. The Tenth Circuit acknowledged the government's concessions that the SSA ALJs who denied petitioners' disability benefits applications were unconstitutionally appointed, and that neither the Social Security Act nor regulations

require issue exhaustion. Pet.App.10a-11a. And the court acknowledged that under this Court's decision in *Sims*, claimants need not raise issues before the Appeals Council to preserve them for judicial review. Pet.App.15a.

But the Tenth Circuit considered *Sims* relevant to issue exhaustion only before the Appeals Council, not ALJs. The Tenth Circuit concluded that the purposes behind issue exhaustion favor requiring claimants to challenge the constitutionality of their ALJs' appointments before the ALJ. Pet.App.20a-24a. The court reasoned that petitioners' "failure to exhaust their Appointments Clause challenges deprived the SSA of its interest in internal error-correction." Pet.App.21a. The court also considered SSA ALJ proceedings more adversarial than Appeals Council proceedings. Pet.App.27a-28a. And the court stated that while SSA ALJs "typically develop[] issues regarding benefits, a claimant must object to an ALJ's authority." Pet.App.28a. Finally, the court refused to excuse petitioners' failure to raise an Appointments Clause challenge "for substantially the same reasons we have found an issue exhaustion requirement." Pet.App.31a n.10.

The Tenth Circuit acknowledged that its decision conflicted with the Third Circuit's decision in *Cirko ex rel. Cirko v. Comm'r, SSA*, 948 F.3d 148, 159 (3d Cir. 2020), *reh'g denied* Mar. 26, 2020, which held that claimants do not forfeit Appointments Clause challenges by failing to raise them before SSA ALJs. Pet.App.29a. The Tenth Circuit stated its agreement with "other circuits [that] have imposed an exhaustion requirement in the SSA ALJ context." Pet.App.20a n.3 (citing *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017); *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003); *Mills v. Apfel*, 244 F.3d 1, 4-5 (1st Cir. 2001)).

REASONS FOR GRANTING THE PETITION

This petition presents an acknowledged conflict in the courts of appeals on an important and recurring question concerning the intersection of the Appointments Clause and judicially created forfeiture rules. The Tenth Circuit admitted that the decision below directly conflicts with a decision of the Third Circuit holding that Social Security claimants need not exhaust challenges to the appointment of ALJs during administrative proceedings to preserve them for judicial review. The Eighth Circuit has since sided with the Tenth Circuit, again acknowledging the existence of the circuit conflict. Similarly, the First and Ninth Circuits impose general rules requiring issue exhaustion before SSA ALJs.

This clear circuit split calls out for this Court's immediate review. The question presented is one of substantial legal and practical importance, potentially affecting thousands of vulnerable Social Security disability claimants. The circuit split will not resolve without this Court's intervention. Waiting only prejudices all claimants in petitioners' shoes, who have been denied a chance at a hearing before a new, constitutionally appointed ALJ purely from bad geographical luck. And this case, which presents the question squarely and cleanly, is an optimal vehicle in which to address the question presented.

I. The Decision Below Sharpens a Clear Circuit Split Over Whether Claimants Must Raise Appointments Clause Challenges Before the SSA

1. If petitioners resided within the Third Circuit, they unquestionably would have obtained a new hearing before a new, properly appointed adjudicator based on their Appointments Clause challenges. As a unanimous Third Circuit panel recently held in a thorough opinion, failing to

challenge the constitutionality of SSA ALJs' appointments before those very ALJs does not bar judicial review of the issue. *See Cirko*, 948 F.3d at 152.

As here, improperly appointed ALJs denied the *Cirko* plaintiffs' disability claims. As here, the *Cirko* plaintiffs did not raise Appointments Clause challenges before the agency, instead raising Appointments Clause challenges before the district court shortly after this Court's *Lucia* decision. As here, the Commissioner conceded that plaintiffs' ALJs had been unconstitutionally appointed, but claimed forfeiture. *See id.*

But unlike here, the Third Circuit held that requiring claimants to raise Appointments Clause challenges before SSA ALJs "is not required in this context." *Id.* The court noted that, in the absence of a statutory or regulatory mandate, courts look to the nature of the claim, the administrative process at issue, and individual versus governmental interests to determine whether to require issue exhaustion. *Id.* at 153 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). All those factors, the Third Circuit concluded, point against requiring issue exhaustion of Appointments Clause claims before the ALJs whose appointments claimants would be challenging.

