No. 19-1442

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.

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

BRIEF FOR THE PETITIONERS

PAUL F. MCTIGHE, JR.
6506 South Lewis Ave.
Suite 105
Tulsa, OK 74136

LISA S. BLATT
SARAH M. HARRIS
Counsel of Record
CHARLES L. MCCLOUD
THOMAS W. RYAN
ANDREW L. HOFFMAN
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
sharris@wc.com

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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OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-31a) is reported at 961 F.3d 1267. 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* (Pet.App.32a-56a) is unreported. The opinion and order of the magistrate judge in *Kim L. M. v. Saul* (Pet.App.57a-83a) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on June 15, 2020. 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

In the Social Security system, claimants dissatisfied with initial determinations on their applications for disability benefits request further review from a Social Security administrative law judge (ALJ), then from the Appeals Council. After that, claimants proceed to district court. In *Sims v. Apfel*, 530 U.S. 103 (2000), this Court held that Social Security claimants need not raise particular issues before the Appeals Council to preserve those issues for judicial review. But *Sims* left open whether any issue-exhaustion rule applies in proceedings before ALJs.

In 2018, this Court held in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), that the Securities and Exchange Commission's ALJs were unconstitutionally appointed. The government does not dispute that Social Security ALJs were likewise unconstitutionally appointed, or that the proper remedy for that infirmity is to vacate the ALJ's benefits determination and remand for proceedings before a new, constitutionally appointed ALJ. The question presented is whether claimants who did not raise Appointments Clause challenges before their ALJs can obtain judicial review of those challenges.

The answer should be clear: claimants need not challenge the constitutionality of ALJs' appointments before those very ALJs to preserve the issue for judicial review. Every element of the reasoning in *Sims* applies with equal or greater force here. No statute or regulation requires claimants to raise specific challenges in Social Security proceedings. And no good justification exists for this Court to impose an implied issue-exhaustion requirement. *Sims* refused to inject such a requirement into non-adversarial Appeals Council proceedings, where claimants are not expected to identify or develop the issues on their own behalf. ALJ proceedings are equally non-adversarial. And it would be anomalous to require claimants to identify all potentially relevant issues to ALJs, but not to the Appeals Council. The Appeals Council exercises plenary review over ALJ decisions and resolves new issues at that stage even if claimants or ALJs omitted them below.

Requiring claimants to challenge the constitutionality of an ALJ's appointment before that very ALJ would be especially unwarranted. The Social Security Administration (SSA) charges its ALJs with identifying the best arguments in favor of the claimant's benefits application. And the agency repeatedly issued internal messages informing ALJs of possible Appointments Clause challenges to their appointments. So if the Appointments Clause problem were relevant to ALJ proceedings, ALJs should have known to identify it. But the agency barred ALJs from raising or considering the issue in ALJ proceedings. Instead, the agency's official position at all key times was that Appointments Clause challenges were beyond the authority of ALJs and Appeals Council judges to resolve. Requiring claimants to raise Appointments Clause challenges before ALJs, only to discover that their ALJs were powerless to resolve those challenges, would have been a pointless exercise.

Further, in *Sims*, the SSA gave claimants no notice of the supposed issue-exhaustion requirement in Appeals Council proceedings. So too here, the SSA gave claimants no notice of an issue-exhaustion requirement in ALJ proceedings. Nowhere in the SSA's copious, outward-facing materials for claimants does the agency hint that claimants must raise issues to ALJs or that failing to do so would result in forfeiture. Quite the contrary, the SSA reassures claimants that ALJs will look for relevant issues until rendering their decision. And claimants particularly lacked notice of any obligation to raise Appointments Clause challenges. The SSA informed claimants that they should have raised Appointments Clause challenges before the agency only when it was months or years too late for claimants to have acted differently—underscoring that no such obligation existed.

Under the reasoning of *Sims*, this case is straightforward. But even if the Court looked to other exhaustion doctrines, the result would be the same. Under the Court's precedents governing the exhaustion of administrative remedies (*i.e.*, the procedures for elevating a claim up the agency decision-making chain), Social Security claimants could have bypassed ALJ review entirely and still obtained judicial review of their Appointments Clause challenges. It would be perverse to impose a more severe penalty on claimants like petitioners, who exhausted all administrative remedies, just because they omitted one issue before their ALJs. Substantial policy considerations also weigh against an issue-exhaustion requirement, which would pressure often-unrepresented claimants to take a kitchen-sink approach to issue-spotting and would risk swamping an adjudicatory process that is already riddled with delays. Even were this Court to require claimants to exhaust some issues before ALJs, the Court should relieve petitioners from such a rule because of the

critical role that Appointments Clause challenges play in policing the separation of powers.

A. Social Security Adjudications

1. Enacted in 1935, the Social Security Act assists vulnerable Americans who cannot work. Congress designed the statutory scheme to be "unusually protective of claimants." *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (internal quotation marks omitted). The Act "provides disability benefits under two programs, known by their statutory headings as Title II and Title XVI." *Id.* at 1772 (citing 42 U.S.C §§ 401 *et seq.* (Title II); 1381 *et seq.* (Title XVI)). Title II affords 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).[1]

SSA regulations prescribe a "four-step process" for claimants to follow in seeking benefits. *Id.* at 1772. First, the agency makes initial determinations on claimants' benefits applications. 20 C.F.R. §§ 404.603, 404.900. Second, claimants dissatisfied with that initial determination may seek reconsideration. *Id.* § 404.907. Third, dissatisfied claimants may request a hearing before an ALJ. *Id.* § 404.929. Fourth, claimants can ask the Appeals Council for discretionary review of the ALJ's decision. *Id.* § 404.967. After the agency renders a final decision, the Social Security Act provides for judicial review in federal district court. 42 U.S.C. § 405(g).

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[1] The relevant statutory and regulatory provisions are materially identical under Title II and Title XVI. *See Smith*, 139 S. Ct. at 1772 & n.4. Because petitioners sought benefits only under Title II, petitioners herein cite to Title II provisions.

2. The administrative process for seeking Social Security disability benefits relies on an inquisitorial model where the agency is a resource and factfinder, not a foe. The SSA "conduct[s] the administrative review process in an informal, non-adversarial manner." 20 C.F.R. § 404.900(b). And the SSA encourages claimants to rely on the agency. The SSA's Handbook is a self-described "readable, easy to understand resource" to help claimants navigate "very complex Social Security programs and services." SSA Handbook, Preface. That Handbook urges claimants to seek "[a]ssistance from the Social Security Office," including "[e]xplaining the issues involved in the case," how to obtain representation, and helping claimants obtain evidence they may need. *Id.* § 2011.[2]

The ALJ hearing process is particularly informal. The SSA recently emphasized the "significant differences between an informal, nonadversarial Social Security hearing" and "formal, adversarial adjudications." Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73,138, 73,139-40 (Nov. 16, 2020). In the SSA's words, "under our 'inquisitorial' hearings process, an ALJ fulfills a role that requires him or her to act as a neutral decisionmaker and to develop the facts for and against a benefit claim." *Id.* at 73,140. So Social Security ALJs wear "three hats": "helping the claimant to develop facts and evidence; helping the government investigate the claim; and issuing an independent decision." *Id.*

After the ALJ renders that decision, dissatisfied claimants can seek discretionary review from the Appeals Council. 20 C.F.R. § 404.900(a)(4). If the Appeals Council denies review, the ALJ's decision is final. *Id.* §§ 404.955,

[2] All citations to provisions of the Social Security Handbook can be found at https://www.ssa.gov/OP_Home/handbook/handbook.html.

404.981. In nearly 85% of cases, the Appeals Council denies the request without issuing a decision. SSA, AC Grant Review Actions as a Percentage of All AC Dispositions, https://tinyurl.com/AC-Disposition-Data.

B. Social Security ALJ Appointments

1. The government does not dispute that Social Security ALJs are inferior "officers of the United States" under the Appointments Clause, U.S. Const. art. II, § 2, cl 2. *See* Pet.App.10a. The Appointments Clause prescribes the exclusive methods of appointing such officers. Permissible methods include appointments by agency heads, but not lower-level officials. *Lucia*, 138 S. Ct. at 2051.

