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 ADMINISTRATION,

Respondent.

JOHN J. DAVIS, ET AL.,

Petitioners,

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Tenth And Eighth Circuits

BRIEF FOR AMICI CURIAE SOCIAL SECURITY, GOVERNMENT BENEFIT PROGRAM, AND ADMINISTRATIVE LAW PROFESSORS AND SCHOLARS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE[1]

The amici whose views are presented here are law professors and social security, government benefit program, or administrative law scholars with expertise in systems of administrative adjudication and judicial review applicable to social security and Supplemental Security Income (SSI) disability claims. Some amici teach classroom courses in Social Security Law, Administrative Law or Government Benefit Program law. Some of amici also teach or have taught in law school clinical courses involving supervised law student representation of social security and SSI claimants in the Social Security Administration's (SSA) hearing proceedings and/or on judicial review in federal court and their scholarship is informed by first-hand knowledge of SSA's unique adjudicative model. Amici submit this brief to vindicate the public interest in ensuring proper understanding of the application of social security, government benefit program, or administrative law as it relates to this appeal. The full list of amici comprising 56 law professors from 40 law schools, appears in the Appendix.

Much social security and administrative law scholarship has been produced about the uniqueness of SSA's unusually informal, non-adversarial and

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[1] Pursuant to Supreme Court Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than Amici made a monetary contribution intended to fund the preparation and submission of this brief. Counsel for all Petitioners and Respondent have consented to the filing of this brief.

inquisitorial administrative adjudicative system. *See*, *e.g.*, Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules*: *A Significant and Promising Reform*, 92 CORNELL L. REV. 235 (2007); Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003); JERRY L. MASHAW, et al., SOCIAL SECURITY HEARINGS AND APPEALS (1978). Social Security and administrative law scholars have also examined the delivery of "mass justice" through the series of relatively short, claimant-accessible administrative stages in the disability benefit process in these cases, which regularly number in the millions rather than the hundreds as in other federal agencies. *See* Jon C. Dubin, *Overcoming Gridlock: Campbell after a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 ADMIN. L. REV. 937 (2010); Charles H. Koch, Jr. and David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199 (1990); ROBERT G. DIXON, JR., SOCIAL SECURITY DISABILITY AND MASS JUSTICE (1973). Indeed, this body of legal scholarship has influenced the development of legal doctrine on the application of exhaustion and judicial review principles from SSA proceedings generally and "issue exhaustion" more specifically, such as in this Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000), rejecting the

application of issue exhaustion to SSA's informal, non-adversarial, and inquisitorial Appeals Council. *See Sims*, 530 U.S. at 111-112 (citing Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1301-05; 1325-29 (1997) and BERNARD SCHWARTZ, ADMINISTRATIVE LAW 469-470 (4TH ED.1994)). Some of the participants on this *amici* brief are contributors to this body of scholarship.

SUMMARY OF ARGUMENT

The *Sims* Court's reasoning in rejecting Appeals Council issue exhaustion applies *a fortiori* to ALJ hearing level issue exhaustion of Petitioners' "unexhausted" issue in the instant case. The decidedly inquisitorial, non-adversarial, informal, and lay claimant-accessible nature and design of SSA's ALJ hearing process is fundamentally at odds with the purposes and policies underlying a prudential issue exhaustion requirement. Applying issue exhaustion would result in severe disruption of an already burdened system of mass administrative justice. In light of the assurance of informality and claimant accessibility in SSA's regulations, forms and adjudicative culture, ALJ issue exhaustion would also produce inadequate and misleading notice to claimants and serve as a procedural trap for the unwary and impediment to court access. Even if ALJ issue exhaustion were otherwise prudentially justified, the Petitioners' unexhausted issue—

the constitutionality of their ALJs' appointment—fits firmly within the futility and constitutional claim exceptions to otherwise applicable exhaustion requirements since ALJs lack the power to remedy or address these constitutional issues.

The judicial imposition of issue exhaustion in the manner urged by Respondent would reflect a significant alteration and judicialization of SSA's uniquely informal ALJ hearing process, with many foreseen and unforeseen additional issues. It would place an unfair burden on claimants and increase ALJs' already significant responsibilities, which could stress the entire process beyond the breaking point. Accordingly, any such SSA ALJ issue exhaustion rule should be the product of a comprehensive, deliberative, open and democratically accountable process designed to reach a nationally uniform result and to balance the impacts on claimants, the public, and the agency alike, such as through notice and comment rulemaking under the Administrative Procedure Act.

ARGUMENT

I. SSA'S UNIQUELY INFORMAL, INQUISITORIAL, NON-ADVERSARIAL HEARING PROCESS AND MASS JUSTICE ADJUDICATION SYSTEM DOES NOT SUPPORT A PRUDENTIAL ALJ HEARING-LEVEL ISSUE EXHAUSTION REQUIREMENT, ESPECIALLY FOR CONSTITUTIONAL AND LEGAL ISSUES THAT ALJS LACK THE POWER TO ADDRESS OR REMEDY

A. This Court's *Sims v. Apfel* Decision

In *Sims v. Apfel*, Justice Thomas's opinion for a four-justice plurality noted at the outset that while administrative issue exhaustion requirements "are largely creatures of statutes" or regulations, no statute or regulation impose such a requirement. *Sims*, 530 U.S. at 107. Courts have sometimes applied judicially imposed issue exhaustion, but the desirability and propriety of superimposing this principle on particular systems "depends on the degree to which the analogy to formal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. Because SSA proceedings are inquisitorial, informal, and non-adversarial—where ALJs investigate facts and develop arguments—Justice Thomas concluded that "the differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Id*. at 110. Also noted were the fact that SSA regulations expressly mandate that the agency conduct its review process "in an informal, non-adversarial manner" (quoting 20 C.F.R. § 404.900(b)), a significant

number of claimants lack attorney representation, and SSA supplies a form with only a three-line space to request administrative review which "strongly suggests that the council does not depend much, if at all for claimants to identify issues for review." *Id.* at 111-12.

