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.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOHN J. DAVIS, et al.,

Petitioners,

v.

ANDREW M. SAUL,
Commissioner of Social Security Administration,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR AMICI CURIAE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS REPRESENTATIVES, AARP, AND AARP FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a national membership organization comprising approximately 2,900 individuals, mostly attorneys, who represent individuals applying for and appealing claims for Social Security and Supplemental Security Income (SSI) benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other nonprofits; employees of for-profit law firms and other businesses; and individuals in private practice. NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts.

NOSSCR has a great interest in ensuring that its members' clients are awarded benefits when they satisfy the criteria under the Social Security Act and the Commissioner's regulations, and that their clients have administrative hearings which satisfy due process, presided over and decided by constitutionally-appointed Administrative Law Judges.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With

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[1] Under 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 or their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All Petitioners and the Respondent have consented to Amici filing an amicus brief.

nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. AARP and AARP Foundation advocate to ensure access to disability benefits under the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs because older workers with disabilities rely heavily on those benefits to stay out of poverty. Mikki Waid, *Social Security Disability Benefits: A Lifeline for Workers with Disabilities*, AARP Pub. Policy Inst. (Apr. 2015). Assuring that Social Security benefits, including disability benefits, are paid promptly is a top priority for AARP.

SUMMARY OF ARGUMENT

Congress has not enacted a statute mandating issue-exhaustion in Social Security administrative hearings. Nor has the Commissioner of Social Security promulgated regulations requiring Social Security claimants either to raise all issues at administrative hearings or to forfeit issues which they did not raise.

The structure and procedures of the Social Security system, which is unusually protective of claimants, militate against a judicially-created issue-exhaustion requirement. The informality of Social Security administrative hearings likewise militates against a judicially-created issue-exhaustion requirement. Requiring claimants to raise Appointments Clause issues before Administrative Law Judges who are barred from deciding those issues would be futile.

Requiring pro se claimants to raise Appointments Clause issues at administrative hearings would cause almost all of those claimants to inadvertently forfeit their constitutional right to a hearing before a properly-appointed Administrative Law Judge. Requiring claimants who are represented by counsel to exhaust (or forfeit) all issues before Administrative Law Judges would overburden and cause havoc in the Social Security hearing process, which adjudicates half a million claims each year.

ARGUMENT

I. The Social Security claims and appeals process is unique. It is intended to be manageable by claimants, many of whom suffer mental impairments, yet it is, at the same time, both arduous and complex.

The Social Security system is enormous, handling hundreds of thousands of claims for benefits each year,[2] with a corps of more than 1,400 Administrative Law Judges.[3] The instant case, however, concerns a very small number of individuals, those who have challenged, in federal court, the authority of the Administrative Law Judges to hear their cases under the Appointments Clause of the United States Constitution, Art. II, §2, cl. 2, and whose cases have not yet been resolved. According to Respondent Andrew Saul, the Commissioner of Social Security, "[m]ore than a thousand claimants who never raised an Appointments Clause argument before SSA have argued for the first time in federal court that they are entitled to new hearings under *Lucia*."[4] Only "[h]undreds of cases involving unpreserved *Lucia* claims are still pending. . . ."[5] Even if all of those thousand or so cases are remanded for new administrative hearings, that will amount to less

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[2] Fiscal Year 2019 Disability Decision data, p. 156, https://www.ssa.gov/budget/FY21Files/2021LAE.pdf.

[3] *Id.*, p. 188.

[4] *Pichardo Suarez v. Saul*, 20-1358 (2d Cir.) (Brief of Appellant Andrew Saul, Doc. 36, p. 2, Aug. 16, 2020).

[5] *Pichardo Suarez v. Saul*, 20-1358 (2d Cir.) (Reply Brief of Appellant Andrew Saul, Doc. 60, p. 8, Dec. 3, 2020).

than one additional hearing for each Administrative Law Judge.

The Social Security system is one that is "unusually protective" of claimants. *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019). A half century ago, this Court analyzed the Social Security statute and regulations as follows:

> 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.

Richardson v. Perales, 402 U.S. 389, 400-01 (1971).