The government concedes that the SSA did not appoint any of its ALJs in a constitutional manner until July 2018. Resp. Cert. Br. at 3. Before then, lower-level SSA officials appointed ALJs through the competitive service selection process administered by the Office of Personnel Management. *See id.*; *accord* Exec. Order No. 13,843, Excepting Administrative Law Judges From The Competitive Service, 83 Fed. Reg. 32,755, 32,755 (July 10, 2018); *O'Leary v. Office of Pers. Mgmt.*, 708 F. App'x 669, 670-71 (Fed. Cir. 2017).

Litigation over the appointments of ALJs arose primarily in the context of Securities and Exchange Commission (SEC) ALJs, who, like Social Security ALJs, were appointed only by lower-level agency staff. *Lucia*, 138 S. Ct. at 2051. In November 2017, the government conceded that SEC ALJs were inferior officers whose appointments violated the Appointments Clause and urged this Court's review "[g]iven the frequency with which ALJs are employed in administrative proceedings by a variety of federal agencies." Resp. Cert. Br., *Lucia v. SEC*, No. 17-130 (Nov. 19, 2017), at 19, 26. On January 12, 2018, this Court granted review. 138 S. Ct. 736.

Soon thereafter, on January 30, 2018, the SSA issued an internal "Emergency Message" to its ALJs and other agency staff. *See* SSA, Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process, EM-18003 (Jan. 30, 2018), *Davis* C.A. App. 61-63 (hereinafter "Jan. 2018 Emergency Message"). This Emergency Message noted the government's position that SEC ALJs "are inferior officers" whose appointments were unconstitutional. *Id.* The SSA expected "adjudicators may see challenges … related to the constitutionality of the appointment of SSA's ALJs." *Id.*

When confronting such challenges, the SSA mandated that ALJs respond: "I do not have authority to rule on that challenge and do not address it further." *Id.* ALJs and Appeals Council judges had to note any Appointments Clause objection, but could not raise the issue themselves. The SSA barred ALJs from "discuss[ing] or mak[ing] any findings related to the Appointments Clause issue" on the record, because the "SSA lacks the authority to finally decide constitutional issues such as these." *Id.* Likewise, the SSA barred the Appeals Council from discussing these challenges, explaining: "[C]hallenges to the constitutionality of the appointment of SSA's ALJs are outside the purview of administrative adjudication." *Id.*

On June 21, 2018, this Court in *Lucia* held that SEC ALJs are inferior officers whose appointments violated the Appointments Clause. 138 S. Ct. at 2051 & n.3. As a remedy, the Court ordered "a new hearing before a properly appointed official." *Id.* at 2055 (internal quotation marks omitted).

Four days later, on June 25, 2018, the SSA updated its internal Emergency Message to ALJs, noting that "in light of … *Lucia*, adjudicators may see challenges … to the constitutionality of the appointment of SSA's ALJs."

SSA, Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process--UPDATE, EM-18003 REV (Jun. 25, 2018), https://tinyurl.com/EM-18003REV (hereinafter "June 2018 Emergency Message"). The agency explained it was still reviewing "whether, and to what extent, [*Lucia*] may affect SSA," and required ALJs to keep following existing instructions to relay their powerlessness to address Appointments Clause challenges until further notice. *Id.*

A few weeks later, the President issued an Executive Order transferring ALJs out of the competitive service, thereby giving agency heads further control over ALJ hiring. Exec. Order No. 13,843, 83 Fed. Reg. at 32,756.

On July 16, 2018, the Acting Commissioner of Social Security "ratified" the appointment of all Social Security ALJs and Appeals Council judges and "approved their appointments as her own in order to address any Appointments Clause questions involving SSA claims." SSA, Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process--UPDATE, EM-18003 REV 2 (Aug. 6, 2018), https://tinyurl.com/aug-2018-EM (hereinafter "Aug. 2018 Emergency Message"). On August 6, 2018, the SSA sent ALJs a revised internal Emergency Message about the ratification. The message instructed ALJs to do nothing further about any pre-ratification challenges, and to deny all post-ratification challenges as "lack[ing] merit by virtue of the Acting Commissioner['s] … ratification." *Id.*

On March 15, 2019, the SSA instituted a public ruling that addressed still-pending cases within the agency where unconstitutionally appointed ALJs had issued decisions before the July 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 at the Appeals Council, 84 Fed. Reg. 9582 (Mar. 15, 2019). Under this ruling, the SSA declined to grant across-the-board relief. Instead, the SSA mandated relief only if claimants had already raised an Appointments Clause challenge to the improperly appointed ALJ or had "include[d] a timely challenge" in "requests for review" to the Appeals Council. *Id.* at 9583. In those circumstances, the Appeals Council would vacate the ALJ's decision and remand for a new hearing before a different, constitutionally appointed adjudicator. *Id.*

C. Petitioners' Proceedings Below

1. Petitioner Willie Earl Carr, a 49-year-old Tulsa resident, worked as an electrician. For nearly 20 years, he has suffered from multiple medical conditions. Gov't C.A. App.10-11. After sustaining serious injuries, doctors diagnosed him with a panoply of severe neck and back conditions that have necessitated six back surgeries. Pet.App.34a-35a; Gov't C.A. App.7, 10-11. Mr. Carr also suffers from high blood pressure, high cholesterol, and obesity. Pet.App.35a. Since 2013, Mr. Carr has been unable to work. Gov't C.A. App.23.

In January 2014, Mr. Carr applied for disability benefits under Title II. In February 2015, the SSA made an initial determination denying his claim. He timely sought reconsideration; in August 2015, the SSA again denied his claim. On October 7, 2015, Mr. Carr timely requested an ALJ hearing. Gov't C.A. Addendum (Add.) 19.

On April 10, 2017, Mr. Carr received an ALJ hearing. On June 15, 2017, the ALJ denied Mr. Carr's claim, concluding that although Mr. Carr had many severe impairments, he could still perform some occupations. Pet.App.35a-37a. Mr. Carr timely requested further review, but the Appeals Council declined review on March

16, 2018. Pet.App.33a n.2. The ALJ's opinion thus became the final agency decision for judicial review.

2. Petitioner Kim L. Minor, a 63-year-old Tulsa resident, worked as a bus driver until 2010, when the combined toll of numerous surgeries and other conditions made work unbearable. Pet.App.59a-60a. Over a two-year period, Ms. Minor required surgery on both knees and two different back surgeries. Doctors also diagnosed her with chronic pain, anxiety, hypertension, irregular heart rhythm, and arthritis. Gov't C.A. App.58-60.

In December 2014, Ms. Minor applied for disability benefits under Title II. In May 2015, the SSA made an initial determination denying benefits. She timely sought reconsideration, but in August 2015, the SSA again denied her claim. On September 17, 2015, she timely requested an ALJ hearing. Add.56.

On March 29, 2017, Ms. Minor received an ALJ hearing. On June 7, 2017, the ALJ denied Ms. Minor's claim, finding that she suffered from many "severe impairments," but concluding that she was still capable of work. Pet.App.60a-61a. Ms. Minor timely requested further review, but the Appeals Council declined review on June 10, 2018. Pet.App.58a n.2. The ALJ's opinion became the final agency decision for judicial review.

3. Both petitioners sought judicial review under 42 U.S.C. § 405(g). Mr. Carr in May 2018 and Ms. Minor in August 2018 timely filed suit in the United States District Court for the Northern District of Oklahoma and separately agreed to proceed before the same magistrate judge. Pet.App.32a-33a, 58a; Gov't C.A. App.2, 54.

Each petitioner raised Appointments Clause challenges in court, arguing that, under this Court's June 2018 decision in *Lucia*, "the decision in this case was rendered by an Administrative Law Judge whose appointment was

invalid at the time." Pet.App.37a, 62a. In both cases, the SSA did not dispute that "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." Pet.App.50a, 77a.

In both cases, the magistrate judge held that the ALJs' appointments violated the Appointments Clause. Pet.App.55a, 83a. Relying on *Sims v. Apfel*, 530 U.S. 103 (2000), the judge further held that claimants need not raise Appointments Clause challenges in Social Security proceedings to preserve them for judicial review. Pet.App.54a, 81a-82a. The judge concluded that "the reasons cited [in *Sims*] … to reject an issue exhaustion requirement before the Appeals Council also apply to the other steps in the [SSA] process." Pet.App.55a, 82a-83a. The judge observed that neither the Social Security Act nor agency regulations require issue exhaustion. Further, the "[a]dministrative process remains non-adversarial and claimants, many of whom are unrepresented, are still not notified of any issue exhaustion requirement." Pet.App.54a, 82a. The judge also noted the perversity of imposing "an issue exhaustion requirement at some steps of the process and not at subsequent steps." Pet.App.54a-55a, 82a. The judge thus reversed the ALJs' decisions and remanded "for further proceedings before a different constitutionally appointed ALJ." Pet.App.55a, 83a.