The plurality thus concluded that "issue exhaustion makes little sense in this particular context" and therefore "a judicially created issue exhaustion requirement is inappropriate." *Id.* at 112. Although relying on repeated references to the informal, inquisitorial, non-adversarial nature of ALJ hearings in its reasoning, the plurality reserved the issue of applying issue exhaustion at the ALJ hearing stage since that specific issue was not before the court. *Id.* at 107. After pointing out that SSA regulations do not require issue exhaustion, the plurality stated in *dicta* that "we think it likely that the [SSA] could adopt a regulation that did require issue exhaustion." *Id.* at 108.

Justice O'Connor authored a concurring opinion, joining in much of the plurality opinion's doctrinal bases and rationales but finding that "the agency's failure to notify claimants of an issue exhaustion requirement in this context was a sufficient basis for [the Court's] decision." *Id.* at 113 (O'Connor, J., concurring in part and in the judgment). Justice O'Connor pointed out that although SSA's regulations make clear that failing to request review at the next stage with applicable time limits "will forfeit the right to seek judicial review, the regulations provide no notice that claimants must also raise specific issues before the Appeals Council to preserve them for review in federal court."

Id. (citations omitted). Indeed, Justice O'Connor found that SSA's regulations and forms were misleading and suggest the absence of such a requirement, pointing to the same SSA form with only a three-line space to supply grounds for review and suggesting that reading, assembling the information for, and completing the form will take only 10 minutes. *Id.*

Justice O'Connor also reasoned that while SSA represented to the Court that it does not invoke Appeals Council issue exhaustion in cases where claimants lack any form of a representative[2] and that claimants with attorney representatives, such as Ms. Sims, might be less likely to be misled, "it would be unwise to adopt a rule that imposes different issue exhaustion obligations based on whether claimants are represented by counsel." *Id.* at 114. Finally, Justice O'Connor concluded that the petitioner "did everything that the agency asked of her. I would not impose any additional requirements." *Id.*

The dissenting opinion supported issue exhaustion in this context based on standard general exhaustion rationales of agency error correction and agency autonomy without premature judicial intervention. *Id.* at 114-17 (Breyer, J., dissenting). As to the Petitioner in *Sims*, since "no one claim[ed] that any established exception to this ordinary 'exhaustion' or 'waiver' rule

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[2] Justice O'Connor noted that SSA's representation to the Court that it did not assert issue exhaustion on appeals by unrepresented claimants "appeared to be inaccurate" and cited a *pro se* case where the agency had nonetheless invoked issue exhaustion. 530 U.S. at 114.

applie[d]" issue exhaustion was appropriate. *Id.* at 115. The dissent cited as examples of such established exceptions to exhaustion principles, not asserted in *Sims*: "futility" (citing *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, 406-07 (1988)) and "constitutional claims" (citing *Mathews v. Eldridge*, 424 U.S. 319, 329 n.10 (1976)). *Sims*, 530 U.S. at 115.

B. The Reasoning, Policies and Circumstances Underlying All Nine Justices' Opinions in *Sims* Support Rejection of ALJ Issue Exhaustion in the Instant Cases

1. The ALJ hearing process is the prototypical inquisitorial, non-adversarial proceeding

"The primary distinction between the traditional Anglo-American adversarial system and the European-style inquisitorial system is the degree of control that the decisionmaker and the parties have over the process of identifying issues and gathering and presenting evidence." Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1300 (1997). Professor Jerry Mashaw has observed that "virtually all mass justice systems have decided that they are unable to function effectively without the active-adjudicator investigation, informal rules of evidence and procedure, and presiding officer control of issue definition and development that characterize an inquisitorial or

examinational approach." Jerry L. Mashaw, *Unemployment Compensation: Continuity, Change and the Prospects for Reform*, 29 U. MICH. J. L. REFORM 1, 18 (1996). As one court described the ALJ's role:

> When the claimant appears before an ALJ, he or she will appear before a person not wearing a judicial robe, who is required by law to act with three hats, (1) a judge, (2) a representative of the government who cross examines the claimant, and, (3) an adviser to the claimant, required by regulation to fully develop the case to see that the claimant has a fair hearing regardless of whether the claimant is represented by counsel or otherwise. . . . The burden of exploring all pertinent facts and issues rests with the ALJ and in many cases, the person is not represented by counsel nor by any other person.

Salling v. Bowen, 641 F. Supp. 1046, 1053 (W.D.Va. 1986); *see Sims*, 530 U.S. at 111 ("It is the ALJ's duty to investigate the facts and develop arguments both for and against granting benefits."). In addition, in SSA's nonadversarial hearing model, "the Commissioner has no representative before the ALJ to oppose the claim for benefits." *Sims*, 530 U.S. at 111. As Professor Bernard Schwartz observed, SSA's "inquisitorial" hearing model with multiple-role ALJs "may represent a practical method of dealing with many problems encountered in agencies dispensing mass justice[;] [t]he great need is to deal efficiently and fairly with a horde of cases, rather than to preserve all the accoutrements of

the courtroom." BERNARD SCHWARTZ, ADMINISTRATIVE LAW 285 (3d Ed. 1991).