The protectiveness of the Social Security system is necessary for what has been described as a "byzantine labyrinth" of rules and procedures. *Wallschlaeger v. Schweiker*, 705 F.2d 191, 194 (7th Cir. 1983). The rules include statutes enacted by Congress, 42 U.S.C. §§401-434, 1381-1384; and regulations issued by the Commissioner of Social Security after notice and comment, 20 C.F.R. §§404.101-404.2127, 416.101-416.2227. The rules also include Social Security Rulings, which are opinions and statements of policy by the Social Security Administration. *Coskery v. Berryhill*, 892 F.3d 1, 4 (1st Cir. 2018). The Rulings "constitute Social Security Administration interpretations of its own regulations

and the statute which it administers." *Smith v. Colvin*, 625 F. App'x 896, 899 n. 1 (10th Cir. 2015), quoting *Walker v. Sec'y of Health & Human Servs.*, 943 F.2d 1257, 1259-60 (10th Cir. 1991). The Rulings are "binding on all components of the Social Security Administration." 20 C.F.R. §402.35, *Sullivan v. Zebley*, 493 U.S. 521, 530 n. 9 (1990). They are also entitled to deference in the courts. *Gordon v. Shalala*, 55 F.3d 101, 105 (2d Cir. 1995).

Social Security rules also include the Hearings, Appeals, and Litigation Manual (HALLEX), which conveys guiding principles, procedural guidance and information to the Social Security hearing staff. *Moore v. Apfel*, 216 F.3d 864, 868 (9th Cir. 2000). And, finally, the rules include the Program Operations Manual System (POMS), a multi-volume manual of "the publicly available operating instructions for processing Social Security claims." *Washington v. Keffeler*, 537 U.S. 371, 385 (2003). The POMS are a set of guidelines through which the Social Security Administration construes the statutes governing its operations. *Lopes v. Department of Social Services*, 696 F.3d 180, 186 (2d Cir. 2012); *Clark v. Astrue*, 602 F.3d 140, 144 (2d Cir. 2010).

Social Security claimants (applicants and recipients) cannot be expected to master that enormous quantity of rules. Large numbers of Social Security claimants (approximately one-third) suffer from mental illness, which inhibits their ability to advocate for themselves. Annual Statistical Report on the Social

Security Disability Insurance Program, 2019.[6] Others are hobbled by painful physical impairments and the brain fog caused by the medications that they must take to dull the pain.

Some claimants do not speak English. Others are poorly educated and not well-versed in law or procedures.[7] As one court noted, a claimant of borderline intelligence, who has little education, and cannot speak English, may have difficulty cross-examining a vocational expert. *Alvarez v. Bowen*, 704 F. Supp. 49 (S.D.N.Y. 1989). And the procedures are complicated. The application process itself entails four stages of administrative review. Without an unusually protective system, many claimants would be unable to navigate the process.

The Social Security system is protective at all four stages of administrative review.

A. Application stage

The protectiveness of the Social Security system begins at the application stage of the process. At that

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[6] https://www.ssa.gov/policy/docs/statcomps/nbs/index.html, Table 6.

[7] In 2015, almost 30% of all beneficiaries neither completed high school nor received a GED. National Beneficiary Survey: Disability Statistics, https://www.ssa.gov/policy/docs/statcomps/nbs/index.html; and see Table 1, https://www.ssa.gov/policy/docs/statcomps/nbs/2015/beneficiary-characteristics.pdf.

stage, the overwhelming majority of claimants – 75% – are pro se.[8]

Of the 25% of claimants who are represented at the application stage, many claimants are represented by non-attorneys, who are of either of two types. One type is the trained non-attorney representative, who must meet a number of criteria in order to be eligible for direct payment of fees. 20 C.F.R. §§404.1717, 416.1517. Such a representative must have a bachelor's degree or its equivalent and pass a written examination administered by the Social Security Administration. But a claimant can also appoint the other type, just about anyone else, to represent him or her under 20 C.F.R. §§404.1705, 416.1505. Often claimants are represented by family members or friends who have no knowledge or expertise whatsoever in Social Security law, much less in arcane issues of constitutional law.

Unlike proceedings before other administrative agencies, where the individuals are expected to supply all the evidence that supports their position, the Social Security Administration recognizes the fact that many applicants are unable to understand the requirements, so Social Security applicants are not required to do anything more than complete an application for benefits. If they are unable to do even that task, the Social Security Administration claims representatives help the claimant complete the application form, either in

[8] Representative Rates by Adjudication Level, https://www.ssa.gov/foia/resources/proactivedisclosure/2019/Representative%20Rates%20by%20Adjudicative%20Level%20FY%202008%20-%20FY%202018.pdf.

person, at the local Social Security office, POMS GN 00203.004 (Oct. 4, 2019),[9] or by telephone, POMS GN 00203.015 (Aug. 11, 2011).[10]

The claimant is not expected to supply any medical information about her impairments. She must only "inform" the agency about "all evidence known to" her relating to her disability. 20 C.F.R. §§404.1512(a)(i), 416.912(a)(1). It is the duty of the Social Security Administration to obtain the claimant's medical records, including the claimant's "complete medical history." 20 C.F.R. §§404.1512(b)(ii), 416.912(b)(ii). That includes obtaining all medical records for at least the 12 months prior to the application date. 20 C.F.R. §§404.1512(b), 416.912(b).