First, the court reasoned, the nature of Appointments Clause claims weighs against demanding issue exhaustion, which "is generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges, which implicate both individual constitutional rights and the structural imperative of separation of powers." *Id.*

Second, the Third Circuit held that the non-adversarial nature of Social Security administrative proceedings counseled against requiring issue exhaustion. While acknowledging that this Court's decision in *Sims* addressed

only issue exhaustion before the Appeals Council, the Third Circuit explained that the "rationales driving *Sims* [] generally apply to ALJs no less than AAJs." *Id.* at 156. Like the statutory and regulatory provisions governing the Appeals Council, nothing in the Social Security Act or regulations requires exhaustion before ALJs, and *Sims* reasoned that imposing an implied issue-exhaustion requirement "would penalize claimants who did 'everything that the agency asked.'" *Id.* at 155 (quoting *Sims*, 530 U.S. at 114 (O'Connor, J., concurring in part and concurring in the judgment)). Further, like Appeals Council proceedings, ALJ hearings are inquisitorial rather than adversarial, and rely on the judges, not claimants, to issue-spot. *Id.* at 155-56.

Finally, the Third Circuit concluded that claimants' interest in judicial review far outweighed governmental interests in requiring issue exhaustion. *Id.* at 156-60. The court found that imposing an exhaustion requirement for Appointments Clause claims "would impose an unprecedented burden on SSA claimants" by jettisoning a process where the ALJ ordinarily "plays a starring role" in developing issues and instead forcing claimants "to root out a constitutional claim." *Id.* at 156-57. That result would be especially prejudicial for the many claimants who lack legal representation in ALJ hearings, and would produce harsh consequences given the financial and physical vulnerability of Social Security claimants. *Id.* at 157.

Conversely, the Third Circuit considered the government's interest in requiring exhaustion "negligible at best." *Id.* The Commissioner had conceded that claimants "have 'no access ... to the [C]ommissioner directly,'" and thus "the only avenues ... available to claimants to seek a remedy—hearings before the ALJs or AAJs—were incapable of providing it." *Id.* at 158-59.

The Third Circuit accordingly "remand[ed] these ... cases to the [SSA] for new hearings before constitutionally appointed ALJs other than those who presided over Appellees' first hearings." *Id.* at 159-60.

2. By contrast, as a result of the decision below, petitioners and every other similarly situated claimant within the Tenth Circuit cannot obtain a judicial remedy for conceded Appointments Clause violations. As the Tenth Circuit recognized, its decision directly conflicts with the Third Circuit's decision in *Cirko*, which the Tenth Circuit deemed "unpersuasive and counter to [its] precedent." Pet.App.29a.

The Eighth Circuit has also rejected the Third Circuit's approach. *See Davis. v. Saul*, -- F.3d --, 2020 WL 3479626 (8th Cir. June 26, 2020). The Eighth Circuit acknowledged that "circuits presented with the issue have disagreed on whether exhaustion of the issue before the agency is required." *Id.* at *2 (citing *Carr* and *Cirko*). The court of appeals then agreed with the Tenth Circuit, holding that claimants must exhaust Appointments Clause issues before the ALJ. *Id.* at *3-*4.

Further, despite *Sims*, "other circuits have imposed an issue exhaustion requirement in the SSA ALJ context," as the Tenth Circuit recognized. Pet.App.20a n.8. In the First Circuit, "the failure of an applicant to raise an issue at the ALJ level" forfeits the issue for judicial review. *Mills*, 244 F.3d at 8. And in the Ninth Circuit, claimants "must raise all issues and evidence at their administrative hearings in order to preserve them on appeal." *Shaibi*, 883 F.3d at 1109 (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999)). Those circuits have thus imposed a general rule that claimants who fail to raise an issue before the SSA ALJ forfeit the issue for judicial review.