Indeed, when this Court decided a challenge to SSA's inquisitorial, multiple-role ALJ hearing model in *Richardson v. Perales*, 402 U.S. 389, 410 (1971), SSA defended the model by arguing that its replacement with a more adversarial and formal system would "scarcely be beneficial to claimants," "add substantially to the administrative costs borne by the [social security] trust fund," and "be contrary to Congressional intent to provide a simple procedure whereby claimants can establish their right to benefits." Dubin, *Torquemada*, 97 COL. L. REV. at 1305-06 (quoting the agency's Reply Brief at p.6 n.2). In *Perales*, this Court upheld the inquisitorial, "multiple hat" model, noting that SSA's "administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. . . . 'Such a system must be fair—and it must work.' " 402 U.S. at 399.

To ensure such a system is workable and fair, the courts have developed a large body of caselaw recognizing and enhancing statutory and regulatory obligations imposed on SSA ALJs to develop issues and evidence at hearings for the benefit of claimants and to ensure a fair hearing, even when claimants are represented. *See Heckler v. Campbell*, 461 U.S. 458, 471 (1983) (Brennan, J., concurring) ("[T]here is a 'basic obligation' on the ALJ in these nonadversarial proceedings to develop a full and fair record") (quoting *Broz v. Schweiker*, 677 F.2d 1351, 1364 (11th Cir. 1982); *see*

also Campbell, 461 U.S. at 471, n.1 ("The 'duty of inquiry' derives from claimants' basic statutory and constitutional right to due process in the adjudication of their claims." (citations omitted)); *see generally* CAROLYN A. KUBITSCHEK AND JON C. DUBIN, SOCIAL SECURITY DISABILITY LAW AND PROCEDURE IN FEDERAL COURT, 2021 EDITION §§ 6.8, 6.9 (2021) (analyzing the ALJ's duty to develop the record); *see also id*. at §§ 3:90, 3:92, 3:94 (identifying circumstances when ALJs must produce vocational expert hearing testimony); Social Security Ruling (SSR)[3] 00-4p, 65 Fed. Reg. 75,759 (Dec. 4, 2000) (placing affirmative duty on ALJs to identify conflicts between vocational expert evidence and the U.S. Department of Labor Dictionary of Occupational Titles); SSR 18-01p, 83 Fed. Reg. 49,613 (Oct. 2, 2018) (delineating circumstances triggering ALJ duty to procure hearing testimony of a medical advisor); 42 USC §§ 423(d)(5)(B); 1382c(a)(3)(H)(i); 20 C.F.R. §§ 404.1512(d); 416.912(d); 77 Fed. Reg. 1,065-01 (Feb. 23, 2012) (imposing duty on agency adjudicators, including ALJs, to make every reasonable effort to gather evidence from a claimant's treating medical sources, and to recontact sources to clarify insufficient or inconsistent reports).

When the ALJ or factfinder at least shares such significant responsibility for identifying and developing issues, developing the record, and directing these

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[3] For discussion of the sources and effect of SSA sub-regulatory guidance including SSRs, HALLEX, and POMS, see FRANK S. BLOCH AND JON C. DUBIN, SOCIAL SECURITY LAW, POLICY AND PRACTICE: CASES AND MATERIALS CH. 9.B.1 (2016).

intimate, face-to-face proceedings with informal, mass justice dispatch in an inquisitorial role, issue exhaustion is obviously less justified or appropriate. Dubin, *Torquemada*, 97 COLUM. L. REV. at 1325. By way of comparison, even in Germany's more adversarial inquisitorial legal system, appeals from inquisitorial trials are not subject to issue exhaustion. *See* William B. Fisch, *Recent Developments in West German Civil Procedure*, 6 HASTINGS INT'L & COMP. L. REV. 221, 223, 260 n.254 (1983) (translating and quoting the German Civil Procedure Code (Zivilprozessordnung or ZPO) § 537 (1950): "[t]he subject matter of argument and decision in the appellate court is all disputed points relevant to a claim sustained or rejected below, with respect to which the parties' demands on appeal require argument and decision, even if these points were not argued or decided below."); *see generally* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824, 856-57 (1985) (describing how the German inquisitorial system avoids "the excesses of American adversarial justice" and includes features such as fully de novo appellate review). Moreover, it is apparent that SSA ALJs have significantly wider and more meaningful inquisitorial and investigative duties to develop issues, arguments and evidence at hearings than does the considerably more-removed Appeals Council at issue in *Sims*. Indeed, Justice Thomas's plurality opinion expressly relied on the ALJ's inquisitorial hearing duties and functions in determining that prudential justifications did not support issue exhaustion at the Appeals Council. *See Sims*, 530 U.S. at 110-11.

2. The ALJ hearing process is unusually informal and designed and advertised to be claimant-accessible. Agency regulations and forms implementing this design fail to supply notice of an issue exhaustion requirement and are misleading

In evaluating challenges to SSA's hearing process, the *Perales* Court also declared:

> 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.

402 U.S. at 389. This Court has also repeatedly emphasized that the agency's adjudicative provisions were designed to be "unusually protective" of claimants. *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019); *Heckler v. Day*, 467 U.S. 104, 106 (1983). Congressional intent supports this conclusion. *See* H.R. Rep. No. 76-728, at 44 (1939) ("[I]t is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of [SSA] claims . . . "); 85 Fed. Reg. 73,139-40 (Nov. 16, 2020) (comparing legislative history of the Social Security Act and Administrative Procedure Act (APA) and observing "there are significant

differences between an informal, non-adversarial Social Security hearing and the type of formal, adversarial adjudication to which the APA applies.").