If the Social Security Administration is unable to obtain necessary medical information from the claimant's treating physicians, the agency will schedule and pay for a consulting physician to examine the claimant and report to the agency. 20 C.F.R. §§404.1519a, 416.919a, POMS DI 22510.016 (Dec. 6, 2019).[11] For example, the agency may purchase an examination from a consulting physician when the information in the claimant's records is insufficient to make a determination regarding disability, 20 C.F.R. §§404.1519a(b), 416.919a(b). The agency may purchase an examination from a consulting physician if the information in the medical records is inconsistent, in order to resolve the

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[9] https://secure.ssa.gov/apps10/poms.nsf/lnx/0200203004.

[10] https://secure.ssa.gov/apps10/poms.nsf/lnx/0200203015.

[11] https://secure.ssa.gov/apps10/poms.nsf/lnx/0422510016.

inconsistency. 20 C.F.R. §§404.1519a(b), 416.919a(b). The agency may purchase an examination from a consulting physician if the treating physician fails to send copies of his or her records to the Social Security Administration. 20 C.F.R. §§404.1519a(b)(2), 416.919a(b)(2). The Social Security Administration will not only pay for the services of the consulting physician but will also pay the claimant's travel expenses and provide an interpreter if necessary, POMS DI 22510.016 (Dec. 6, 2019).[12]

The application stage is a paper process only. The claimant does not meet face-to-face with the individual who decides the application. The initial determination is made by an SSA employee, POMS GN 03101.040 (June 17, 2011).[13] The claimant receives written notice that his or her application has been approved or denied. A claimant whose application has been denied has the right to request reconsideration. The Social Security Administration provides a brief form for the claimant to complete, requesting reconsideration.[14]

B. Reconsideration

The second stage of the Social Security application/appeals process is virtually identical to the first step. The applicant completes a one-page request for reconsideration, and the Social Security Administration again engages in the task of developing the administrative

[12] https://secure.ssa.gov/poms.nsf/lnx/0422510016.

[13] https://secure.ssa.gov/apps10/poms.nsf/lnx/0203101040.

[14] https://www.ssa.gov/forms/ssa-561.pdf.

record. That includes requesting updated medical records, sending the claimant for a consultative medical examination, and having Social Security's own doctors review the records. For each of the past ten years, approximately one-third of the claimants have been pro se at the reconsideration stage.[15]

If the Social Security Administration denies reconsideration, the claimant's final step in the reconsideration process is to file a request for a hearing before an Administrative Law Judge (ALJ). The Social Security Administration provides its own form for a claimant to request a hearing, Form HA-501.[16] The relevant box on the hearing request form states, "I REQUEST A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE. I disagree with the determination because: _____".

Like the form used later to seek Appeals Council review, the hearing request form allots less than an inch of space for the claimant to write anything at all. In amici's experience, pro se claimants often go to their District Offices after losing at reconsideration, seeking assistance in completing the form. The Social Security staff who assist them in completing Form HA-501 frequently instruct the claimants to write words to the effect of "I am disabled and cannot work" after the word "because" on the form. The form does not advise the

[15] Representative Rates by Adjudication Level, https://www.ssa.gov/foia/resources/proactivedisclosure/2019/Representative%20Rates%20by%20Adjudicative%20Level%20FY%202008%20-%20FY%202018.pdf.

[16] https://www.ssa.gov/forms/ha-501.pdf.

claimant that their failure to raise issues at that stage acts as a waiver or forfeiture of those issues.

C. ALJ Hearing

Claimants who seek hearings before Administrative Law Judges have already undergone two administrative stages in which the Social Security Administration did virtually all of the work for them. They can reasonably expect that the hearing stage will be similar in that regard, i.e., that they need only show up at the hearing, explain their situation, and let the Administrative Law Judge do the rest. This assumption is not wildly unrealistic. Social Security statutes, rules, and procedures require that the Administrative Law Judge assist the claimant, just as the agency staff assisted the claimant at the previous two stages.