This division of authority over whether claimants must exhaust Appointments Clause challenges before SSA ALJs is clear, indisputable, and acknowledged. The question presented has a binary answer—either claimants must raise Appointments Clause challenges to ALJs as a precondition of judicial review, or not. Given that the Third Circuit denied the government's request for rehearing in *Cirko*, *see* Order Den. Pet. for Reh'g, *Cirko v. Comm'r, SSA*, No. 19-1172 (3d Cir. Mar. 26, 2020), ECF No. 77, and the Tenth and Eighth Circuits pointedly disagreed with *Cirko*, there is little possibility that lower courts will settle on a single answer. Only this Court can resolve this conflict and restore national uniformity for exhaustion rules in the country's largest federal program.

II. The Question Presented Is Important and Squarely Presented

1. The question presented affects thousands of claimants for disability benefits who are similarly situated to petitioners. "[T]he Social Security hearing system is probably the largest adjudicative agency in the western world." *Barnhart v. Thomas*, 540 U.S. 20, 28-29 (2003) (internal quotation marks omitted). When this Court decided *Lucia*, the SSA employed some 1,600 ALJs, Pet.App.3a n.1, who adjudicated some 761,000 hearings per year. Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification* 3 (2018). Most, if not all, of those ALJs appear to have been unconstitutionally appointed through July 16, 2018. *Supra* p. 10. And petitioners are just two of the approximately 18,000 claimants per year who seek judicial review of SSA decisions in federal district court. Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification* 3 (2018); Soc. Sec. Admin., *Fiscal Year 2020 Congressional Justification* 16 (2019).

The number of cases across the nation implicating the question presented is significant by any metric. The government estimated that as of March 2020, over a thousand district-court cases raise the issue, with more potentially to come. Gov't Pet. for Reh'g En Banc, *Cirko v. Comm'r, SSA*, No. 19-1772 (3d Cir. Mar. 9, 2020), ECF No. 76 at 2. Scores of district courts across the country have already staked out diverging positions on whether claimants must have raised Appointments Clause challenges before ALJs to remedy conceded Appointments Clause violations in court.[5] As of March 2020, the government had identified "more than fifty appeals spread across" the Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits raising the question presented. Gov't Pet. for Reh'g En Banc, *Cirko v. Comm'r, SSA*, No. 19-1172 (3d Cir. Mar. 9, 2020), ECF No. 76 at 2 & n.1; *see* Gov't C.A. Br. viii-xi (listing 49 pending federal appeals with this issue as of December

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[5] *Compare, e.g., Myers v. Comm'r, SSA*, No. 1:19-CV-10010-ADB, 2020 WL 1514547 (D. Mass. Mar. 30, 2020); *Danielle R. v. Comm'r, SSA*, No. 5:19-CV-538, 2020 WL 2062138 (N.D.N.Y. Apr. 29, 2020); *Ricks v. Comm'r, SSA*, No. CV 18-1097-RLB, 2020 WL 488285 (M.D. La. Jan. 30, 2020); *Chamberlin v. Comm'r, SSA*, No. 19-10412, 2020 WL 2300240 (E.D. Mich. May 8, 2020); *Herring v. Saul*, No. C18-120-LTS, 2020 WL 1528163 (N.D. Iowa Mar. 31, 2020); *Latosha N. v. Saul*, No. ED CV 18-2475-SP, 2020 WL 1853310 (C.D. Cal. Apr. 13, 2020); *Gagliardi v. SSA*, No. 18-CV-62106, 2020 WL 966595 (S.D. Fla. Feb. 28, 2020); *Jason D. v. Saul*, No. 3:19-CV-00176-SLG, 2020 WL 1816470 (D. Alaska Apr. 10, 2020) (requiring issue exhaustion of SSA ALJ Appointments Clause challenges) *with, e.g., Suarez v. Saul*, No. 3:19-CV-00173 (JAM), 2020 WL 913809 (D. Conn. Feb. 26, 2020); *Duane H. v. Saul*, No. 3:19-CV-138-JVB-SLC, 2020 WL 1493487 (N.D. Ind. Mar. 27, 2020); *Jenny R. v. Comm'r, SSA*, No. 5:18-CV-1451 (DEP), 2020 WL 1282482 (N.D.N.Y. Mar. 12, 2020); *Morse-Lewis v. Saul*, No. 2:18-CV-48-D, 2020 WL 1228678 (E.D.N.C. Mar. 12, 2020); *McCary-Banister v. Saul*, No. SA-19-CV-00782-XR, 2020 WL 3410919, at *8 (W.D. Tex. June 19, 2020); *Morris W. v. Saul*, No. 2:19-CV-320-JVB, 2020 WL 2316598 (N.D. Ind. May 11, 2020) (no exhaustion needed).