Indeed, this unusual informality extends to the substantial constriction of SSA ALJs' legal authority; ALJs are prohibited from applying or interpreting controlling case law from the U.S. Courts of Appeals—which has not been first interpreted and embodied in an SSA Acquiescence Ruling (AR)—even while adjudicating within the circuits where the caselaw arose. *See* Social Security Ruling 96-1p; 63 Fed. Reg. 24,930-31 (May 6, 1998); *see generally, Stieberger v. Sullivan*, 738 F. Supp. 716, 757-60 (S.D.N.Y. 1990) (describing "informal non-acquiescence" through current SSA policy). Despite numerous circuit decisions that have modified substantive SSA disability positions, SSA effectively nullifies many such circuit precedents by declining to issue acquiescence rulings in the overwhelming majority of such cases. As a result, all agency adjudicators ignore several precedential decisions at ALJ hearings. Because many federal court appeals are decided entirely on such controlling circuit caselaw issues, *see generally* KUBITSCHEK & DUBIN, at §§ 1:21-1:26, their presentation in court is often decisive but their assertion in ALJ hearing proceedings would be futile.

Agency regulations and forms reinforce the agency's focus on informality, simplicity and claimant-accessibility. *See* 20 C.F.R. §§ 404.900(b), 416.1400(b) ("we conduct the administrative review process in an informal, non-adversarial manner."); *Biestek v. Berryhill*, 139 S.Ct. 1148, 1152 (2019). Analogous to the

form Justice O'Connor found misleading for discouraging appeals council issue exhaustion in *Sims*, SSA (HA-501), provided to claimants to request ALJ hearings, is similarly misleading. It supplies only a one-line space of less than an inch to assert all issues and arguments in the request for hearing, and assures claimants, it only will take "about 10 minutes" to complete. *See* https://www.ssa.gov/forms/ha-501.pdf. The *Sims* plurality also emphasized that "SSA regulations do not require issue exhaustion" 530 U.S. at 108, much less provide clear notice of an issue exhaustion requirement to counter the pervasive reinforcement of hearing informality and lay-claimant-accessibility.

SSA has asserted for the first time in its response to the *certiorari* petitions—as suggested, but not decided, by the Tenth Circuit *sua sponte* in *Carr v. Comm'r of Soc. Sec.*, 961 F.3d 1267, 1274-75 n.7 (10th Cir. 2020)—that an existing SSA regulation requires issue exhaustion. Resp. Cert. Br. at 10-11. This regulation requires objections to the ALJ's notice of the date, place, time and basic issues to be decided at the hearing; however, SSA argues that it requires ALJ issue exhaustion of all conceivable legal and factual arguments and issues a claimant might eventually raise on judicial review. That regulation, now in 20 C.F.R. §§ 404.939; 416.1439, was first promulgated for the Supplemental Security Income (SSI) program in 1974, *see* 39 Fed. Reg. 37,978 (Oct. 25, 1974) (appearing in 20 C.F.R. § 416.1433), and then for the Disability Insurance Benefit (DIB) program in 1976. *See* 41 Fed. Reg. 51,586 (Nov. 23, 1976) (in 20 C.F.R. § 404.923).

Typically, in disability program cases, the notice of hearing informs that the ALJ will be deciding eligibility for DIB, SSI, or both, and whether the hearing's focus is on the subject of a lower agency disability determination or on a non-disability issue prerequisite to benefits eligibility (such as the required income or resource levels for SSI benefits) or the validity of an overpayment determination.

The hearing notice does not delineate the many legal arguments and issues that may arise from adjudication of those benefit claims and, as such, does not call for objection to all such conceivable issues or arguments, or the lack of comprehensive issue and argument delineation in the notice. *See* SSA Hearing, Appeals and Litigation Law Manual (HALLEX) I-2-2-10 (Jan. 13, 2016). For example, it requires a claimant requesting a hearing to challenge a denial of SSI benefits based on excess income to object that the hearing was incorrectly noticed about disability eligibility and not excess income. *See id.*, at Examples 1 and 2*; see also* 72 Fed. Reg. 61,231 (Oct. 29, 2007) ("If you believe that the issues contained in the hearing notice are incorrect, you should notify the [ALJ] in writing . . . no later than 5 business days before the hearing."). It is telling that in the first 45 years since adoption, SSA had never asserted that this regulation mandated exhaustion of all issues and arguments potentially stemming from these broader claims and categories, and no court has so held. "The [SSA] knows how to draft a waiver rule." *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999); *cf.* 42 U.S.C. § 1320a-8(d)(1) (issue exhaustion rule for

adversarial fraud proceedings). Indeed, when SSA first promulgated this hearing-notice-objection regulation in 1974, it expressly rejected a suggestion, in the notice and comment process, urging application of formal advocacy system rules, declaring:

> In administering the programs for which it is responsible, it is the policy of the [SSA] to provide advice and assistance as necessary to insure the protection of every individual's rights under law. . . . From the [SSA's] past experience in dealing with individuals of all socio-economic backgrounds, the procedures providing support and assistance to individuals have proven adequate without a formal advocacy approach. Therefore, the suggestion to provide an advocacy system for individuals under the [SSI] program is not accepted.

39 Fed. Reg. 37,976 (Oct. 25, 1974).

SSA's adoption of Social Security Ruling (SSR) 19-1p, 84 Fed. Reg. 9,582 (March 15, 2019), reflecting implementation of *Lucia v. SEC*, 138 S.Ct. 2044 (2018) as applied to SSA, also could not itself supply notice of an issue exhaustion requirement on *Lucia* Appointments Clause challenges and certainly not for claims prior to March 15, 2019. Moreover, this SSR did not mandate ALJ issue exhaustion of Appointment Clause challenges at any time. This ruling simply establishes the condition for SSA's provision of voluntary relief to claimants who assert Appointments Clause claims either before the Appeals Council or an ALJ, and does not purport to announce or supply notice of an issue

exhaustion rule for judicial review of such issues. Because all of the Petitioners' cases had exited the agency and proceeded to federal court prior to March 2019, SSR 19-1p could not possibly have supplied notice to them of an SSA issue exhaustion requirement on Appointments Clause claims. However, SSR 19-1p does perhaps reveal that SSA believed, at least in March 2019, that no general issue exhaustion requirement was already applicable. It also reflects that mandating exhaustion of these legal issues to preserve access to the courts for judicial review of this issue was not an SSA policy priority for ALJ hearings, as opposed to the Appeals Council, but rather a convenient litigating position of agency counsel when Appointments Clause cases proceed to court.