Hearing procedures are governed by the Social Security Act, regulations and the Social Security Administration's Hearings, Appeals, and Litigation Law Manual (the HALLEX).[17] The regulations provide that: "At the hearing, the administrative law judge looks fully into the issues. . . ." 20 C.F.R. §§404.944, 416.1444. The ALJ must give notice of issues to the claimant.[18] "*When an ALJ has jurisdiction to do so*, he or she may agree to adjudicate a new issue(s) raised by a party to

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[17] https://www.ssa.gov/OP_Home/hallex/hallex.html.

[18] HALLEX I-2-2-10, Notice of Issues, https://www.ssa.gov/OP_Home/hallex/I-02/I-2-2-10.html.

a hearing, or may adjudicate a new issue(s) on his or her own initiative."[19] (emphasis added).

Neither the statute nor the regulations nor the HALLEX alert the claimant that failure to raise an issue at the administrative hearing forfeits further review of that issue. To the contrary, the rules make it clear that an ALJ cannot adjudicate a claim over which he or she lacks jurisdiction, which would certainly include the claim as to whether the ALJ was constitutionally appointed.

It is true that an ALJ may disqualify himself if he is prejudiced or partial with respect to any party, or if he has an interest in the matter pending for decision, 20 C.F.R. §§404.940, 416.1440, and that a claimant may seek recusal on any of those bases. But the regulation does not authorize a request for disqualification on the basis that the ALJ was not constitutionally appointed. Nor would it make any sense for the regulations to do so. The ALJ corps has always been appointed in a uniform fashion. If one ALJ was not constitutionally appointed, then all ALJs were not constitutionally appointed, and none of them could adjudicate any case. The individual ALJ would have no jurisdiction to rule on the constitutionality of his or her appointment, so raising the issue at this level would clearly be futile. Moreover, the claimant would be making an argument which would preclude any ALJ from rendering a favorable decision in his or her case

[19] *Id*.

seeking benefits on which to live. Surely the law cannot command such an absurd result.

The hearing procedure continues to be unusually protective of claimants. As the Social Security Administration says, "Our disability system is non-adversarial, and we assist claimants in developing the medical and non-medical evidence we need to determine whether or not they are disabled." 79 Fed. Reg. 9663 (Feb. 20, 2014). This Court has agreed that the ALJ has a "duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims v. Apfel*, 530 U.S. 103, 111 (2000).

Appellate courts throughout the nation have reaffirmed that duty. The Administrative Law Judge is required "to fully and fairly develop the record as to material issues." *Carter v. Chater*, 73 F.3d 1019, 1021 (10th Cir. 1996). Because Social Security hearings are non-adversarial, "precedent confirms that the ALJ bears a responsibility to develop the record fairly and fully, independent of the claimant's burden to press his case. The ALJ's duty to develop the record extends even to cases . . . where an attorney represented the claimant at the administrative hearing." *Snead v. Barnhart*, 360 F.3d 834, 838 (8th Cir. 2004) (internal citations omitted). The "Commissioner and claimants' counsel share the goal of assuring that disabled claimants receive benefits." *Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir. 1994). It is "a basic obligation of the ALJ to develop a full and fair record." *Thompson v. Sullivan*, 933 F.2d 581, 585 (7th Cir. 1991). "Even when a claimant is represented by counsel, it is the well-established rule in

our circuit 'that the social security ALJ, unlike a judge in a trial, must on behalf of all claimants . . . affirmatively develop the record in light of the essentially non-adversarial nature of a benefits proceeding.'" *Moran v. Astrue*, 569 F.3d 108, 112-13 (2d Cir. 2009) (internal citations omitted).

That obligation has been interpreted to require that the ALJ "scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts." *Henry v. Commissioner of Social Security*, 802 F.3d 1264, 1267 (11th Cir. 2015). The ALJ must be "especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978); accord, *Krishnan v. Barnhart*, 328 F.3d 685, 695 (D.C. Cir. 2003).

As part of the obligation to develop the record, the ALJ must ensure that the administrative record contains all of the claimant's medical records. *Torres-Pagan v. Berryhill*, 899 F.3d 54, 59 (1st Cir. 2018), quoting *Currier v. Secretary of Health, Ed. and Welfare*, 612 F.2d 594, 598 (1st Cir. 1980). That obligation includes obtaining reports from the claimant's treating physicians and copies of medical charts regarding the claimant. *Miracle v. Barnhart*, 187 F. App'x 870, 874 (10th Cir. 2006); *Carter v. Chater*, 73 F.3d 1019, 1022 (10th Cir. 1996); *Maes v. Astrue*, 522 F.3d 1093, 1096 (10th Cir. 2008); *Nelms v. Astrue*, 553 F.3d 1093, 1099 (7th Cir. 2009).

