Nos. 19-1442 & 20-105

IN THE

Supreme Court of the United States

WILLIE EARL CARR AND KIM L. MINOR,
PETITIONERS,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL SECURITY
RESPONDENT.

JOHN J. DAVIS, ET AL,
PETITIONERS,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL SECURITY,
RESPONDENT.

On Writs of Certiorari to the United States Courts of Appeals For the Tenth and Eighth Circuits

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BRIEF OF AMICUS CURIAE COLLECTIVE OF SOCIAL SECURITY ADMINISTRATION ADMINISTRATIVE LAW JUDGES IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI[1]

The amicus curiae Collective of Social Security Administration Administrative Law Judges is an unincorporated association of current and retired Social Security Administration (SSA) administrative law judges (ALJs), whose cases involve claims made to the SSA. Amicus and its members have no interest, financial or otherwise, in the outcome of the forfeiture issue before the Court in these consolidated cases. It is filing this brief for two reasons.

First, the members of amicus have vast experience with the administration of the programs for which they serve as ALJs. In this brief they describe the process by which benefit determinations are made, which they believe may be useful to the Court in determining whether claimants who did not raise an objection to the status of the ALJ who heard their case had forfeited the claim that the ALJ was not validly appointed under the Appointments Clause.

Second, petitioners and respondent SSA agree that ALJs are inferior officers who were not appointed by the head of the SSA, which they contend was required by the Appointments Clause. Although the merits of that argument are not before the Court, amicus does not agree with that position, and in this brief, it will present to the

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[1] No person other than the amicus, its members and its counsel have authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. All parties have consented to the filing of this brief.

Court the basic facts and an outline of the argument that supports the position that ALJs at the SSA are employees and not inferior officers.

SUMMARY OF ARGUMENT

In its decisions in *Lucia v. Securities and Exchange Commission*, 138 S.Ct. 2044 (2018), and *Freytag v. Commisioner*, 501 U.S. 868 (1991), this Court adopted a functional approach in deciding whether individuals employed by the Federal Government to perform adjudicative functions are employees or inferior officers under the Appointments Clause. Under that approach, the Court examined what the individuals did under the statutory scheme governing their work, but did not establish a one size fits all test for determining their Appointments Clause status.

Nonetheless, following *Lucia,* the President took the position that all federal personnel who perform adjudicative functions, including ALJs at the SSA, are to be treated as inferior officers. The President ordered future ALJs to be removed from the competitive service, and as a result, "appointment to this position [of ALJ will] not be subject to the requirements of 5 CFR, part 302, including examination and rating requirements, though each agency shall follow the principle of veteran preference as far as administratively feasible." Executive Order 13843, § 3(a), Schedule

E, July 10, 2018.[2] After the issuance of the Executive Order, the Solicitor General provided legal "Guidance" for agency general counsels applying *Lucia* so that "all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause."[3]

That uniform classification is erroneous. As this brief shows, individuals performing adjudicative functions for federal agencies do so under very different statutes, with very different roles and assignments, such that the analogy between the ALJs in *Lucia* and those who work for SSA is badly misplaced. This mischaracterization is not simply a matter of labels; the change in status has enabled this Administration to argue that SSA ALJs lose their protected civil service status because they are "officers" of the United States and not employees. If that position is upheld, it would not only harm the ALJs at SSA, but would remove one pillar of independence that helps assure claimants that their cases will be decided under the law, and not based on the preferences of those who head the SSA.

Amiocus recognizes that the Appointments Clause issue is not before this Court at this time, but it will be on remand, or in other cases in which

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[2] https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/.

[3] https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf at 2. The Guidance is undated, but note 1 refers to the previously issued Executive Order removing ALJs from the OPM appointment process.

the constitutional issue was raised before the ALJ. Because of these and other court challenges, the issue will have to be decided whether or not the new Administration adheres to the position that the ALJs at SSA are inferior officers. For that reason, this brief seeks to inform the Court of the role that these ALJs have, both for this and future cases, and because this information may affect the Court's conclusion as to whether forfeiture is appropriate in these cases.

ARGUMENT

THE COURT SHOULD NOT DISCUSS THE QUESTION OF WHETHER SOCIAL SECURITY ALJs ARE INFERIOR OFFICERS.

The underlying, but untested, legal argument in these cases is that ALJs at the SSA are inferior officers, who were not properly appointed, and that therefore the denial of petititioners' disability claims must be set aside and heard again by a properly appointed ALJ. There are four reasons why this Court should not address that question at all in these cases.