Beyond the agency's myriad and pervasive representations of informality through its regulations and forms, the ALJs themselves often reinforce expectations of lay-claimant-accessibility and simplicity through comments and actions at hearings. In a virtually identical challenge to application of issue exhaustion to bar judicial consideration of a claimant's constitutional objection to her ALJ's appointment, the court recounted an exchange between the ALJ and claimant at the hearing's outset:

> The ALJ began by telling plaintiff that "[t]his is just an informal fact-finding process." Tr.27. He went on to say:
>
> > The way I explain it to people, it's no worse than if you and me were just sitting in your living room talking about your

> life. This isn't Law and Order. This isn't some kind of show that you're watching where every one is getting cross-examined. It's real low key, no big deal.
>
> Tr. 28. The ALJ's statement certainly indicates the non-adversarial nature of the hearing. But it goes well beyond that in its benign characterization of the proceeding. The ALJ equates the hearing to a casual conversation in plaintiff's home with no legal consequences at all. The ALJ's statement thereby reinforces the propriety of not applying the exhaustion requirement in this case.

Probst v. Berryhill, 377 F. Supp. 3d 578, 586 (E.D.N.C. 2019), *aff'd sub nom., Probst v. Saul*, 980 F.3d 1015 (4th Cir. 2020).

Sometimes ALJs go further and actively discourage claimant representatives from raising issues and arguments and further developing the record because of the ostensibly informal nature of these hearings. *See*, *e.g.*, *Ventura v. Shalala*, 55 F.3d 900, 903 (3d Cir. 1995); *Rosa v. Bowen*, 677 F. Supp. 782, 784-85 (D.N.J. 1988). Some ALJs even discourage *pro se* claimants from seeking counsel as undesirable or unnecessary in these informal hearings. *See*, *e.g.*, *Kendrick v. Sullivan*, 784 F. Supp. 94, 102-03 (S.D.N.Y. 1992) (listing cases demonstrating ALJs' efforts to induce claimants to proceed without counsel, including one case, *Spears v. Heckler*, 625 F. Supp. 208, 209, 218 (S.D.N.Y. 1985), where the ALJ gave the claimant a "Hobson's choice" of proceeding with the hearing *pro se* or having the

case dismissed). Hearings are typically short, often lasting less than 30 minutes. *See*, *e.g.*, *Watson v. Shalala*, 5 F.3d 1495 (5th Cir. 1993) (Table), 1993 WL 391418, *1 (hearing lasted 17 minutes and full transcript was 9 pages); *Carrier v. Sullivan*, 944 F.2d 243, 245 (5th Cir. 1991) (hearing lasted 26 minutes); *James v. Bowen*, 793 F.2d 702, 705 (5th Cir. 1986) (10 minute hearing). Approximately 50% of SSI disability claimants and 40% of all claimants lack attorney representation. *See* 41 SOCIAL SECURITY FORUM 1, 17 (Jan. 2019), https://nosscr.org/wp-content/uploads/2020/12/1-Jan-2019-compressed.pdf). A total of 285,916 claimants lacked attorney representation at their ALJ hearings in Fiscal Year 2018. *Id.*

In short, as developed further in Point II below, the SSA's ALJ hearing process, regulations, forms and long-ingrained adjudicative culture would have to be altered significantly to accommodate the attendant judicialization resulting from imposition of issue exhaustion at the ALJ hearing level. For example, substantial legal briefing and presentation of all conceivable legal issues and arguments at these hearings would inevitably follow.

Finally, SSA's suggestion of widespread adoption of a judicial common law ALJ issue exhaustion requirement in the circuits, consistent with this Court's reasoning in *Sims*, is inaccurate. *See* Resp. Cert. Br. at 10 (citing *Mills v. Apfel*, 244 F.3d 1, 8 (1st Cir. 2001), *cert. denied*, 534 U.S. 1085 (2002); *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003); *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017)); *see also Carr*, 961

F.3d at 1273-74 nn.3 and 6 (citing the same cases to make this point). Rather than reflecting principled distinctions of *Sims*, the very few cases listed each failed to identify and apply the *Sims* Court's reasoning, and in some instances also reflected misplaced or erroneous application of social security law. For example, in *Mills*, the First Circuit declined to address the *Sims* Court's reasoning beyond identifying that ALJ issue exhaustion was not addressed in *Sims* and erroneously opining that only four members of the *Sims* court rejected Appeals Council issue exhaustion. *See* 244 F.3d at 8. Moreover, the First Circuit's application of issue exhaustion to bar the argument that the record lacked evidence of other work in the national economy to which a claimant incapable of performing past relevant work could make a work adjustment is plain error; SSA regulations and settled caselaw place the burden of production on this issue firmly on the agency. *See*, *e.g.*, *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); 20 C.F.R. §§ 404.1512(b)(3), 416.912(b)(3).

The Eighth Circuit's *Anderson* decision made no mention of *Sims* and did not apply its reasoning in declining to consider the ALJ's only limited consideration of the claimant's obesity where the clamant supplied no evidence or assertion of disabling impacts from obesity at the hearing. 344 F.3d at 814. The court's suggestion that claimants must generally point to and furnish evidence of their impairments to claim error on appeal from the agency's discounting of the impact of such impairments is addressed expressly elsewhere in the Social Security Act. Assuming the ALJ has

otherwise discharged the affirmative duty to develop the record and statutory evidence-gathering obligations discussed above, this fact pattern is fully addressable under the statutory obligation to furnish evidence of a medically determinable impairment in 42 U.S.C. § 423(d)(5)(A), or as a substantial evidence issue under 42 U.S.C. § 405(g)—and not common law issue exhaustion.