The ALJs' obligation to obtain medical evidence is not only a part of their general obligation to develop the record fully and fairly, but is also explicitly mandated by statute. The Social Security Act requires that the ALJ "make every reasonable effort to obtain from the individual's treating physician . . . all medical evidence, including diagnostic tests, necessary in order to properly make [a disability] determination, prior to evaluating medical evidence obtained from any other source on a consultative basis." 42 U.S.C. §§423(d)(5)(B), 1382c(a)(3)(G). That statutory obligation exists whether or not the claimant is represented by counsel. Whether "dealing with a pro se claimant or one represented by counsel, the ALJ must 'develop [the claimant's] complete medical history.'" *Lopez v. Commissioner of Social Sec.*, 622 F. App'x 59, 60 (2d Cir. 2015).

As the foregoing demonstrates, the ALJ commits reversible error when he or she fails in the affirmative obligation to develop the record. Amici have found no court which has held that a claimant has waived the issue of the Administrative Law Judge's failure to develop the record by failing to raise the issue at the hearing.

The duty to develop the record is so broad that an ALJ must investigate impairments that are obvious to the ALJ, even if not claimed by the claimant. See, e.g., *Harris v. Secretary of Dept. of Health and Human Services*, 959 F.2d 723 (8th Cir. 1992); *Thompson v. Sullivan*, 933 F.2d 581 (7th Cir. 1991); *Stambaugh on Behalf of Stambaugh v. Sullivan*, 929 F.2d 292 (7th Cir. 1991); *Cunningham v. Apfel*, 222 F.3d 496, 502 (8th Cir. 2000).

This is especially true in cases of mental and cognitive impairments, because people "often deny receiving treatment from a psychiatrist." *Cruz v. Apfel*, 48 F. Supp. 2d 226, 229 (E.D.N.Y. 1999). Also, claimants "often do not have insight into the reasons they are unable to work, especially when mental health illness are involved." *Kinzebach v. Barnhart*, 408 F. Supp. 2d 773, 779 (S.D. Iowa 2006). The ALJ must consequently inquire into the present status of the mental impairment and its possible effects on the claimant's ability to work. *Plummer v. Apfel*, 186 F.3d 422, 434 (3d Cir. 1999). The relevance of "obtaining a claimant's mental health treatment records to the ALJ's determination of whether the claimant suffered from mental health impairments is plainly evident." *Torres-Pagan v. Berryhill*, 899 F.3d 54, 60 (1st Cir. 2018).

It is not sufficient that the ALJ obtain only the claimant's medical records and the treatment notes made by the claimant's treating physician. If necessary to adjudicate a case, the ALJ must also obtain a report from the treating physician, POMS DI 29501.015 (April 10, 2017).[20] The Social Security Administration has even developed a form for the Administrative Law Judges to send to treating physicians to obtain their opinions and findings. *Id*.

If there are significant, prejudicial gaps in the medical records, the ALJ has an affirmative obligation to order supplemental examinations and testing. *Warren v. Colvin*, 565 F. App'x 540, 544 (7th Cir. 2014)

[20] https://secure.ssa.gov/apps10/poms.nsf/lnx/0429501015.

(IQ testing); *Nelms v. Astrue*, 553 F.3d 1093, 1099 (7th Cir. 2009); *Channel v. Colvin*, 756 F.3d 606, 608-09 (8th Cir. 2014) (mental health evaluation). That may include a consultative examination by a physician.[21] Failure to order a necessary consultative examination is reversible error. *Reed v. Massanari*, 270 F.3d 838 (9th Cir. 2001); *Reeves v. Heckler*, 734 F.2d 51 (11th Cir. 1984); *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997); *Haley v. Massanari*, 258 F.3d 742, 749 (8th Cir. 2001).

Administrative hearings themselves remain non-adversarial, 20 C.F.R. §§404.900(b), 416.1400(b), with no attorney to "prosecute" the case against the claimant's entitlement to benefits. Indeed, after undertaking a pilot project in 1982 to provide representation for the government at Social Security hearings, the Social Security Administration abandoned that project in 1987.[22]

Given the degree of the ALJ's affirmative obligation to assist the claimant in developing her case and the non-adversarial nature of the hearings, it is jarring and illogical to judicially engraft a rule that the claimant has an obligation to raise issues at the administrative hearing or be forever barred from raising those

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[21] SSA Program Operations Manual System DI 29501.010 (October 27, 2015), https://secure.ssa.gov/apps10/poms.nsf/lnx/0429501010.