2019). And the numbers of cases and circuits confronting the question presented has only grown since then.

The Third Circuit's estimate of a closed set of "hundreds (not hundreds of thousands) of claimants whose cases are already pending in the district courts," would be significant in its own right. *Cirko*, 948 F.3d at 159. But that estimate also undercounts the universe of cases. The Appeals Council can often take more than a year to render a final decision. Gov't Pet. for Reh'g En Banc, *Cirko v. Comm'r, SSA*, No. 19-1172 (3d Cir. Mar. 9, 2020), ECF No. 76 at 14. Because the Acting Commissioner ratified ALJs' appointments on July 16, 2018, some claimants challenging decisions rendered by improperly appointed ALJs have yet even to receive final decisions, and thus the time to seek judicial review in district court is still open. *See id.* at 14-15.

The circuit split over the question presented also produces stark differences in outcomes for similarly situated claimants who did not invoke an Appointments Clause challenge before their ALJs. The SSA undisputedly violated the Appointments Clause nationwide in its longstanding manner of appointing ALJs. And the government does not dispute that the proper remedy for all cognizable claims is a new hearing before a different, properly appointed SSA adjudicator. Yet, based on the fortuity of where a claimant lives, claimants in one part of the country get a new chance to establish their entitlement to benefits before constitutionally appointed ALJs, while claimants elsewhere get nothing.

That disparity is unacceptable in any federal program requiring uniformity, and is especially intolerable given that Social Security disability benefits "provide[] a crucial lifeline for some of the nation's most vulnerable citizens." Melissa M. Favreault et al., Urban Inst., *How Important Is Social Security Disability Insurance to U.S. Workers?*

1 (June 2013), https://urbn.is/2YFL1AP. Disability payments "account for the majority of family income for nearly half" of recipients and "more than two-thirds" of unmarried recipients. *Id.* And getting another look before a new ALJ can make all the difference for disabled claimants and their families. Overall, SSA ALJs reversed earlier determinations and granted benefits in about 55% of cases. GAO, *SOCIAL SECURITY DISABILITY Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions*, GAO-18-37 at 14 (Dec. 7, 2017), https://www.gao.gov/assets/690/688824.pdf. But individual ALJs' grant rates have varied significantly, and so the identity of the individual ALJ adjudicating the claim may matter greatly to the outcome. *See id.*; Admin. Conf. of the U.S., Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudication, 78 Fed. Reg. 41,352, 41,353 (July 10, 2013).

2. For thousands of Social Security claimants, there is no time to lose in resolving the acknowledged circuit split, and this case is an optimal vehicle for doing so. Further percolation is counterproductive, and would needlessly require courts of appeals, as well as countless district courts, to choose sides on an issue that only this Court can definitively resolve. The battle lines have been drawn in lengthy opinions. The conflict of authority is exceedingly unlikely to disappear given the Third Circuit's denial of en banc review in *Cirko*, the Tenth and Eighth Circuits' express disagreement with the Third Circuit's position, and other circuits' longstanding general issue-exhaustion requirements for SSA ALJs. Dozens of appeals are in the pipeline. Requiring claimants to wait years for a possible favorable ruling is fundamentally un-

fair, especially given the built-in, year-plus delay to receive a hearing and a new ALJ decision. *See Smith*, 139 S. Ct. at 1776 n.16.

This case presents a clean opportunity for the Court to resolve this intractable conflict swiftly. There are no jurisdictional or procedural barriers to this Court's review. And the question presented was outcome-determinative. The Tenth Circuit's decision rested entirely on its conclusion that an exhaustion requirement exists. Further, the court refused to excuse petitioners' failure to raise Appointments Clause challenges before the SSA "for substantially the same reasons [it] found an issue exhaustion requirement." Pet.App.31a n.10. The Tenth Circuit's issue-exhaustion holding, in sum, is all that stands between petitioners and an entitlement to new hearings in front of new, constitutionally appointed adjudicators who would consider petitioners' entitlement to life-changing disability benefits anew.