4. On appeal, the Tenth Circuit consolidated petitioners' cases and reversed, holding that Social Security claimants forfeit Appointments Clause challenges to their ALJs' appointments if they do not raise them before those ALJs. Pet.App.1a-31a. The court acknowledged that under this Court's decision in *Sims*, claimants need not raise issues before the Appeals Council to preserve them for ju-

dicial review. Pet.App.15a. But the Tenth Circuit considered *Sims* relevant to issue exhaustion only before the Appeals Council, not before ALJs. The court instead invoked the "general rule" in various administrative contexts that "parties exhaust prescribed administrative remedies before seeking relief from the federal courts." Pet.App.12a (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992)). The court concluded that the purposes behind that exhaustion principle favor requiring claimants to challenge the constitutionality of ALJs' appointments before ALJs. Pet.App.20a-24a.

Specifically, 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 considered ALJ proceedings more adversarial than Appeals Council proceedings. Pet.App.27a-28a. The court suggested that while 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' forfeiture "for substantially the same reasons [the court] found an issue exhaustion requirement." Pet.App.31a n.10.

SUMMARY OF ARGUMENT

Social Security claimants need not challenge the constitutionality of ALJs' appointments before the very ALJs charged with adjudicating their benefits claims in order to preserve the issue for judicial review.

A. In *Sims v. Apfel*, 530 U.S. 103 (2000), this Court rejected an issue-exhaustion requirement for Social Security claimants in Appeals Council proceedings. Every rationale underlying that holding applies with even greater force to ALJ proceedings.

As in *Sims*, no statute or regulation requires claimants in SSA proceedings to exhaust issues before the agency. And there is no basis for inserting a judicially crafted issue-exhaustion mandate that neither Congress nor the SSA have seen fit to require. As the plurality opinion in *Sims* recognized, Social Security proceedings are the polar opposite of adversarial proceedings, where parties must bring issues to the court's or agency's attention. Instead, both Social Security Appeals Council judges and ALJs play the starring role in identifying and developing the issues, while agency regulations relieve claimants of any corresponding duty. When an agency charges its adjudicators with raising all relevant issues, courts should not subvert that choice by putting the onus on claimants instead.

The non-adversarial nature of SSA proceedings makes it particularly inappropriate to require claimants to exhaust challenges to ALJs' appointments before those same ALJs. The SSA repeatedly alerted ALJs and Appeals Council judges to Appointments Clause issues. So, if Appointments Clause challenges were relevant, ALJs were well-positioned to spot the issue. But instead, the agency forbade ALJs and Appeals Council judges from raising or considering this issue, and instructed them that they were powerless to resolve Appointments Clause challenges. It would be unreasonable to expect claimants to futilely confront ALJs with Appointments Clause challenges under these circumstances.

Further, as in *Sims*, no regulation or other agency pronouncement informs claimants that they must speak now and object to ALJs' appointments or forever hold their peace. Warnings about the perils of failing to exhaust administrative *remedies* are legion, but the SSA never tells claimants that they must raise specific *issues*

as a prerequisite to judicial review. Instead, as Justice O'Connor emphasized in *Sims* with respect to Appeals Council proceedings, all the information the agency provides to claimants about ALJ proceedings conveys that claimants need not raise issues themselves and face no penalties for failing to do so.

The government and court of appeals unpersuasively embrace an across-the-board issue-exhaustion rule for agency proceedings that this Court already rejected in *Sims*. That rule would radically expand the issue-exhaustion doctrine, which the Court has applied sporadically and has historically confined to situations where parties failed to give the agency first crack at addressing issues implicating the agency's technical expertise. That issue-exhaustion rule would also give the government an unfair advantage. This Court's precedents allow the government to raise pure legal issues in defense of agency action even if the agency never raised them at the time. At a minimum, the same rule should allow private litigants to raise pure legal issues to invalidate agency action.

B. Even aside from *Sims*, requiring Social Security claimants to raise Appointments Clause challenges before ALJs as a precondition to judicial review would be unwarranted. Under this Court's longstanding remedy-exhaustion precedents, claimants can pursue constitutional claims in court even if they forgo ALJ proceedings entirely. It would be senseless to treat claimants who *did* exhaust administrative remedies—and merely failed to raise Appointments Clause challenges—worse than claimants who raised *no* challenges of any type to any ALJ. At a minimum, this Court should relieve petitioners of any forfeiture of their Appointments Clause challenges. Such challenges are essential to preserving the separation of powers, and petitioners' ALJ proceedings unquestionably contravened this structural constitutional guarantee.

C. The government's policy concerns with the lack of an issue-exhaustion rule are meritless and too insubstantial to have prompted the government to engage in rulemaking in the years since *Sims*. A holding that claimants need not raise Appointments Clause challenges to ALJs in order to preserve the issue for judicial review would affect a tiny proportion of Social Security cases. More broadly, if the government feels the system would be unworkable without requiring claimants to raise issues before ALJs, the government can propose regulations to that effect. Regardless, the effects of a ruling for petitioners are far outweighed by the massive disruptions that the government's rule would portend. The Court should be wary of fashioning an issue-exhaustion requirement that would upend many existing SSA procedures and would encourage a counterproductive and overwhelming kitchen-sink approach to ALJ proceedings.

Further, there is no serious risk of sandbagging. Claimants have no incentive to hold back on objections in a system where ALJs and Appeals Council judges rigorously spot issues *de novo*. And it is implausible that the government might have provided relief sooner if only more claimants had raised Appointments Clause objections to the agency. The SSA repeatedly adopted a policy of refusing to adjudicate Appointments Clause challenges in the expectation that objections might come. The government was not only aware of the risk that this Court would consider various ALJs to be unconstitutionally appointed; the government affirmatively embraced that outcome, and should not stand in the way of relief now.

ARGUMENT

SOCIAL SECURITY CLAIMANTS NEED NOT OBJECT TO ALJS THAT ALJS ARE UNCONSTITUTIONALLY APPOINTED TO PRESERVE JUDICIAL REVIEW

This Court held in *Sims v. Apfel*, 530 U.S. 103 (2000), that claimants need not raise issues to the Appeals Council to preserve issues for judicial review. Every shred of reasoning in that decision supports applying the same rule to ALJ proceedings, and at the very least to ALJ proceedings involving Appointments Clause challenges.

Even if this Court looked further afield to administrative-exhaustion principles, requiring claimants to futilely exhaust their Appointments Clause challenges before ALJs would be unjustified. This Court has long held that Social Security claimants can raise constitutional challenges in court after bypassing ALJ proceedings entirely, and has frequently allowed litigants to raise unexhausted constitutional claims in other contexts as well. Finally, strong policy considerations weigh against requiring exhaustion here.

A. The Reasoning of *Sims* Forecloses Imposing an Issue-Exhaustion Requirement Before ALJs

This Court in *Sims* rejected the notion that claimants must raise specific objections to an ALJ's decision to the Appeals Council as a precondition of judicial review. 530 U.S. at 105. No single rationale commanded a majority, but a majority agreed upon basic principles for determining whether parties to agency proceedings must raise issues in that proceeding to preserve judicial review. To start, if legislation or regulations require parties to exhaust issues before the agency, courts ordinarily respect those judgments. *Id.* at 107-08.

But courts must tread with caution before imposing an implied issue-exhaustion requirement as a matter of judicial discretion. The Court explained: "The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Id.* at 108-09. And "the relation of administrative bodies and the courts" does not "reflexively" mirror "the relationship between upper and lower courts." *Id.* at 110 (alteration and internal quotation marks omitted). Issue exhaustion is thus a far weaker doctrine in the agency context, where its applicability "depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109-10. Thus, the Court has sometimes required issue exhaustion in the most court-like, adversarial proceedings, where parties are charged with "develop[ing] the issues" themselves. *Id.* at 110. By contrast, in a non-adversarial administrative proceeding, "the reasons for a court to require issue exhaustion are much weaker." *Id.*

Writing for a plurality, Justice Thomas concluded that claimants need not exhaust issues before the Appeals Council due to the extraordinarily non-adversarial nature of SSA proceedings. *Id.* at 110-12 (plurality op.). Justice O'Connor concurred, reasoning that the SSA's failure to notify claimants of any issue-exhaustion requirement in Appeals Council proceedings was sufficient to reach the same conclusion. *Id.* at 112-13 (O'Connor, J., concurring in part and concurring in the judgment).