[22] See, testimony, related documents, and letter to Rep. Edward R. Roybal, Chair, House Select Committee on Aging, dated March 27, 1987, from Social Security Commissioner Dorcas Hardy (on file with counsel for amici).

issues. Neither Congress, by statute, nor the Commissioner of Social Security, by regulation, has ever added an issue-exhaustion rule for administrative hearings, a fact which the Commissioner has repeatedly conceded. *Ramsey v. Commissioner of Social Security*, 973 F.3d 537, 541 (6th Cir. 2020); *Cirko o/b/o Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 153 (3d Cir. 2020).[23]

D. Appeals Council

A claimant who loses an administrative hearing has a right to appeal to the Social Security Appeals Council. 20 C.F.R. §§404.967; 416.1467. Again, the appeal form[24] has only one small line to insert the reason for the appeal.

The Appeals Council process is, again, a paper review. The claimant has no right to appear in person before the Appeals Council, although the Appeals Council has discretion to grant oral argument. There is no

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[23] Despite the Commissioner's concession, the Tenth Circuit *sua sponte* interpreted 20 C.F.R. §§404.938-404.939 as requiring claimants to exhaust issues by raising them before the ALJ. *Carr v. Comm'r of Soc. Sec.*, 961 F.3d 1267, 1274-75 (10th Cir. 2020). Contrary to the Tenth Circuit's interpretation, those two regulations only require ALJs to notify claimants of "specific issues to be decided" at the hearings, and require claimants to object only to those "issues to be decided." The regulations do not require claimants to object to issues about which they have not been notified; moreover, the regulations do not inform claimants that failure to raise other issues will result in forfeiture of such issues on judicial review.

[24] Form SSA 520-U5, https://www.ssa.gov/forms/ha-520.pdf.

requirement that the claimant exhaust administrative remedies at the Appeals Council stage of review. *Sims v. Apfel*, 530 U.S. 103 (2000). In the 20 years since this Court decided *Sims*, Congress has not imposed an issue-exhaustion requirement on claimants by legislation, as it has imposed for proceedings before other types of administrative agencies, notably the Securities and Exchange Commission. See, 15 U.S.C. §78y(c)(1) and 15 U.S.C. §80b-13(a). In the past 20 years, the Social Security Administration has not, by regulation, created an issue-exhaustion requirement.

II. An issue-exhaustion requirement would wreak havoc upon the administrative hearing process

Currently, the administrative hearing process is non-adversarial. Judicially grafting an issue-exhaustion requirement onto that process would change the process into a highly adversarial process. If claimants had to identify each and every potential issue at the administrative level, claimants would need to "lawyer up"[25] in order to ensure that no potential issues in their cases were overlooked. Such a rule would cause irreversible hardship for the claimants who are pro se at administrative hearings, as they would very likely forfeit most of the potential issues in their cases.

For claimants represented by counsel, in order to protect their clients, counsel would have to submit a

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[25] See, e.g., *Blackman v. District of Columbia*, 633 F.3d 1088, 1095 (D.C. Cir. 2011) (Brown, J., concurring).

laundry list of objections at each hearing. Claimants' attorneys would have to comb through the medical evidence line by line, and state their objections to each objectionable entry in their clients' medical charts or consultative examination reports, explaining which entries were entitled to credence, which were not, and why. Administrative Law Judge hearings, which presently are allotted 30 minutes to an hour, and some of which take up far less time,[26] would expand to durations of many hours if claimants were required to exhaust all issues before Administrative Law Judges.

The District Court and Court of Appeals review procedures are an important error-correction process. Requiring a claimant to raise all issues at her administrative hearing would create the attendant risk that her failure to raise each and every issue would cause a truly disabled individual to be wrongly denied benefits, merely because she did not identify a potential mistake on the part of the ALJ.

For example, in *Yenik v. Comm'r of Soc. Sec.*, 522 F. App'x 65 (2d Cir. 2013), the Court of Appeals *sua sponte* noticed that the claimant's administrative record contained medical records of someone other than the claimant, records which the ALJ had mistakenly reviewed in deciding that the claimant was not disabled. The Appeals Council had apparently not noticed that

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[26] See, e.g., *Watson v. Shalala*, 5 F.3d 1495 (5th Cir. 1993) (Table), 1993 WL 391418, *1 (court found adequate, hearing lasting 17 minutes and full transcript was 9 pages); *Carrier v. Sullivan*, 944 F.2d 243, 245 (5th Cir. 1991) (26-minute hearing); *James v. Bowen*, 793 F.2d 702, 705 (5th Cir. 1986) (10-minute hearing).

medical records of another individual were mistakenly contained in the file. Neither the claimant's attorney nor the government's attorney noticed the error in the District Court, nor had the District Judge noticed the mistake. An issue-exhaustion rule would prohibit appellate judges from correcting such incontrovertible error.