The only question presented by these petitions is the forfeiture issue, and the Appointments Clause issue is not fairly comprised within the forfeiture question. Second, because the Appointments Clause issue has not been addressed by the lower courts in these cases, the Court should do what it ordinarily does: "await 'thorough lower

court opinions to guide our analysis of the merits.' *Zivotofsky v. Clinton,* 566 U.S. 189, 201 (2012)." *Lucia,* 138 S. Ct. at 2150, n.1.

Third, the current parties agree on the outcome of the Appointments Clause issue, but that could change with the incoming Biden administration. If it does not, then the Court will have to do what it did in *Lucia*: appoint an amicus to defend the employee status of SSA ALJs. 138 S. Ct. at 2051. Last, as we now demonstrate, the ALJs at the SSA are very different from those at the SEC, and their officer status should not be determined solely by the outcome in *Lucia.*

The fundamental mistake made by the Administration post-*Lucia* was to treat all of the more than 1900 administrative law judges working for federal agencies identically even though they function in very different ways based on the nature of the proceeding over which they preside. Without attempting to cover all functions at all federal agencies, the types of proceedings over which ALJs preside fall into four general categories.[4]

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[4] The most recent official counting of ALJs by agency was in March 2017, when the total number of ALJs was 1931 of which 1625 were at SSA. https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency. That total does not include 266 Administrative Patent Judges at the Commerce Department. *See* https://www.uspto.gov/sites/default/files/documents/What%20is%20PTAB%20for%20website%2010.24.19.pdf (p.3).

The first are cases in which the agency has taken some action or filed a case against a private party. In *Lucia,* for example, the SEC brought a proceeding against an individual and a company seeking injunctive relief, and obtained civil penalities and a lifetime ban from the investment industry. 138 S. Ct. at 2050. Similarly, in *Freytag,* the IRS had assessed taxes and penalties against the taxpayers because of $1.5 billion in deductions allegedly realized in a tax shelter scheme and duly contested in a Tax Court proceeding. 501 U.S. at 871.

Second are cases like *United States v. Arthrex,* No. 19-1434, *certiorari granted,* November 9, 2020, in which a private party has asked the Patent & Trademark Office (PTO) to review the validity of a patent held by the party that will be on the other side if the PTO agrees to hear the case. In those cases, the Administrative Patent Judge (APJ) performs functions like a judge who is resolving a dispute between private parties, with the agency taking no position, except that the Director of the PTO has the right to intervene in an appellate proceeding to provide its perspective on the issues presented.

Third, there are cases under the National Labor Relations Act, in which the general counsel of the NLRB files an administrative complaint against an employer or a union, 29 U.S.C. § 160, but in which the other side will often intervene to support the general counsel. Similar dynamics apply in cases under laws like the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§

901 *et seq*, in which an employee seeks compensation for an injury and the employer defends against the claim of liability.

Finally, there are cases like these, in which the SSA is not an adversary, nor is there any party on the other side. Rather, the agency is acting to assure that the laws enacted by Congress are carried out and that only those claimants who meet the statutory criteria are awarded benefits. The manner in which ALJs function under the applicable statute is explained more fully below, but even this brief summary makes it clear that ALJs at the SSA have a very different role from the ALJs at the SEC, the NLRB, and the PTO. And while there are no ALJs at the Department of Veterans Affairs, the programs there are quite similar to those at SSA, where they have other individuals with different titles who perform functions closer to those of ALJs at the SSA than to those ALJs at the other agencies discussed above.

Congress created the position of ALJ (then called hearing examiners) in the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq* (APA), as "classified Civil Service Employees." *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 133 (1953). Congress placed ALJs, and other similar employees, in the civil service to prevent political appointments to these positions and to ensure public confidence in the administrative process. *Administrative Procedure: Hearings Before a Subcomm. Of the S. Comm. On the Judiciary*, 77th Cong. 250, 876, 1000 (1941).

In the APA, Congress gave agencies the power to appoint hearing examiners, 5 U.S.C. § 3105, but it coupled that power with the power of the Civil Service Commission (Commission) to determine who is qualified to be a hearing examiner, 5 U.S.C. § 5372.[5] The Commission implemented a merit-based system for determining eligibility to be a hearing examiner, and the agencies appointed hearing examiners from the list of applicants that the Commission determined to be eligible. In 1972, the Commission changed the name of hearing examiners to administrative law judges. Change of Title to Administrative Law Judge, 37 Fed. Reg. 16,787 (Aug. 19, 1972). In 1978, Congress ratified that decision by statute and renamed the Commission the Office of Personnel Management (OPM). Pub. L. No. 95-251, 92 Stat. 183 (1978).