These same rationales dictate that claimants need not raise issues at the ALJ level to preserve them for judicial review, and certainly need not challenge the appointments of the very ALJs deciding their benefits claims. There is still no legislation or regulation requiring Social

Security claimants to exhaust issues in the course of seeking benefits from the agency. And the case for imposing a judicially-crafted issue exhaustion requirement is at its nadir. Proceedings before ALJs and Appeals Council judges are equally non-adversarial. The non-adversarial nature of ALJ proceedings makes it particularly unreasonable to expect claimants to challenge the authority of ALJs charged with helping to develop claimants' arguments in favor of benefits. And the SSA gave no notice of an issue-exhaustion requirement before ALJs.

1. *No Statute or Regulation Requires Issue Exhaustion*

a. The Court's conclusion in *Sims* that no statute or regulation requires issue exhaustion in SSA proceedings for benefits remains just as true today. *See* 530 U.S. at 108 (majority op.). Congress well knows how to require parties to raise issues before an agency as a prerequisite to judicial review, and has done so for agencies new and old.[3] But Congress has never required claimants to raise

[3] *E.g.*, 5 U.S.C. § 7123(c) (Federal Labor Relations Authority); 15 U.S.C. §§ 78y(c), 80b-13, 80a-42 (Securities and Exchange Commission); 15 U.S.C. § 687a(e) (Small Business Administration); 15 U.S.C. § 715d(c) (President-established board(s) concerning the interstate transportation of petroleum products); 15 U.S.C. §§ 717r(b), 3416(a)(4) (Federal Energy Regulatory Commission); 15 U.S.C. § 1710(a) (Consumer Financial Protection Bureau); 21 U.S.C. § 355(h) (Food and Drug Administration); 25 U.S.C. § 4161(d)(2) (Department of Housing and Urban Development); 27 U.S.C. § 204(h) (Alcohol and Tobacco Tax and Trade Bureau); 29 U.S.C. § 160(e) (National Labor Relations Board); 29 U.S.C. §§ 210(a), 3247(a)(3) (Department of Labor); 29 U.S.C. § 660(a) (Occupational Safety and Health Review Commission); 30 U.S.C. § 816(a)(1) (Mine Safety and Health Administration); 42 U.S.C. § 5311(c)(2) (Department of Housing and Urban Development); 43 U.S.C. § 1349(c)(5) (Department of the Interior); 47 U.S.C. § 405(a) (Federal Communications Commission); 49 U.S.C. §§ 1153(b)(4), 46110(d) (National Transportation Safety Board).

all issues in Social Security proceedings to preserve them for review.

Instead, the Social Security Act requires issue exhaustion only in one situation far afield from this case. The SSA can initiate special proceedings to impose penalties against people who knowingly made false statements during benefits determinations. In those proceedings, Congress required the party opposing the charge to raise all relevant objections to the agency by prescribing that "[n]o objection that has not been urged before the Commissioner of Social Security shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 42 U.S.C. § 1320a-8(a)-(d).

By "includ[ing] particular language" requiring issue exhaustion "in one section of a statute but omit[ting] it" elsewhere, Congress signaled that issue exhaustion is not required in other SSA proceedings. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 384 (2013). That textual inference cautions against reading in an issue-exhaustion requirement here. "Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise, for '[o]f paramount importance to any exhaustion inquiry is congressional intent.'" *Darby v. Cisneros*, 509 U.S. 137, 144-45 (1993) (quoting *McCarthy*, 503 U.S. at 144).

b. As the Court observed in *Sims*, even when Congress is silent on the subject, agencies routinely promul-

gate regulations requiring parties to exhaust issues before the agency. 530 U.S. at 108 (majority op.).[4] Courts, in turn, honor those requirements. *Id.* But *Sims* noted that "SSA regulations do not require issue exhaustion," even though the Commissioner "likely" could promulgate such regulations. *Id.*

In the 20 years since *Sims*, the SSA has not adopted any issue-exhaustion regulation. The government's certiorari-stage brief for the first time suggests that regulations do require issue exhaustion, pointing to 20 C.F.R. §§ 404.938, 404.939. Resp. Cert. Br. 10. That argument is hard to credit given that the government has repeatedly "concede[d] that there are no statutes or regulations requiring issue exhaustion in Social Security proceedings," including after filing its certiorari-stage brief.[5] And if the government may raise a forfeited legal argument at this late date, it is ironic for the government to fault claimants for purportedly doing the same thing at an earlier stage of the proceedings.

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[4] *E.g.*, 10 C.F.R. § 2.341(a)(1), (b)(2)(ii)-(iii) (Nuclear Regulatory Commission); 12 C.F.R. § 308.39(b)-(c) (Federal Deposit Insurance Corporation); 16 C.F.R. § 3.52(c) (Federal Trade Commission); 20 C.F.R. § 802.211(b) (Department of Labor Benefits Review Board); 28 C.F.R. § 542.15(b)(2) (Bureau of Prisons' Administrative Remedy Program); 38 C.F.R. § 20.202(a) (Veterans Administration).

[5] *E.g.*, *Probst v. Saul*, 980 F.3d 1015, 1020 (4th Cir. 2020) ("The Commissioner concedes that there are no statutes or regulations requiring issue exhaustion in Social Security proceedings."); *Ramsey v. Comm'r, SSA*, 973 F.3d 537, 541 & n.2 (6th Cir. 2020) (same); *Cirko ex rel. Cirko v. Comm'r, SSA*, 948 F.3d 148, 153 (3d Cir. 2020) (same); *Carr*, 961 F.3d at 1270 (similar); Reply Br. for Appellant at 7, *Hekter v. Saul*, Nos. 20-1855 & 20-1860 (7th Cir. Sept. 10, 2020); Oral Arg. at 26:22-35, *Lopez v. Saul*, No. 19-11747 (11th Cir. 2020), https://www.ca11.uscourts.gov/oral-argument-recordings.

Regardless, those regulations do not require claimants to preserve issues before ALJs. Section 404.938 states that ALJs will issue a Notice of Hearing informing claimants of "[t]he specific issues to be decided in your case." 20 C.F.R. § 404.938. Section 404.939 then tells claimants, "[i]f you object to the issues to be decided at the hearing, you must notify the [ALJ] … at the earliest possible opportunity." *Id.* § 404.939. That reference to the "issues to be decided," however, simply means disagreement with the specific issues that the ALJ specified in the Notice—not unspecified issues. The SSA's manual for ALJs, HALLEX, confirms as much, interpreting section 404.939 to mean that "if a party objects to an issue(s) the ALJ will decide at the hearing" after receiving the Notice of Hearing, "the party must notify the ALJ." SSA, Hearings, Appeals, and Litigation Law Manual § I-2-2-20 (hereinafter "HALLEX").[6] So claimants can object to how ALJs have framed the issues the ALJ plans to address, but need not do so in order to preserve issues for review. Nor must claimants change the subject and raise new issues that the ALJ did *not* identify.

Underscoring the point, the SSA estimated that out of the hundreds of thousands of claimants who receive ALJ hearings each year, only *ten* would object that the ALJ incorrectly listed the issues in the Notice of Hearing. *See* Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Levels, 72 Fed. Reg. 61,218, 61,227 (proposed Oct. 29, 2007). Not only that, the SSA projected that reviewing the Notice and identifying any objections would take just 30

[6] All HALLEX provisions are at https://www.ssa.gov/OP_Home/hallex/hallex.html.

minutes. *Id.* Those estimates are incompatible with requiring claimants to uncover unmentioned issues on pain of forfeiture.

Other agency pronouncements confirm that the above regulations do not require issue exhaustion. Other regulations recognize that ALJs and claimants can raise new issues well after objections to the Notice of Hearing are due. Section 404.946 provides that ALJs or parties can raise new issues at the hearing. 20 C.F.R. § 404.946(b). And ALJs can raise new issues "on [their] own initiative" even post-hearing. HALLEX §§ I-2-2-1, I-2-2-10. Thus, claimants' failure to object or raise new issues in responding to a Notice of Hearing is immaterial.