Likewise, in *Randall v. Sullivan*, 956 F.2d 105 (5th Cir. 1992), the record contained an EMG study of a different patient, which the ALJ had relied upon in denying benefits to Shirley Randall, thinking, incorrectly, that the test results were hers. While the claimant herself may not have raised the issue before the ALJ, the Fifth Circuit corrected the error. Again, a rule requiring issue exhaustion would have prevented correction of that obvious mistake.

III. The hearings conducted by Administrative Law Judges are informal.

A salient characteristic of ALJ hearings in the Social Security system is that they are informal. An ALJ is to conduct a disability hearing in "an informal, nonadversarial manner." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1152 (2019) (citing 20 C.F.R. §404.900(b)).

The Commissioner of Social Security has repeatedly confirmed the informality of administrative hearings. Just recently, the Commissioner stated that "there are significant differences between an informal, non-adversarial Social Security hearing and the type of formal, adversarial adjudication to which the APA

applies. . . . [U]nder our 'inquisitorial' hearings process, an ALJ fulfills a role that requires him or her to act as a neutral decisionmaker and to develop facts for and against a benefit claim. The ALJ's multiple roles involve, in essence, wearing 'three hats': helping the claimant develop facts and evidence; helping the government investigate the claim; and issuing an independent decision." 85 Fed. Reg. 73138, 73140 (Nov. 13, 2020).

The Commissioner's regulatory pronouncements about the informality of hearings are often reinforced by his ALJs, who explicitly emphasize that informality and offer reassuring comments to claimants at the hearings. For example, in one case:

> 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 everyone is getting cross-examined. It's real low key, no big deal.' Tr. 28.

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).

Given the informal nature of the proceedings, claimants understandably do not believe that they will lose important rights, including the right to a hearing conducted by a constitutionally-appointed officer of the

United States, if they fail to raise such issues at their hearings. As the *Probst* court noted, in holding that claimants had not forfeited their challenges to the authority of ALJs under the Appointments Clause when they failed to raise those challenges at the ALJ hearings: "The ALJ's statement . . . goes well beyond [the non-adversarial nature of the proceedings] 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." *Id*. Thus, the judicially-created issue exhaustion requirement imposed by the Eighth and Tenth Circuits is particularly inappropriate in the informal context of Social Security hearings.

IV. Many claimants appear at their ALJ hearings unrepresented by counsel, leaving them particularly ill-equipped to raise issues such as the constitutional status of the ALJs assigned to hear their claims.

Claimants may appoint either attorneys or non-attorney representatives to represent them in the Social Security claims process. 20 C.F.R. §§404.1705, 416.1505. However, a large number of claimants appear at their ALJ hearings with no representation at all, and a smaller number appear with non-attorney representatives. In Fiscal Year 2018, 765,554 cases were decided by the Commissioner's ALJs; 28 percent of those claimants (215,050) were completely unrepresented at

their hearings, and another 11 percent (82,583) were represented by individuals who were not attorneys. Thus, 39 percent of all claimants were not represented by counsel when they appeared before ALJs in FY 2018. The lack of representation was even more pronounced among the 223,878 of claimants presenting claims for SSI: more than half of all SSI claimants in FY 2018 (113,319, or 51 percent of SSI claimants) were not represented by counsel at their hearings.[27]

The relatively low incidence of legal representation is the result of several factors, including the financial circumstances of claimants who have lost the ability to work and generate income, and the number of attorneys available to handle such claims. Whatever the reasons, however, the effect seems clear: pro se claimants may (or may not) be able to describe their medical conditions and disabling symptoms, but cannot reasonably be expected to raise technical legal issues at their hearings, especially where, as here, those issues involve a relatively obscure aspect of the Constitution, whose application to their claims was opaque even to many attorneys. Moreover, prior to his July 16, 2018, ratification, the Commissioner did not provide claimants any notice that there was good reason to question the constitutionality of those appointments. As the Third Circuit noted, although ALJs have a heightened duty to assist pro se claimants in presenting their

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[27] Representative Rates by Adjudication Level, https://www.ssa.gov/foia/resources/proactivedisclosure/2019/Representative%20Rates%20by%20Adjudicative%20Level%20FY%202008%20-%20FY%202018.pdf.

claims, "even the most diligent ALJ is unlikely to raise a sua sponte objection to his own appointment." *Cirko o/b/o Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 157 (3d Cir. 2020).