Prior to the President issuing Executive Order 13843 in 2018, if any agency needed to hire ALJs, it would request a list of qualified applicants from a ranked list created by OPM based on a competitive examination. *See* 5 C.F.R. § 930.201. As a result, although ALJs usually work for a single agency, the ALJs, like the ones who decided

[5] This statutory section is within Part III of the statute entitled "Employees," which further reveals Congress's intention that ALJs are employees, absent a finding that the Appointments Clause demands that a particular ALJ is an officer.

these cases, became eligible to be ALJs through a process overseen by OPM.

Congress also provided a number of protections for ALJs to assure their independence in making their decisions. For ALJs, including those at SSA, these include a prohibition against SSA disciplining an ALJ except for good cause and then only after approval by the Merit Systems Protection Board, 5 U.S.C. § 7521; determining an ALJs' compensation, 5 U.S.C. § 5372; assigning a case to an ALJ except in rotation, 5 U.S.C. § 3105; or assigning an ALJ duties that are inconsistent with the duties and responsibilities of an ALJ. *Id.*

It is evident from this statutory scheme that Congress did not intend ALJs to be inferior officers and did not provide for their appointment by the head of the agency for which they work, as required by the Appointments Clause. Therefore, unless that Clause requires that the ALJs at SSA be officers, rather than employees, the judgment of Congress as to their status as employees must be sustained.

This Court in *Buckley v. Valeo*, 424 U.S.1, 126 (1976), established the test for determining who is an officer of the United States: "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article." Accordingly, this brief will examine the functions that the ALJs at the SSA perform and

how their work fits into the overall structure of the SSA in order to determine whether ALJs "exercise significant authority of the United States" at SSA. Because most of their cases involve claims for disability, and because the claims in these cases are for disability, this brief will refer only to their roles in disability claims, although the work on other cases is in all material respects the same.

Social Security disability programs are the largest of several Federal programs that provide financial assistance to individuals with disabilities who are unable to work as a result. *Heckler v. Day,* 467 U.S. 104, 105-106 (1984). Disability insurance benefits are available under title II of the Social Security Act to individuals who have a disability and meet medical criteria, provided that they or certain members of their family worked long enough and paid Social Security taxes. Supplemental Security Income (SSI) benefits, including disability benefits, are available to indigent individuals under title XVI of the Social Security Act. 42 U.S.C. §§ 1381, 1382. Parallel statutes and regulations exist covering these two programs. However, the relevant law and regulations governing the determination of disability are the same. *Compare* 42 U.S.C. § 423 *with* 42 U.S.C. § 1382 *and* 20 C.F.R. Part 404 *with* 20 C.F.R. Part 416.[6]

There are no limits on how many claimants can receive disability payments; they just have to

[6] Title 42 U.S.C. § 1383(c)(3) renders the judicial provisions of 42 U.S.C. § 405(g) fully applicable to the claims for SSI.

qualify. As this Court observed, to carry out these programs, "the Secretary [now the Commissioner of SSA] and Congress have established an unusually protective four-step process for the review and adjudication of disputed claims." *Heckler* at 106. In doing so, the Commissioner acts pursuant to 42 U.S.C. § 405(a), which provides him "full power and authority to make rules and regulations ... which are necessary or appropriate to carry out [the law including] 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."

Unlike cases before ALJs in most other agencies, the ALJs at SSA decide disability cases only after claimants have had one and often two levels of prior review. 20 C.F.R §§ 404.900(a), 416.1400(a)(describing four step process). Although each step in the process is mandatory, including deadlines, SSA has very generous rules allowing for good cause exceptions. 20 C.F.R §§ 404.911, 416.1411, which include extensions of time to file suit in a federal district court. 20 C.F.R §§ 404.982, 416.1482. Furthermore, even when a claimant fails to seek timely review of an adverse determination, SSA rules provide for reopening a decision in certain circumstances. 20 C.F.R §§ 404.987-989, 416.1487-1489.

Attached in the Appendix to this brief (App. 1a) is a chart that SSA prepared for its FY 2021 budget request, which shows the numbers of disability cases resolved at various levels in the process during FY 2019. Thus, there were

2,231,554 decisions at the first level, which is handled by the states. Of those, 37% of the claims were granted. Most states provide for reconsideration, but 21% of the denials are issued in states that do not provide for reconsideration. Of the 532,771 reconsiderations sought in that year, 13% were granted. In that same year, ALJs decided 562,414 cases, allowing claims in 45%.