Further, materially similar versions of sections 404.938 and 404.939 date to the 1970s. *See* Hearings, Appeals, and Judicial Review Under Titles II, and XVIII of the Social Security Act, 41 Fed. Reg. 51,585, 51,586 (Nov. 23, 1976). But the government did not point to those regulations in *Sims*, and this Court concluded that no SSA regulations require issue exhaustion. *See* 530 U.S. at 108. Since *Sims,* groups of ALJs have urged the SSA to adopt issue-exhaustion regulations because none exist. *E.g.*, *Social Security Administration's Management of the Office of Hearings and Appeals: Hearing Before H. S. Comm. on Social Security*, 108th Cong. 69 (2003) (statement of Ronald G. Bernoski, President, Association of Administrative Law Judges). That history belies the notion that the SSA has ever adopted regulations requiring issue exhaustion.

2. *ALJ Proceedings Are As Non-Adversarial As Appeals Council Proceedings*

The *Sims* plurality refused to impose a judicially crafted issue-exhaustion requirement for Appeals Council proceedings because "the Council, not the claimant, has

primary responsibility for identifying and developing the issues." 530 U.S. at 112 (plurality op.). After all, "[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Id.* at 110 (plurality op.). Accordingly, the rationale that parties charged with developing issues below should not get to inject new issues on appeal "simply does not exist." *Id.* at 112 (plurality op.).

a. An implied issue-exhaustion requirement would be just as inappropriate for ALJ proceedings. ALJ and Appeals Council proceedings are indistinguishable in material respects. *See id.* at 110-12 (plurality op.). All SSA proceedings are "inquisitorial rather than adversarial." *Id.* at 110-11 (plurality op.); *see* 20 C.F.R. § 404.900(b); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1303-04 (1997). At every step, "the agency operates essentially, and is intended so to do, as an adjudicator, and not as an advocate or adversary." *Richardson v. Perales*, 402 U.S. 389, 403 (1971).

Whereas courts task the parties with identifying issues, both ALJs and Appeals Council judges lead the charge in issue-spotting. "It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits," and the Appeals Council's ambit is "similarly broad." *Sims*, 530 U.S. at 111 (plurality op.). In the agency's words, an ALJ's job includes "helping the claimant develop facts and evidence." 85 Fed. Reg. at 73,140. ALJs exercise plenary review over all claims. *See* 20 C.F.R. § 404.944. Thus, no matter what the claimant says, the ALJ takes a fresh look. Even when a claimant requests an ALJ hearing by "specifically indicat[ing] that he or she only disagrees with certain aspects of the determination," the ALJ independently issue-

spots. HALLEX § I-2-2-1; *see* 20 C.F.R. § 404.946(a). Likewise, even if claimants do not specifically object to issues that the ALJ identifies for review, ALJs can consider new issues if the "ALJ, on his or her own initiative, raises a new issue." HALLEX § I-2-2-1. And ALJs are responsible for independently identifying issues throughout proceedings, including after the hearing. *See* 20 C.F.R. § 404.946(b); HALLEX §§ I-2-2-1, I-2-2-10.

In court, forcing parties to raise and test arguments through the adversarial process permits the other side to respond. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941). But no adversary exists in SSA proceedings. "The Commissioner has no representative before the ALJ" or Appeals Council "to oppose the claim for benefits." *Sims*, 530 U.S. at 111 (plurality op.); *see* Dubin, *supra*, at 1303. Instead, an ALJ develops the facts independently, "looks fully into the issues," and "questions [the claimant] and the other witnesses." 20 C.F.R. § 404.944. Claimants need not even appear at ALJ hearings unless the ALJ finds that their appearance and testimony is necessary. *Id.* § 404.950. Thus, in the SSA's view, ALJ hearings merely "augment ex parte investigations" that ALJs conduct "on the claims before them." 85 Fed. Reg. at 73,140 (internal quotation marks omitted).

Further, court proceedings usually involve lawyers. But the SSA encourages claimants to rely on the agency for help understanding "the issues involved in the case." SSA Handbook § 2193.5. So claimants often do not retain their own counsel. In 2018, over 200,000 claimants appeared before ALJs without any representation—nearly 30% of all ALJ hearings that year. SSA, Hearing Disability Decisions and Representation Rates by Title and Fiscal Year (Jan. 8, 2019), https://tinyurl.com/ssa-rate-of-representation; *see Sims*, 530 U.S. at 112 (plurality op.) (similar statistics at earlier juncture).

The SSA also relieves claimants of key procedural obligations that are associated with developing issues in court. Parties to judicial proceedings file complaints or notices of appeal to seek review. But to seek ALJ or Appeals Council review, the SSA merely requires a simple "written request." 20 C.F.R. §§ 404.933, 404.968. Often, that written request involves filling out a one-page SSA-provided form to request ALJ or Appeals Council review; those forms include a mere 3-4 lines for identifying why the claimant wants further review, and instruct claimants that filling out the form should take no more than 10 minutes.[7] But claimants need not even use that form; to request ALJ review, claimants can merely "imply" that they disagree with a determination without mentioning any grounds at all. HALLEX § I-2-0-40. Claimants need not even request ALJ hearings themselves. If a Member of Congress writes and "implies that the Member of Congress is requesting a hearing on the claimant's behalf," the SSA deems that a valid request. *Id.* § I-2-0-65.

Court proceedings involve trials, formal briefing, and oral arguments. But claimants need not submit any briefs to ALJs or the Appeals Council. *See* 20 C.F.R. §§ 404.949, 404.975; *Sims*, 530 U.S. at 111 (plurality op.). Nor is oral argument required before either body. 20 C.F.R. §§ 404.949, 404.976(b).

These features leave no doubt that ALJs, like the Appeals Council, "do[] not depend much, if at all, on claimants to identify issues for review." *Sims*, 530 U.S. at 112 (plurality op.). And the plenary nature of ensuing Appeals Council review makes this an easier case than *Sims*. Appellate courts refuse to consider new issues to avoid

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

usurping the trial court's factfinding role. But the Appeals Council does not rely on ALJs' issue-spotting, let alone on the issues that claimants raised to ALJs. Instead, the Appeals Council lets claimants raise new issues and identifies new issues *sua sponte* no matter what claimants or ALJs specified below. *See id.* at 111 (plurality op.); 20 C.F.R. §§ 404.900(b), 404.970(b), 404.976. Because the SSA has assigned the task of "discover[ing] and correct[ing] its own errors" to its adjudicators, notions of "administrative autonomy" require courts to respect the SSA's choice and not to shift that burden to claimants. *See McKart v. United States*, 395 U.S. 185, 195 (1969).

b. Requiring claimants to have raised Appointments Clause challenges is particularly inconsistent with the inquisitorial nature of ALJ proceedings. If anyone was supposed to spot this issue, it was ALJs. And they were indeed well aware of the problem. The agency just prohibited them from doing anything about it.

ALJs could hardly miss that the validity of their appointments and ensuing decisions might be an issue in every proceeding. The SSA was the Paul Revere of bureaucratic consciousness-raising, sending Emergency Message after Emergency Message to its ALJs to let them know the Appointments Clause challenges were coming long before any challenges arrived. *See* Jan. 2018 Emergency Message, *supra*; June 2018 Emergency Message, *supra*; Aug. 2018 Emergency Message, *supra*; Oral Arg. at 20:48-20:57, *Lopez*, No. 19-11747 (11th Cir. 2020) (government representation that no claimants had raised Appointments Clause challenges to the agency by early 2018).

Yet, instead of allowing ALJs to respond to this call to arms, the SSA barred ALJs and Appeals Council judges from raising the Appointments Clause. *See* Jan.

2018 Emergency Message, *supra*. So this is not a case where the SSA needed claimants to raise the alarm to give the agency a chance to consider the Appointments Clause problem before courts got involved. *Cf.* Resp. Cert. Br. 8; *see* Pet.App.21a. By January 2018, the SSA had decided on a policy of refusing to entertain Appointments Clause challenges. *See* Jan. 2018 Emergency Message, *supra*. And the SSA later doubled down on that position. *See* June 2018 Emergency Message, *supra*. Given ALJs' primary issue-spotting responsibility, it is incoherent for the SSA to absolve ALJs for not raising this known issue while faulting claimants for missing it.

Faulting claimants for failing to pointlessly float Appointments Clause objections would also be unreasonable given the ALJ's role. For claimants, the ALJ is vested with life-changing powers to grant or deny benefits with a stroke of the pen. Told by the SSA to depend on the ALJ to develop claimants' position, claimants might understandably avoid accusing that same adjudicator of lacking constitutionally valid decision-making authority. In light of the SSA's position that ALJs lacked power to resolve those challenges anyway, no reasonable claimant would engage in such an exercise in futility.