Similarly, in *Shaibi* the Ninth Circuit declined to evaluate this Court's rationales in *Sims*. Instead, the court followed and relied on a pre-*Sims*, Ninth Circuit decision, *Meanel v. Apfel*, 172 F.3d 1111 (9th Cir. 1999), which did not apply the *Sims* Court's reasoning. 883 F.3d at 1109. The court also erred in *Shaibi* by suggesting that ALJ issue exhaustion is supported by the sixth sentence of 42 U.S.C. § 405(g), which restricts a remand for the taking of new evidence on judicial review to situations where the evidence is new, material and good cause exists for failing to submit the evidence in the administrative proceedings. 883 F.3d at 1109; *cf. Sullivan v. Hudson*, 490 U.S. 877, 885 (1989) (describing unique function of this statutory provision). Such a limited statutory rule has no bearing on the propriety of applying judicial, common law ALJ issue exhaustion in SSA hearings.

If anything, these cases signal adjudicative confusion created through *ad hoc*, judicially created doctrines modelled after formal adversarial courtroom procedure, such as issue exhaustion, superimposed upon a decidedly informal, nonadversarial, inquisitorial hearing system. They underscore the importance

of open, deliberative, participatory and comprehensive examination of any such proposed requirement by Congress or through agency rulemaking, as invited by this Court in *Sims* and discussed in Point II.

3. The futility and constitutional claim exceptions to general exhaustion requirements are met in *Carr/Davis*, thereby satisfying the conditions for rejecting ALJ issue exhaustion in accordance with the *Sims* dissent

The purposes of judicial common law issue exhaustion like other forms of prudential exhaustion—agency error correction and protection from premature interference with agency proceedings—are similarly unserved in these cases. It is undisputed that ALJs lack authority to address or remedy Appointment Clause challenges to their own appointments. Indeed, SSA specifically instructed ALJs to take no action to address any such claims. *See* Social Security Administration, Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process, EM-18003 (2018) ("Because SSA lacks the authority to finally decide constitutional issues such as these, ALJs will **not** discuss or make any findings related to the Appointments Clause issue on the record.") (emphasis in original). Accordingly, even if issue exhaustion were deemed applicable to SSA's unique hearing process, the futility and constitutional claim exceptions to prudential exhaustion doctrine, recognized in other

social security statutory or regulatory claim-exhaustion cases, firmly apply *a fortiori* under these circumstances to justify rejection of prudential, judicial common law issue exhaustion. *See* KUBITSCHEK & DUBIN, at § 7:26 (analyzing and collecting cases on the futility exception and general waiver of exhaustion principles); § 7:28 (same on constitutional issues exhaustion exception); *see also id*. § 7:29 (same on the improper agency procedures exhaustion exception). Thus, this case also fits within the *Sims* dissenters' reasoning, delineating settled exhaustion doctrine exceptions and rationale for when issue exhaustion should not be applied to agency proceedings. *Sims*, 530 U.S. at 114-19.

Toward the end of its opinion in *Sims*, the dissent suggested in passing that SSA ALJ issue exhaustion, in contrast to Appeals Council issue exhaustion, is a "nonwaivable, non excusable" presentment requirement in the statute [42 U.S.C. § 405(g)]. 530 U.S. at 117 ("Yet I assume the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ" (citing *Shalala v. Illinois Council on Long Term Care, Inc*., 529 U.S. 1, 15 (2000) "(noting statute's 'nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court')."')). In *Carr*, the Tenth Circuit expressly relied on and quoted this passage in its opinion applying issue exhaustion to preclude consideration of petitioner's appointment's clause argument. 961 F.3d at 1274. However, the *Sims* dissent's suggestion, relied on in *Carr*, conflated the statutory jurisdictional requirement of "presentment" of a

concrete "claim" for benefits under the Act before "the agency," with the prudential issue exhaustion doctrine and requirement of raising and developing issues to the ALJ to preserve those specific issues for judicial review as a matter of judicial common law prudential principles.

Issue exhaustion is not and never has been a statutory requirement applicable to SSA ALJ hearings, or one that is "nonwaivable and non-excusable." Indeed, the statutory, non-waivable "presentment requirement" in SSA cases is satisfied by having a benefits application denied by the agency and does not even require ALJ hearing-stage presentation, much less presentment of all issues that arise from the benefits-claim to the ALJ. *See* KUBITSCHEK & DUBIN, at § 7.26 (analyzing and collecting cases on SSA statutory nonwaivable "presentment" requirement). It is undisputed that the *Carr* and *Davis* petitioners had their applications for benefits denied by SSA, thereby satisfying the nonwaivable statutory jurisdictional presentment requirement. They also appealed their claims for benefits through all levels of review required to obtain a final decision under the "waivable" statutory and regulatory exhaustion-of-benefits-claim requirements.