An SSA claimant who is denied relief by an ALJ must request review by the agency's Appeals Council within 60 days of receiving notice of an adverse decision. 20 C.F.R §§ 404.968, 416.1468. The Council consists of "approximately 53 Administrative Appeals Judges, 44 Appeals Officers, and several hundred support personnel."[7] It is the policymaking arm of the SSA with respect to particular claims. *See, e. g.*, 20 C.F.R. § 404.970(a)(4) (Council will review an ALJ decision if "[t]here is a broad policy or procedural issue that may affect the general public interest…"). In addition to reviewing ALJ decisions adverse to claimants, the Council also reviews a modest number of cases favorable to claimants, in an effort to assure consistency in the decisions. The Appeals Judges on the Council would appear to be at least inferior, and perhaps principal, officers, although none of them are appointed by the President; only

[7] https://www.ssa.gov/appeals/about_ac.html. That data was available when counsel visited the site in late November, but on December 9, 2020, it was no longer at the site, although an SSA index suggests that the data is available at that site. https://search.ssa.gov/search?utf8=%E2%9C%93&affiliate=ssa&sort_by=&query=%22Appeals+Officers%22.

the Commissioner, the Deputy Commissioner, and Inspector General at SSA are Presidential appointees. 42 U.S.C. §§ 902, 904.

SSA regulations provide for the scope of review by the Appeals Council, which includes in some cases the receipt of additional evidence, 20 C.F.R §§ 404.970, 416.1470, as well as the right to file briefs. 20 C.F.R §§ 404.975, 416.1475. The Appeals Council generally sits in panels of two or three, and in FY 2019, it decided 94,600 cases, granting relief in only 1%, but remanding another 11%. App. 1a. At that point, many claimants seek judicial review in the District Courts, which decided 18,116 cases in that year, ruling for the claimant in 2%, but also remanding 50% for further consideration. *Id.*

Automatically equating all ALJs, including those at SSA, with ALJs at the SEC, as the President and Solicitor General have done, is unsupported for several reasons. During the same period that the SEC had only five ALJs, SSA had 1625, *see note* 4, *supra*, who each issued hundreds of decisions annually. In addition, the hearings held by the ALJ in *Lucia*, were formal hearings under the APA, 5 U.S.C. § 554, whereas hearings before ALJs at the SSA, although conducted under the APA, are quite different. They were described this way by this Court in *Richardson v. Perales,* 402 U.S. 389, 400-401 (1971):

> There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this

> administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.

In particular, "Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. § 405(b)(1). As the SSA regulations state, the proceedings are conducted "in an informal, non-adversarial manner." 20 C.F.R §§ 404.900(b), 416.1400(b). *See also Biestek v. Berryhill*, 139 S. Ct. 1148, 1152 (2019) (describing ALJ hearings as "recognizably adjudicative in nature," but "less rigid than those a court would follow").

Claimants have the right to be represented at all stages of the disability process, either by an attorney or by a non-attorney representative. 42 U.S.C. § 406. Your Right to Representation.[8] In most cases, claimants may be charged for representation only with the written approval of SSA, *id.*, and the amount of fees that a claimant may be charged is regulated by law. *See generally Culbertson v. Berryhill,* 139 S. Ct. 517 (2019). Even at the ALJ stage, many claimants are

[8] Your Right to Representation (detailed pamphlet written for claimants) https://www.ssa.gov/pubs/EN-05-10075.pdf.

unrepresented, others are represented by non-lawyers, and others are represented by lawyers.

This Court has observed that "the differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Sims v. Apfel*, 530 U.S. 103, 110 (2000) (plurality op.). Unlike Article III judges, or other ALJs who preside over adversarial enforcement proceedings like those at the SEC, this Court has described their function as "inquisitorial rather than adversarial," in which the ALJs have the "duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 111 (citing to *Richardson, supra,* at 400-401 and 20 C.F.R. § 404.900(b)). Because of these differences, this Court ruled in *Sims* that claimants need not present to the Appeals Council all of the issues that they are raising in court. *Id.* at 112. Thus, although ALJs render decisions that either grant or deny the claimant a disability payment, their duties and powers are very different from those of traditional judges and, as we now show, from ALJs at the SEC.