3. *Claimants Lacked Notice of an ALJ Issue-Exhaustion Requirement*

Justice O'Connor's separate concurrence in *Sims* rejected the notion that claimants had to raise issues to the Appeals Council because of "the agency's failure to notify claimants of an issue exhaustion requirement." 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment). The same is true in spades here.

a. Justice O'Connor zeroed in on three aspects of Appeals Council procedures that failed to adequately notify claimants of a supposed issue-exhaustion requirement.

First, SSA regulations "provide no notice that claimants must … raise specific issues before the Appeals Council to reserve them for review in federal court." *Id.* Not only that, the regulations state that "completely failing to request Appeals Council review will forfeit the right to seek judicial review," but say nothing about forfeiting particular issues by failing to raise them. *Id.* (citing 20 C.F.R. § 404.900(b)).

Second, Justice O'Connor concluded, SSA regulations and procedures "affirmatively suggest that specific issues need not be raised" by informing claimants that they "need not file a brief" before the Appeals Council. *Id.* (citing 20 C.F.R. § 404.975). Instead, the SSA tells claimants to "request review" via a one-page form with just "three lines … for the statement of issues" and says the form "should take a total of 10 minutes" to complete. *Id.*

Finally, Justice O'Connor emphasized that Appeals Council review is generally "plenary," and that the Appeals Council informed claimants that it "would review [the] entire case for issues." *Id.* at 113-14 (citing 20 C.F.R. § 404.976). Because these features "affirmatively suggest that specific issues need not be raised before the Appeals Council," Justice O'Connor considered it "inappropriate" and unfair for courts to fashion an implied issue-exhaustion requirement. *Id.* at 113.

Those rationales apply even more forcefully to ALJ proceedings, where the SSA gives claimants every reason to believe that issue exhaustion is *not* required. SSA regulations still inform claimants that they must exhaust remedies through the agency's four-step process to obtain judicial review, but conspicuously omit any issue-exhaustion requirement. 20 C.F.R. § 404.900(b). The SSA also tells claimants to consult its user-friendly Handbook for the "most common and helpful information" necessary for "keeping you informed of your rights and obligations."

SSA Handbook Preface. But the Handbook makes no mention of any issue-exhaustion requirement. Even claimants who consulted the agency's technical manual for ALJs, HALLEX, would search in vain for any mention of an issue-exhaustion requirement.

What is more, the agency's regulations and procedures "affirmatively suggest" to an even greater degree "that specific issues need not be raised" before ALJs. *See Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment). The SSA not only informs claimants that they need not "file a brief" before ALJs. *See id.*; *accord* 20 C.F.R. § 404.949; HALLEX § I-2-8-13. The SSA also makes pellucid that claimants need not identify any issues whatsoever when requesting an ALJ hearing. *Supra* pp. 24-26.

Likewise, when the ALJ issues a Notice of Hearing, the ALJ asks claimants to object to identified issues, but does not suggest claimants must raise unidentified ones, let alone identify consequences for failing to do so. *Supra* pp. 22-23. Instead, the SSA instructs that ALJs can consider other, unraised issues at the hearing or beyond. *E.g.*, 20 C.F.R. § 404.946; SSA Handbook §§ 2010.1, 2010.3; HALLEX §§ I-2-2-1, I-2-2-10. With all these assurances that ALJs will keep issue-spotting to the end of their decision-making process, claimants would hardly expect penalties for failing to raise an issue themselves.

Lastly, ALJ review is at least as plenary as Appeals Council review. *See Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment). The Appeals Council exercises *de novo* review over the issues in the case and notifies parties of the issues to be decided. 20 C.F.R. §§ 404.967, 404.973, 404.979. The SSA's regulations for ALJs prescribe materially similar *de novo* review. *See id.* §§ 404.944, 404.946. And the SSA assures

claimants that the Appeals Council can consider even issues that claimants and ALJs failed to raise below. *See id.* §§ 404.900(b), 404.970(b), 404.976.

b. The SSA deprived claimants of any notice that they must raise Appointments Clause challenges to ALJs or forgo them forever. The agency's pronouncements portray ALJs as factfinders. *E.g.*, 85 Fed. Reg. at 73,140. The form for requesting ALJ hearings tells claimants they may submit additional evidence, but says nothing about legal arguments. Form HA-501, *supra.*

Further, at all relevant points in time, the SSA repeatedly failed to notify claimants of the purported need to raise Appointments Clause objections, even as the SSA sent internal messages to ALJs warning of these challenges. The government in November 2017 conceded that SEC ALJs were unconstitutionally appointed and that many other agencies' ALJs likely were as well. Resp. Cert. Br., *Lucia v. SEC*, No. 17-130, at 9-10, 18, 21. Yet the SSA did not tell claimants to use or lose any objection.

By January 2018, the SSA foresaw challenges to the constitutionality of Social Security ALJs' appointments. *See* Jan. 2018 Emergency Message, *supra.* But instead of instructing claimants to exhaust those challenges before ALJs, the SSA sent Emergency Messages—*i.e.*, "[e]mergency changes to operations instructions for SSA employees," not claimants. SSA, Current Program Rules, Employee Operating Instructions, https://www.ssa.gov/regulations/. The SSA did not update its Handbook for claimants. Nor did the SSA issue any other claimant-oriented guidance. No surprise, then, that by the government's estimation, *zero* claimants raised Appointments Clause challenges before the agency as of early 2018, and only a "small handful" of claimants objected before the agency after *Lucia*. *See* Oral Arg. at 20:48-20:57, *Lopez*, No. 19-11747 (11th Cir. 2020).

Only in March 2019 did the SSA change course. *See* 84 Fed. Reg. at 9582. Under its new ruling, the agency informed claimants that the Appeals Council could resolve Appointments Clause challenges and would order a new hearing before a new ALJ as relief. But the agency would only grant relief if (1) an unconstitutionally appointed ALJ decided the claimant's benefits request before the Acting Commissioner's July 2018 ratification, and (2) the claimant raised the Appointments Clause challenge during proceedings before the ALJ or the Appeals Council. *Id.* at 9583. That about-face did not even expressly impose an issue-exhaustion requirement. And the March 2019 ruling only confirms the lack of any prior notice that claimants had to raise Appointments Clause challenges to ALJs or the Appeals Council to obtain relief.

Worse, by March 2019, the horse had already left the barn. In the SSA's view, the Acting Commissioner's July 2018 ratification of all ALJ appointments ensured the legality of ALJ decisions issued from that date onward. By March 2019, the SSA had finished considering many of the affected decisions, and many dissatisfied claimants had proceeded to district court. The SSA thus provided no notice (let alone meaningful notice) by telling claimants in March 2019 that, back before July 2018, they should have raised Appointments Clause objections to ALJs.

The SSA in March 2019 alternatively told claimants that they could raise their Appointments Clause challenges to the Appeals Council in "requests for review" to preserve review. *Id.* But that instruction was also too little, too late. Claimants who received pre-July 2018 ALJ decisions from unconstitutionally appointed ALJs had to request Appeals Council review by September 2018 at latest, absent good cause. *See* 20 C.F.R. § 404.968. Advising

those claimants in March 2019 that they should have objected when requesting Appeals Council review months or years ago was no help at all.

4. Sims *Forecloses the Government's Broad Issue-Exhaustion Rule*

The government and courts below invoked the "general rule" that courts should only vacate erroneous agency decisions if the agency "erred against objection made at the time appropriate under its practice." Resp. Cert. Br. 7 (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); *see* Pet.App.12a-15a. The government made the same argument in *Sims*, and a majority of this Court rightly rejected it. *See* 530 U.S. at 109 (majority op.); Br. of United States, *Sims v. Apfel*, No. 98-9537 (Jan. 20, 2000), at 29-31. The idea of a "general rule" begs the question of what exceptions exist, and what time is "appropriate" to raise an issue under a particular agency's practice. *Sims*, 530 U.S. at 109 (majority op.). When an agency relieves claimants of any obligation to develop the issues, as is the case in non-adversarial, claimant-friendly Social Security proceedings, that "general rule" does not apply. *See id.* at 109-10.