III. The Decision Below Is Wrong

The Tenth Circuit's decision undermines this Court's decision in *Sims*, which rejected the very sort of judge-made exhaustion requirement that the Tenth Circuit has created. Further, the Tenth Circuit's reasoning makes particularly little sense in the context of Appointments Clause claims, where the case against an issue-exhaustion requirement is especially strong.

1. The Tenth Circuit's justifications for requiring issue exhaustion before SSA ALJs are incompatible with this Court's rationales in *Sims* for refusing to require claimants to exhaust issues before the Appeals Council. In *Sims*, the Court emphasized that most agencies' statutes or regulations expressly require issue exhaustion, but not the SSA. 530 U.S. at 108. When Congress and the

agency fail to require issue exhaustion, *Sims* explained, courts' justification for stepping in rests on an analogy to the rule that litigants forfeit issues on appeal by failing to raise them below. *Id.* at 108-09. Thus, *Sims* held, judicially-crafted issue-exhaustion rules may be appropriate for adversarial administrative proceedings—but when "an administrative proceeding is not adversarial, ... the reasons for a court to require issue exhaustion are much weaker." *Id.* at 110.

Applying those principles, both the *Sims* plurality and Justice O'Connor's separate concurrence refused to impose an issue-exhaustion requirement for Appeals Council proceedings. Writing for four justices, Justice Thomas reasoned that the "inquisitorial" nature of Social Security proceedings meant that the Appeals Council "does not depend much, if at all, on claimants to identify issues for review." *Id.* at 110-11, 112 (plurality op.). Thus the plurality declined to fault claimants for failing to do so. *Id.* at 112 (plurality op.). And for Justice O'Connor, "the agency's failure to notify claimants of an issue exhaustion requirement" sufficed to reject it. *Id.* at 113 (O'Connor, J. concurring in part and concurring in the judgment). Citing the SSA's instructions that (1) claimants "could request review" via a one-page form "that should take 10 minutes to complete," (2) "failing to request Appeals Council review would preclude judicial review," and (3) the Appeals Council would issue-spot cases, Justice O'Connor concluded that the claimant "did everything the agency asked of her." *Id.* at 114.

While *Sims* expressly reserved the issue "[w]hether a claimant must exhaust issues before the ALJ," 530 U.S. at 107, ALJ proceedings share all the same dispositive features. ALJs, like Appeals Council judges, have the "duty to investigate the facts and develop the arguments

both for and against granting benefits." *Id.* at 111 (plurality op.). ALJs, like the Appeals Council, use an inquisitorial process to discharge their duty to develop arguments, "look[] fully into the issues," and "decide when the evidence will be presented and when the issues will be discussed." 20 C.F.R. § 404.944. Claimants are not required to present written arguments, *id.* § 404.949, let alone exhaust each of the issues they wish the ALJ to consider. And claimants fill out a materially similar one-page form to request ALJ review; regulations similarly inform claimants that they must exhaust administrative remedies, but not individual issues; and regulations expressly note that ALJs can raise issues *sua sponte*. *Supra* p. 7; 20 C.F.R. §§ 404.900(b), 404.946. These features and others "strongly suggest[] that [ALJs] do[] not depend much, if at all, on claimants to identify issues for review." 530 U.S. at 112 (plurality op.); *see* Dubin, *supra*, at 1303, 1325. So it would be manifestly unreasonable, and contrary to the nature of the proceedings the agency chose to employ, to require claimants to raise issues before ALJs or forfeit them.

Rather than starting from *Sims*' premise that judge-made issue-exhaustion rules depend on context, the Tenth Circuit required "adequate reasons to depart from the general principle" of issue exhaustion, and found none. Pet.App.30a. The Tenth Circuit conceded that "[a]n SSA ALJ typically develops issues regarding benefits," Pet.App.28a, but brushed these similarities aside. Instead, the Tenth Circuit relied heavily on an SSA regulation requiring claimants to notify ALJs in writing if they object to the issues the ALJ identifies to be decided at each hearing. Pet.App.6a, 26a. (citing 20 C.F.R. § 404.939). But the Commissioner rightly has never argued that this regulation (or any other) expressly requires

issue exhaustion. *See* Pet.App.26a-27a n.7. That regulation dates to 1980, *see* 45 Fed. Reg. 52,085 (Aug. 5, 1980), yet *Sims* nonetheless characterized the SSA ALJ process as inquisitorial in 2000.