SEC ALJs "preside over proceedings that often last months and resemble civil litigation in Article III courts." Jonah Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Litigation*, 96 Texas Law Review 1097, 1103 (2018). By contrast, ALJs at SSA have different responsibilities. For example, SSA ALJs are not tasked with making credibility findings. Social

Security Ruling (SSR) 16-3p.[9] Rather, SSA regulations stipulate that in determining whether an individual is disabled, ALJs are to assess the extent to which an individual's symptoms are consistent with the objective evidence. 20 C.F.R. §§ 404.1529, 416.929. The agency has instructed that "[i]n evaluating an individual's symptoms, our adjudicators will not assess an individual's overall character or truthfulness in the manner typically used during an adversarial court litigation." *Id.*

While SSA ALJs can issue subpoenas, they are not empowered to enforce those subpoenas. Instead, "[i]f the ALJ finds the information [requested in the subpoena] is reasonably necessary for the full presentation of the case, he or she will prepare a memorandum to [the Office of the General Counsel], requesting enforcement of the subpoena." Hearings, Appeal, Litigation & Law Manual (HALLEX) I-2-5-82. Not only does the SSA ALJ not have the power to enforce the subpoena, he or she is not even empowered to decide whether the subpoena enforcement is critical to the adjudication of the case. That role is delegated to the agency's General Counsel (OGC). Thereafter, "OGC will review the request and determine whether to seek a Federal court order to enforce the subpoena." *Id.*

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[9] Social Security Rulings (SSRs) are agency rulings published "under the authority of the Commissioner of Social Security" which "are binding on all components of the Social Security Administration." 20 CFR § 402.35(b)(1); *see Sullivan v. Zebley*, 493 U.S. 521, 530, n. 9 (1990), citing *Heckler v. Edwards*, 465 U.S. 870, 873, n. 3 (1984).

The SSA has not empowered its ALJs to sanction misconduct, including representative misconduct. Instead, it has enacted comprehensive regulations that set out the process for sanctioning representatives, and this process does not include the ALJ before whom the misconduct occurred. *See* 20 C.F.R. §§ 404.1740-1799, 416.1540-1599. Rather, the power to determine whether such conduct is sanctionable is delegated to the agency's OGC. 20 C.F.R §§ 404.1750, 416.1550; *see* HALLEX I-1-1-50.

Most significantly, ALJs at SSA apply agency policy; they do not set or influence policy. In the Appendix to this brief is a standard Position Description for ALJs at SSA (PD). App 2a-.8a. The section entitled SUPERVISION AND GUIDANCE makes it clear that ALJs are "subordinate to the Commissioner in matters of policy and the interpretation of the law," and that the Commissioner has only "delegated authority to the incumbent [ALJ] to apply agency policy regarding the administrative adjudication and review of claims." App. 6a. The PD instructs ALJs to refer legal issues on which "the agency has not issued an opinion... to the agency's Office of the General Counsel so that the agency can make a decision on the issue." App 9a-10a. Equally significant is the fact that SSA has enumerated nineteen specific actions that ALJs *may* take, underscoring the limits of their powers. App 4a-5a.

Moreover, while ALJs at the SSA can authorize financial payments to claimants, they cannot impose monetary penalties against any

private party. By contrast, ALJs at the SEC can issue cease and desist orders, bar defendants from doing securities industry work, and order disgorgement and payments to injured investors. 15 U.S.C. § 77h-1. All of these orders are subject to plenary review by the SEC, but they are nonetheless more far-reaching than the powers of ALJs at the SSA.

Accordingly, the automatic equation of SEC and SSA ALJs by the President and the Solicitor General is inappropriate for at least three reasons. First, the five ALJs at the SEC decide a small number of cases in an adversarial context seeking injunctive relief and monetary penalties, while the 1625 ALJs at the SSA annually determine hundreds of thousands of claims for benefits in an inquisitorial context. Second, SSA ALJs make one of many decisions in a multi-level decision-making process. Third, the powers and duties of the ALJs at the SSA are quite different from the powers and duties of the ALJs at the SEC or at many other regulatory agencies. When these or other SSA cases reach the merits of the Appointments Clause claims, the Court will then decide, based on these facts and others that the parties present, whether ALJs at the SSA are employees or inferior officers.

CONCLUSION

Regardless of what this Court concludes on whether petitioners' Appointments Clause claims were forfeited for failure to raise them before the SSA, the Court should not discuss the merits of

those claims because they are not before the Court and because no existing party argues that ALJs at the SSA are employees, not inferior officers, which is the issue on the merits.

Respectfully submitted,

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