Moreover, judicially crafted issue-exhaustion requirements are much rarer than the government's citations suggest. *See* Resp. Cert. Br. 7-8. Courts generally enforce statutory or regulatory exhaustion mandates. *E.g.*, *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (enforcing Prison Litigation Reform Act exhaustion mandate); *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 497 (1955) (enforcing Natural Gas Act exhaustion mandate). Courts also generally honor requirements that parties exhaust all administrative remedies—unless the party's interest in pressing the claim outweighs countervailing institutional interests, or exhaustion would have been futile. *McCarthy*, 503 U.S. at 149. None of those

principles supports imposing a broad, judicially-crafted rule that parties must exhaust specific issues before an agency or forgo them forever.

The government's other citations reveal a far more anemic premise: courts expect litigants to raise some issues before agencies, sometimes. In the early 20th century, the Court began requiring such exhaustion *ad hoc*, backed at most by conclusory analogies to court proceedings. *E.g.*, *United States ex rel. Vajtauer v. Comm'r of Immigr.*, 273 U.S. 103, 113 (1927); *Spiller v. Atchison, Topeka & Santa Fe Ry. Co.*, 253 U.S. 117, 130-31 (1920). But the results were inconsistent. Sometimes the Court required exhaustion. For instance, the Court refused to consider whether the Internal Revenue Service improperly reckoned the base value of a company's shares when the party had not asked the Commissioner to consider the issue. *Burnet v. Commonwealth Improvement Co.*, 287 U.S. 415, 418 (1932). The Court faulted a party for failing to raise long-available evidence to the Interstate Commerce Commission. *United States v. N. Pac. Ry. Co.*, 288 U.S. 490, 494 (1933). And the Court faulted a party for failing to object to the appointment of a hearing officer before the Interstate Commerce Commission. *See L. A. Tucker*, 344 U.S. at 37-38.

Other times, the Court entertained issues that the agency never considered. For instance, the Court allowed the agency to invoke a particular Tax Code provision to justify a tax assessment, despite never raising that argument below. *Hormel*, 312 U.S. at 557-59. And the Court allowed a detainee to challenge the validity of his administrative hearing officer's appointment in court despite failing to raise the issue in adversarial immigration proceedings. *Sung v. McGrath*, 339 U.S. 33, 53 (1950); *see L. A. Tucker*, 344 U.S. at 41 (Douglas, J., dissenting).

At most, these cases suggest reserving judicially crafted issue-exhaustion requirements for cases where parties failed to raise technical issues that implicate the agency's specialized expertise or discretion. *See Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946). The dissenters in *Sims* embraced that view, but the government would not prevail even under that view. *See* 530 U.S. at 116 (Breyer, J., dissenting). Appointments Clause challenges are about as far from agency expertise as one can get. "[C]onstitutional claims" that do not rest on technical factors "are … outside the [agency's] competence and expertise." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010). Such constitutional claims are "wholly collateral" legal questions that do not require agency judgments or fact-finding. *Id.* at 489-91; *Sims*, 530 U.S. at 115-16 (Breyer, J., dissenting). Indeed, that question is so far afield from the SSA's expertise that, until March 2019, the agency deemed Appointments Clause challenges to be beyond the agency's ken. *See* 84 Fed. Reg. at 9582.

Lucia is not to the contrary. *Cf.* Resp. Cert. Br. at 10-11. *Lucia* observed that the litigant there made "a timely challenge" that entitled him to relief by "contest[ing] the validity of [the ALJ's] appointment before the SEC" and on judicial review. *See* 138 S. Ct. at 2055. But *Lucia* involved the SEC, which unlike the SSA is subject to an express issue-exhaustion requirement and conducts adversarial proceedings. *See* 15 U.S.C. § 78y(c).

Adopting the government's expansive and ahistorical issue-exhaustion rule would also produce a skewed playing field. The government cannot defend agency actions against invalidation by supplying *post hoc* "determination[s] of policy or judgment which the agency alone is authorized to make." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *see Smith*, 139 S. Ct. at 1779-80. But pure legal

arguments stand on different footing. Thus, this Court has repeatedly credited new legal arguments that the agency never raised in administrative proceedings. *E.g.*, *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544-45 (2008); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 766 & n.6 (1969); *see Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 304-06 (D.C. Cir. 2015). And what is good for the goose is good for the gander. If the government can defend its actions by invoking legal arguments that it never presented in agency proceedings, private parties should receive the same courtesy when identifying legal grounds for invalidating agency action.

B. Claimants' Appointments Clause Challenges Would Be Reviewable Under Remedy-Exhaustion Principles

Even putting *Sims* aside, it would be perverse to require Social Security claimants to raise constitutional challenges before ALJs. Under this Court's longstanding remedy-exhaustion precedents, those claimants could have forgone ALJ proceedings entirely and still obtained judicial review of these same challenges.

1. Social Security claimants generally can obtain judicial review of constitutional challenges even if they do not go through ALJ proceedings. Punishing claimants who proceed through the agency's multiyear, multistep exhaustion process on their claim, but never raise an Appointments Clause objection to their unconstitutionally appointed ALJ, would be senseless.

"[T]he Court's precedents make clear that an ALJ hearing is not an ironclad prerequisite for judicial review." *Smith*, 139 S. Ct. at 1774 & n.7 (citing cases). Thus, the Court has "authorized judicial review" in federal court "notwithstanding the absence of a prior … hearing" because "the claimants challenged the Secretary's decisions

on constitutional grounds," and "[c]onstitutional questions obviously are unsuited to resolution in administrating hearing procedures." *Califano v. Sanders*, 430 U.S. 99, 108-09 (1977).

Mathews v. Eldridge, 424 U.S. 319 (1976), illustrates the principle. The claimant did not even "seek reconsideration of the initial determination," let alone seek ALJ review. *Id.* at 328. Nor did the claimant at any point "raise with the Secretary his constitutional claim to a pretermination hearing." *Id.* at 329. Nonetheless, the Court rejected the SSA's argument that the claimant's failure to exhaust precluded judicial review of his constitutional claim. Because the claimant's "constitutional challenge is entirely collateral to his substantive claim of entitlement" and was not immediately remediable by the agency, the Court authorized immediate judicial review. *Id.* at 330-31; *see Weinberger v. Salfi*, 422 U.S. 749, 764-67 (1975); *Mathews v. Diaz*, 426 U.S. 67, 76-77 (1976). Since then, the Court has expanded this principle to cover some unexhausted non-constitutional issues, like facial challenges to the legality of SSA policies. *Bowen v. New York*, 476 U.S. 467, 482-86 (1986); *Smith*, 139 S. Ct. at 1774 n.7.

Those precedents make this an easy case, given the constitutional challenges at issue. Indeed, the Court suggested as much in *Eldridge*. While the claimant's failure to present his whole claim to multiple layers of agency adjudicators prompted detailed analysis, the Court considered it self-evident that "[i]f Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in district court." 424 U.S. at 329 n.10. So too here: petitioners fully exhausted administrative review procedures, and should not be barred from now raising their Appointments Clause challenges.

It makes sense to have stricter rules for exhausting administrative remedies than for exhausting particular issues. The Social Security Act and SSA regulations expressly impose remedy-exhaustion requirements. *See Smith*, 139 S. Ct. at 1773; 42 U.S.C. § 405(g); 20 C.F.R. § 404.900(b). Yet no statute or regulation requires *issue* exhaustion. *Supra* pp. 19-23. And when a party leapfrogs layers of agency review entirely, every issue the party presents in court is one the agency lacked the opportunity to conclusively decide. Allowing these claimants judicial review, while denying it to claimants who commit the lesser-included offense of failing to raise their Appointments Clause challenge, would be arbitrary.

2. Outside the Social Security context, this Court has taken a similarly flexible approach to whether parties must exhaust administrative remedies as a prerequisite to judicial review. This Court has allowed parties to raise discrete constitutional issues for the first time in court even when parties fail to exhaust administrative remedies in more adversarial agency proceedings. *E.g.*, *McCarthy*, 503 U.S. at 149 (prisoner raising constitutional claim for money damages need not exhaust administrative remedies within Bureau of Prisons); *Sims*, 530 U.S. at 115 (Breyer, J., dissenting) (noting that constitutional claims are often exempt from exhaustion rules). Given the "nature" of constitutional claims and the importance of remedying violations, it is difficult to imagine circumstances where "the interest of the individual in retaining prompt access to a federal judicial forum" would not outweigh "countervailing institutional interests favoring exhaustion." *McCarthy*, 503 U.S. at 146.