Claimants with hearings scheduled prior to ratification were thus highly unlikely to have been aware of any potential Appointments Clause issue, and the few who became aware of the issue would have felt daunted by the prospect of challenging the authority of the very ALJ empowered to decide their cases. As one district court has noted, such an "attack on the structural integrity of the process itself[ ] is as adversarial as it gets." *Muhammad v. Berryhill*, 381 F. Supp. 3d 462, 467 (E.D. Pa. 2019). These factors explain why so few claimants mounted Appointments Clause challenges to the Commissioner's ALJs prior to this Court's decision in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), and why those who did not do so should not be penalized by the judicially-created issue exhaustion requirement imposed by the Eighth and Tenth Circuits.

V. Raising Appointments Clause objections to ALJs at hearings would have been a futile exercise for claimants.

It would have been futile for Petitioners to have raised the Appointments Clause issue before the ALJs who heard their claims. At the time of the hearings in their claims, the ALJs had no authority to resolve Appointments Clause challenges. The Commissioner

himself issued internal policy guidance in January 2018, prior to the *Lucia* decision, instructing his ALJs that they were to respond to any Appointments Clause challenge only by "acknowledg[ing] that the issue was raised," and by noting in the decision that the ALJ does "not have the authority to rule on [the] challenge" because "challenges of the constitutionality of the appointment of SSA's ALJs are outside the purview of the administrative adjudication." SSA, EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (2018); Davis C.A. App. 61-63.[28] Thus, the Commissioner's stated policy barred any relief for claimants raising such challenges during the administrative proceedings, and effectively acknowledged the futility of raising an Appointments Clause claim at the ALJ level. Even if ALJs had been given the authority by the Commissioner to rule on such challenges and had recused themselves on that basis, claimants could not have obtained hearings by constitutionally-appointed ALJs because, under that logic, the entire ALJ corps was similarly situated, lacking constitutional appointments prior to July 16, 2018.

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[28] The Commissioner subsequently issued another message, EM-18003 REV, which was effective on June 25, 2018. Both messages make clear that it was the Commissioner's policy that neither the ALJ nor the Appeals Council was allowed to make any ruling on an Appointments Clause challenge. The Commissioner did not change his policy until March 15, 2019, when he issued SSR 19-1p, 84 Fed. Reg. 9582 (Mar. 15, 2019), a ruling providing at least some relief to claimants who raised Appointments Clause challenges before the ALJ or the Appeals Council (but not to Petitioners).

Claimants certainly had no access to the Commissioner (the only agency official empowered to provide a remedy for the Appointments Clause violation) through the administrative review process. Because it would have been futile for Petitioners to challenge the ALJs' appointments and authority to hear their cases below, the Court should not judicially-impose forfeiture of their Appointments Clause claims in these circumstances.

Moreover, this Court has held that a Social Security claimant is not required to exhaust administrative remedies and may raise a constitutional claim for the first time on appeal to a federal court, because the agency has no power to adjudicate such a challenge, which is beyond the scope of the administrative proceeding. *Mathews v. Eldridge*, 424 U.S. 319, 329-30 (1976) ("It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge."). Similarly, this Court has held that administrative exhaustion of a constitutional claim is not required "where the challenge is to the adequacy of the agency procedure itself," and the agency lacks authority to grant relief. *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992); see also *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such

questions."); *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) ("[M]atter[s] of constitutional law [are] concededly beyond [SSA's] competence to decide," and requiring they be heard there would be "futile and wasteful . . . "). Thus, because Petitioners' Appointments Clause challenges would have been futile if raised before the ALJs who heard their claims, they should not have been required to exhaust those challenges by the Courts of Appeals for the Eighth and Tenth Circuits.

CONCLUSION

As Justice Black wrote for a unanimous Court almost eighty years ago, "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). The Commissioner urges this Court to adopt a broad rule of forfeiture appropriate in formal judicial proceedings, but ill-suited to the informal, non-adversarial and inquisitorial system of Social Security administrative proceedings. Adoption of the rule sought by the Commissioner would leave Petitioners with no remedy for the Commissioner's uncontested violation of the Appointments Clause, or for the denial of their disability benefits by ALJs who were not

appointed in conformity therewith. The Court should reverse the judgment of the Courts of Appeals for the Eighth and Tenth Circuits and hold that Petitioners did not forfeit their Appointments Clause challenges by failing to raise those challenges before the ALJs who heard their claims.

Respectfully submitted,

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