II. IMPOSITION OF AN ISSUE EXHAUSTION RULE FOR SSA'S UNIQUE HEARING MODEL, IF DEEMED NECESSARY AND DESIRABLE BY SSA, SHOULD COME FROM CONGRESS OR APA NOTICE AND COMMENT RULEMAKING, NOT FROM COURTS AND JUDICIAL COMMON LAW

The judicial imposition of ALJ issue exhaustion would reflect a significant alteration and judicialization of SSA's uniquely informal hearing process, with many foreseen and unforeseen additional issues raised from such adjudicative formalization. Therefore, any such rule should be implemented through a deliberative, open, participatory, and democratically accountable process by Congress or through APA rulemaking designed to comprehensively address all such issues, and not through piecemeal judicial common law. It has been over 20 years since the *Sims* plurality invited the agency to promulgate an issue exhaustion rule, if deemed necessary, as several federal agencies with formal, adversarial hearing processes have done. *See Sims*, 530 U.S. at 108; *cf.* 10 C.F.R. § 2.341(b)(5) (Nuclear Regulatory Commission). SSA has not heeded that invitation. Indeed, in the 65 years since enactment of the disability insurance benefits program, SSA has never issued a notice of proposed rulemaking on the subject.[4] As described in Point I, current SSA

[4] In 1999, government counsel in *Sims* represented to this Court that "it has [the issue exhaustion] matter under review" and "can conclusively resolve [it] by regulation." *Sims*, No. 98-9537, Resp. Cert. Br. at 13.

regulations and forms emphasize informality and simplicity of SSA hearings and discourage comprehensive briefing, argument and exhaustion of legal issues.

A. ALJ Issue Exhaustion Would Significantly Alter SSA's Uniquely Informal Hearing Process

Applying issue exhaustion at the ALJ hearing level would significantly disrupt SSA's longstanding and unique informal administrative process. It would burden ALJs by adding significantly to their already significant responsibilities and could stress the entire process beyond the breaking point.

Issue exhaustion at the ALJ hearing stage would impose considerable additional responsibilities on already heavily burdened ALJs. The potential impact from an avalanche of legal briefs and the judicialization of the process from issue exhaustion would be significant. If taken seriously by the agency, and not simply adopted as a procedural trap for claimants to diminish access to the courts, it would significantly alter the mass justice function of the current adjudicative model. In turn, this would diminish process-efficiency through system delay, and substantially undermine fairness to claimants.

In the system at present, difficulties facing ALJs with carrying out their duty to develop a full and fair evidentiary record abound and are well known. *See* Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *The Social Security Administration's New Disability*

Adjudication Rules: A Significant and Promising Reform, 92 CORNELL L. REV. 235 (2007); Frank S. Bloch, *Representation and Advocacy at Non-Adversary Hearings: The Need for Non-Adversary Representatives at Social Security Disability Hearings*, 59 WASH. U. L. Q. 349 (1981). Assuring that any and all legal issues are preserved fairly in the face of an issue exhaustion requirement would be a near-impossible, open-ended responsibility for the corps of Social Security ALJs. This would impose substantial additional strains on ALJs and their staffs in such cases, certainly so where a claimant lacks attorney representation.

More broadly, a judicially imposed issue exhaustion requirement would add harmful stress to a fragile "mass justice" system. As this Court noted in 1983, "[t]he Social Security hearing system is 'probably the largest adjudicative agency in the western world.'" *Campbell*, 461 U.S. at 461 n.2 (quoting J. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS (1978) at xi). *See generally*, Robert G. Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681 (1972); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974). As respondent pointed out, "[e]ach year, SSA receives about 2.3 million initial disability claims, completes over 760,000 ALJ hearings, and pays about $203 billion in disability insurance benefits and SSI payments to over 15 million people. Social Security

Administration, Annual Performance Report, Fiscal Years 2019-2021, at 4, 44, 46 (2020)." Resp. Cert. Br. at 8. SSA also noted, in its plan for adjudicating *Lucia* challenges before the Appeals Council, "[t]he essential requirement for any system of administrative review in a program as large and complex as ours is that it 'must be fair—and it must work.' " SSR 19-1p (quoting *Perales*, at 399, and noting specifically that this Court "has recognized that we must make decisions efficiently in order to ensure that the system continues to work and serve the American people," citing *Barnhart v. Thomas*, 540 U.S. 20, 28-29 (2003)).

With ALJ hearings regularly plagued by tremendous delay, having to address briefs exhausting all conceivable legal arguments and issues would likely produce a new round of chronic backlogs. *See* U.S. Gov't Accountability Office, GAO-09-398, Social Security Disability: Additional Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts to Eliminate Its Hearings Backlog (2009); U.S. Gov't Accountability Office, GAO/HEHS-96-87, Backlog Reduction Efforts Underway: Significant Challenges Remain (1996). Hearings could double or triple in time required, with substantial additional hearing preparation time needed by ALJs and their staffs from advance research on and processing of comprehensive legal briefs in cases with attorney representation. This would produce corresponding reductions in efficiency, heightened costs and resource allocation demands on the agency, while imposing significant hardships to claimants from substantial adjudication delay. *Cf.*

Johnson, 189 F.3d at 563 ("If courts take it upon themselves to adopt waiver rules for the agency that compel disappointed applicants for disability benefits to bombard the appeals council with full briefs in order to preserve their right to judicial review, we shall be disserving the agency."). Indeed, SSA's mass justice hearing system essentially collapsed from similar chronic problems under the strain of an ill-fated, limited experiment with adversarial hearings in the 1980s. *See Salling*, 641 F. Supp. at 1059-74 (enjoining SSA's adversarial demonstration project (SSARP) as violative of due process, finding systemic unreasonable delays, reduction in decisional quality, adjudicative inconsistency, and fundamental unfairness to claimants); *see* Dubin, *Torquemada*, 97 COLUM. L. REV. at 1320, n.158.