Here, claimants' interest in judicial review is particularly compelling. Unconstitutionally appointed ALJs adjudicated claimants' applications. *See* Pet.App.50a, 77a. Remedying Appointments Clause violations is critical to

"protect[ing] individual liberty." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring). ALJs are inferior officers precisely because they wield so much sovereign power over individuals. The Appointments Clause serves the essential role of ensuring a politically accountable process for vesting bureaucrats with those powers. *See Freytag v. Comm'r*, 501 U.S. 868, 884 (1991).

By contrast, the SSA has no valid interest in forcing claimants to exhaust Appointments Clause challenges that the agency preemptively said it had no power to hear. Forcing claimants to object to the agency, only to learn that the agency would not entertain Appointments Clause challenges because the agency professed to be powerless to hear them, serves neither administrative nor judicial efficiency. *Supra* pp. 27-28, 31-32. That course would be all the more futile because all Social Security ALJs and Appeals Council judges were unconstitutionally appointed. So it is not as if ALJs or Appeals Council judges could have granted relief by assigning the matter to a different, constitutionally appointed adjudicator. This Court has never required exhaustion when objections would be useless. *See McCarthy*, 503 U.S. at 147-48.

3. If nothing else, the Court should excuse any forfeiture with respect to petitioners' Appointments Clause challenges. This Court has excused far more serious forfeitures of Appointments Clause challenges in its discretion. In *Freytag*, for instance, petitioners not only "failed to raise a timely objection" in adversarial agency proceedings, but also affirmatively "consented to the assignment" of an unconstitutionally appointed officer. 501 U.S. at 878. Yet the Court entertained petitioners' Appointments Clause challenges, classifying them as "nonjurisdictional

structural constitutional objections that c[an] be considered on appeal whether or not they were ruled upon below." *Id.* at 878-79 (internal quotation marks omitted).

This case calls out for allowing petitioners to pursue Appointments Clause challenges because the violation is so clear. Just like SEC ALJs, Social Security ALJs can and often do issue decisions that represent the agency's final word—a dispositive characteristic distinguishing officers from mere employees. *See Lucia*, 138 S. Ct. at 2054; 20 C.F.R. § 404.981. Social Security ALJs also exercise significant discretion in receiving evidence, examining witnesses, issuing subpoenas, and developing the record. *See Lucia*, 138 S. Ct. at 2053; 20 C.F.R. §§ 404.944, 404.950. The government accordingly does not dispute that Social Security ALJs were unconstitutionally appointed officers, or that the proper remedy is a new proceeding before a different, constitutionally appointed ALJ. *Supra* p. 7. Given that common ground, "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" warrants allowing petitioners to remedy undisputed Appointments Clause violations here. *See Freytag*, 501 U.S. at 879.

C. Strong Policy Grounds Weigh Against Requiring Issue Exhaustion Here

The government and court of appeals raised policy concerns about failing to require Social Security claimants to make specific objections in ALJ proceedings. But those objections only underscore the problems with imposing an issue-exhaustion requirement in this context.

1. The government worries that without a general issue-exhaustion requirement, the Social Security "system would be unworkable" and would compromise agency efficiency. Resp. Cert. Br. 8; *see* Pet.App.22a-23a. But those concerns are plainly overstated as applied here.

The government's current estimation is that the Appointments Clause issue affects only a few hundred cases. Resp. Cert. Br. 13. That is a drop in the ocean relative to the 760,000 ALJ hearings and 2.3 million claims the agency resolves each year. SSA, Annual Performance Report, Fiscal Years 2019-2021, at 44, 46 (2020), https://tinyurl.com/ssa-annual-performance-report. Remanding affected cases to properly appointed ALJs for new proceedings would hardly impede the agency's work.

Even beyond the Appointments Clause context, there is no reason to think the sky would fall without an ALJ issue-exhaustion requirement. The SSA does not appear to have invoked issue exhaustion until the 1980s. *See, e.g.*, *Fandino v. Sec. of Health and Hum. Servs.*, No. 86-CV-0010, 1987 WL 16150, at *5 n.4 (S.D.N.Y. Aug. 21, 1987); Dubin, *supra*, at 1313-14. And if the SSA believes that enforcing an issue-exhaustion requirement is central to its functions, the SSA can take up this Court's 20-year-old suggestion that the agency could promulgate regulations, which would allow for public comment and participation. *See Sims*, 530 U.S. at 108 (majority op.).

By contrast, imposing a judicially-crafted issue-exhaustion requirement would upend current practice, resulting in immense burdens on both claimants and the SSA. If claimants must raise objections to ALJs or forfeit them forever, innumerable ALJ procedures need retooling. The SSA would need to tell claimants when to raise issues to ALJs. If claimants should be raising issues when they request ALJ review, the SSA will need to jettison its current rules accepting cursory, implied requests from claimants or Members of Congress as sufficient. *Supra* p. 26. And if claimants should raise issues at some later point, the agency should take back its many assurances that ALJs will continue looking for issues up through their final decision. *Supra* p. 25.

Accomplishing those changes would transform current ALJ proceedings beyond recognition, which is all the more reason to leave such changes to Congress or the agency. About 30% of claimants—some 200,000 per year—lack any representation before ALJs. *See* SSA, Hearing Disability Decisions and Representation Rates by Title and Fiscal Year, *supra.* Moving from a system where requesting ALJ review takes under 10 minutes to a system where claimants must identify complex legal issues on pain of forfeiture would impose extreme, unfair burdens on people who are seeking SSA assistance because they already face significant physical or mental challenges. For claimants with representation (whether from non-attorneys or lawyers), the new regime would incentivize a kitchen-sink approach to hearing requests and notices. That mountain of paperwork is the last thing the Social Security system can afford. ALJs already labor under massive caseloads, and if ALJs must wade through all these issues, existing delays will only grow worse. *See Smith*, 139 S. Ct. at 1776 & n.16.

2. The government argues that an issue-exhaustion rule is necessary to prevent Social Security claimants from sandbagging the agency. Resp. Cert. Br. 8-9; *see Davis v. Saul*, 963 F.3d 790, 795 (8th Cir. 2020). The government argues that a contrary rule could incentivize claimants to sit on objections during agency proceedings, then raise the objection in court if the agency denies benefits.

That concern is divorced from reality. Hundreds of thousands of SSA claimants approach the agency without legal representation. Their immediate objective is simple: they want to obtain disability benefits that are often their primary source of income. Meanwhile, the SSA generally takes years to finish adjudicating claims all the way through the agency's convoluted four-step process.

Smith, 139 S. Ct. at 1774. There is no reason for claimants to hold back unraised arguments for district-court proceedings years down the line. And any strategy built around tactical omissions would fail so long as ALJs or Appeals Council judges properly discharge their duty to ferret out all relevant issues regardless of what claimants raise. Sandbagging also presupposes the element of surprise, and the government can hardly claim to have been caught unaware by Appointments Clause challenges. *See* Jan. 2018 Emergency Message, *supra*.

3. Finally, the government suggests that "[i]f the hundreds of claimants who are now challenging the appointments of SSA's ALJs in court had raised those challenges before the agency, the repetition of the objection would have demonstrated to the agency the accumulating risk of reversal and could have led the agency to change its policy." Resp. Cert. Br. 11; *see* Pet.App.21a, 29a-30a.

But presumably the government was aware of the risks of allowing unconstitutionally appointed ALJs to continue hearing cases. After all, the government rightly urged this Court to hold that SEC ALJs were unconstitutionally appointed. Resp. Br., *Lucia v. SEC*, No. 17-130, at 38. The government conceded that its position affected ALJs across agencies. Resp. Cert. Br., *Lucia v. SEC*, No. 17-130, at 9-10. And the SSA adopted (and re-adopted) its policy of refusing to address Appointments Clause objections despite expecting ALJ challenges. Jan. 2018 Emergency Message, *supra*; June 2018 Emergency Message, *supra*. Having sown the wind by identifying the unconstitutionality of many ALJ appointments, the government should not object to reaping the whirlwind.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PAUL F. MCTIGHE, JR.
6506 South Lewis Ave.
Suite 105
Tulsa, OK 74136

LISA S. BLATT
SARAH M. HARRIS
Counsel of Record
CHARLES L. MCCLOUD
THOMAS W. RYAN
ANDREW L. HOFFMAN
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
SHARRIS@WC.COM

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