The Tenth Circuit further concluded that, "even if SSA ALJ review of disability claims is largely non-adversarial, Appointments Clause challenges are 'adversarial'" because regulations purportedly require claimants to "object to an ALJ's authority." Pet.App.28a. But the regulation the Tenth Circuit cited—20 C.F.R. § 404.940—is inapt, and merely requires claimants who believe an ALJ is prejudiced to "notify the [ALJ in question] at [the] earliest opportunity." And again, the Tenth Circuit's interpretation of SSA regulations runs against the government's acknowledgment that those regulations do not expressly require issue exhaustion. Pet.App.20a; *Cirko*, 948 F.3d 155-56 & n.6 (noting "[t]he Commissioner concedes" that "ALJ hearings have no express exhaustion requirement."). From start to finish, the Tenth Circuit thus ignored the features of SSA adjudications material to this Court's reasoning in *Sims*.

2. The Tenth Circuit compounded its error by making a series of incorrect assumptions about Appointments Clause challenges in particular.

a. The court speculated that, had petitioners raised their Appointments Clause claim before the ALJs, "the SSA could have corrected an appointment error." Pet.App.21a. But, under *Lucia*, the Commissioner was the only actor within the SSA capable of constitutionally appointing ALJs. *See* 138 S. Ct. at 2051. Before this Court's decision in *Lucia*, the Acting Commissioner repeatedly instructed the agency's ALJs *not* to "discuss or make any findings related to the Appointments Clause is-

sue," because the "SSA lacks the authority to finally decide constitutional issues such as these." January 2018 Emergency Message; *supra* p. 10-11. And as the government admitted in *Cirko*, individual claimants litigating disability claims before the agency "have 'no access ... to the [C]ommissioner directly.'" 948 F.3d at 158.

This Court has long held that litigants are not required to exhaust particular issues where the decision maker who would consider their claim "lack[s] authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148; *see McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675 (1963) (no requirement to file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" beyond asking the Attorney General to bring suit). Here, not only could the individual ALJs not correct the error in their own appointments, Appeals Council judges were also unconstitutionally appointed, making it even more futile to pursue the issue.

The Tenth Circuit suggested that raising Appointments Clause arguments before ALJs would at least put the Commissioner "on notice" and potentially influence the agency. Pet.App.21a. But this Court rejected such speculation in *Mathews v. Eldridge*, stating that "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." 424 U.S. 319, 330 (1976).

b. The Tenth Circuit was equally incorrect that an exhaustion requirement would promote judicial and agency efficiency by permitting the Commissioner an opportunity to appoint the agency's ALJs. It is clear that

the Commissioner would not have promptly addressed petitioners' constitutional concerns even had petitioners raised them before their ALJs. Both before and immediately after *Lucia*, the agency signaled its awareness that its ALJs' appointments might be unconstitutional, but instructed ALJs to simply note any Appointments Clause challenges made. *Supra* p. 10-11. If the Commissioner were concerned about "the possibility of having to conduct two ALJ merits hearings on [petitioners'] disability benefits claims," Pet.App.23a, the Commissioner could have preemptively addressed the issue once it became clear there was a substantial question as to the constitutionality of the ALJs' appointments. And the idea that other claimants suffer delays when claimants in petitioners' shoes receive new hearings before different, constitutionally appointed ALJs, Pet.App.23a, is a problem of the agency's own making.

c. The Tenth Circuit, in a footnote, also cited an interest in avoiding sandbagging. Pet.App.30a n.9. But this Court has held that the interests implicated by an Appointments Clause challenge are so important that they can "be considered on appeal whether or not they were ruled upon below." *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991). And it is hardly likely that Social Security claimants—who are often unrepresented, unsophisticated, and disabled—would strategically proceed through the multi-year administrative process and hold an obscure constitutional challenge in reserve just in case the agency denied benefits. If anything, the agency is sandbagging Social Security claimants, who have no reason to think they must raise every conceivable issue before an ALJ or lose those objections forever. *See Cirko*, 948 F.3d at 156; *supra* p. 7. In sum, the numerous errors in the Tenth Circuit's resolution of an important question of law call out for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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