B. A Regulation Promulgated through Notice and Comment Rulemaking Could Address Comprehensively the Many Potential Variations, Open Issues, and Problematic Non-Uniformity that Would Result from an Ad Hoc, Judicial ALJ Issue Exhaustion Rule

"Even if it were appropriate for the judicial branch to design an issue-exhaustion requirement for Social Security proceedings, the courts are poorly equipped to do so in a way that adequately accounts for the interests of both the Administration and claimants." *Bradshaw v. Berryhill*, 372 F. Supp. 3d 349, 360 (W.D.N.C. 2019), *aff'd sub nom., Probst v. Saul*, 980 F.3d 1015

(4th Cir. 2020). For example, under an issue exhaustion rule what issues must be exhausted to the ALJ? All conceivable issues? Only those which the ALJ has authority to address (i.e. no constitutional issues or those from controlling circuit caselaw not interpreted in SSA Acquiescence Rulings)? Only factual issues? Will the rule apply to *pro se* claimants or only represented ones? *Compare Sims*, 530 U.S. at 114 (O'Connor, J., concurring) ("it would be unwise to adopt a rule that imposes different issue exhaustion obligations based on whether claimants are represented by counsel*") with Shaibi*, 883 F.3d at 1109 (judicially imposing ALJ issue exhaustion only where the "claimant is represented by counsel"). Should non-attorney representatives be treated as "counsel" for a rule made applicable only to represented claimants? *See Sears v. Bowen*, 840 F.2d 394, 402 (7th Cir. 1988) (presumption of "best case" representation when claimant has attorney-representation at the hearing "does not necessarily hold true when a claimant is represented by a nonlawyer").[5] Should there be exceptions to issue exhaustion based on prudential exceptions to the appellate waiver doctrine in adversarial judicial litigation, such as where "the new issue is purely legal and the record pertinent to this issue can be developed no further," *United States v. Krynicki*, 689 F.2d 289, 291-92 (1st Cir. 1982)? Or where "the public interest or justice so warrants," *Franki Foundation v. Alger-Rau*, 513 F.2d 581, 586 (3d Cir. 1975)? How much of SSA's other regulations, rules,

[5] In FY 2018, 82,296 claimants were represented by non-attorneys. *See* 41 SOCIAL SECURITY FORUM, at 17.

forms and subregulatory guidance would be deemed misleading, bordering on "bait and switch" notice, by assuring claimants of an informal, simple and claimant-accessible hearing process, yet requiring formal hearing-level presentation of even complex constitutional arguments to preserve such issues for court review? How many would require repeal or modification to accommodate issue exhaustion and satisfy equitable notice or due process concerns such as the putatively misleading language in 20 C.F.R. §§ 404.900(b), 416.1400(b) and SSA Form HA-501?

Courts throughout the country will address these issues in myriad ways producing undesirable non-uniformity in administration of a national program. *See Day*, 467 U.S. at 116 (recognizing importance to SSA of "uniform and consistent adjudication procedures necessary for the administration of a national program"). These issues and others generated from imposition of an ALJ issue exhaustion rule would undoubtedly benefit from a comprehensive, deliberative, open and accountable process designed to reach a nationally uniform result and balance impacts on claimants, the public, and the agency alike, such as through notice and comment rulemaking under 5 U.S.C. § 553.

C. Congress, or the Agency through APA Rulemaking, are Best Situated to Determine how an SSA ALJ Issue Exhaustion Rule Should be Implemented; *Chevron* Deference Principles Reinforce this Conclusion

The political branches of government are best suited to determine how an SSA issue exhaustion rule might be implemented consistent with the SSA's uniquely informal, non-adversarial and inquisitorial scheme, as well as the Act's core relevant legislative purposes. They are equally well-suited to consider both present fiscal and operational realities and projected inevitable transformations of the SSA adjudicative process and overall pension system. A constitutionally enacted congressional issue exhaustion provision would be dispositive,[6] and a duly promulgated issue exhaustion regulation would be entitled to substantial deference under *Chevron U.S.A. Inc. v. Natural*

[6] Such a rule is not beyond the level of detail provided by Congress for SSA. For example, Congress created an issue exhaustion rule applicable to SSA's limited, special adversarial proceedings to impose penalties against persons who knowingly make false statements during benefits adjudications. *See* 42 U.S.C. § 1320a-8(d)(1) ("[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."); *see generally Jaxson v. Saul*, 963 F.3d 645, 648 (7th Cir. 2020) (noting adversarial nature of § 1320a-8 fraud proceedings).

Resource Defense Council, Inc., 467 U.S. 837, 842-45 (1984).[7]

Courts "accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (*rather than the courts*) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (emphasis added). At present, judicial deference is owed SSA's adjudication process-informality regulations in 20 C.F.R. §§ 404.900(b) and 416.1400(b), not the Justice Department's convenient litigating positions defending SSA in court. As this Court explained:

> We have never applied the principle of [*Chevron*] to agency litigating positions that

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[7] Although the APA exempts matters related to grants and benefits from public rulemaking requirements, SSA has agreed to be bound by APA rulemaking, including the requirements of notice and public participation. *See* 36 Fed. Reg. 2,532 (Jan. 28, 1971) (publicizing SSA announcement to follow APA notwithstanding benefit exception in 5 U.S.C. § 553(a)); 47 Fed. Reg. 26,860 (June 22, 1982) (extending announcement). Upon agreeing to be bound by the APA, an agency may not disregard its provisions on a case-by-case basis. *See Rodway v. United States Dept. of Agric.*, 514 F.2d 809, 814 (D.C. Cir. 1975); *see also* Administrative Conference of the United States, Recommendation 92-1: The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, 1992 ACUS 1 (encouraging APA § 553 notice and comment rulemaking on process rules and construing the procedural exemption narrowly).

> are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (citations omitted); *see Smiley*, 517 U.S. at 741. Moreover, "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect." *Smiley*, 517 U.S. at 741. Because in the instant case, as in *Georgetown*, "deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate," 488 U.S. at 213; *see Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019), an SSA ALJ issue exhaustion rule should be left to "the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley*, 517 U.S. at 741.

CONCLUSION

For the reasons discussed above, the judgments of the courts of appeals should be reversed.

Respectfully Submitted,

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