No. 19-1442

In the Supreme Court of the United States

WILLIE EARL CARR AND KIM L. MINOR,
PETITIONERS,

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

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Sims v. Apfel, 530 U.S. 103 (2000), resolves this case. When an agency does not depend on the parties to raise issues, courts should not punish parties for taking the agency at its word. *Sims* held that claimants need not raise issues before the Social Security Appeals Council to preserve those issues for judicial review. For the same reasons, claimants need not raise issues to Social Security ALJs as a precondition of judicial review. ALJ proceedings are equally non-adversarial and assign the ALJ primary responsibility for issue-spotting. The Social Security Administration (SSA) has never informed claimants of any ALJ issue-exhaustion requirement. Retroactively imposing one would be grossly inappropriate.

At a minimum, petitioners did not need to challenge the constitutionality of ALJs' appointments before those very ALJs to obtain judicial review of their Appointments Clause challenges. Those challenges fall within the well-established rule that parties need not exhaust constitutional challenges before the agency. Exhausting these challenges was also futile. The SSA told its ALJs that their appointments were, at least, constitutionally questionable—then barred ALJs from considering the issue.

The government responds with an anti-*Sims* jeremiad that largely reiterates its *Sims* brief. The government urges this Court to apply a default "general rule" of issue exhaustion to every agency context—i.e., the position *Sims* rejected. The government also invents an Appointments Clause-specific issue-exhaustion rule, despite many precedents allowing parties to raise Appointments Clause challenges for the first time in court. And the government attacks strawmen. Petitioners do not oppose all judicially created forfeiture rules or reject a century of administrative law. The government, not petitioners, seeks a sea change through its rearguard attack on *Sims*, and would impose punitive issue-exhaustion rules that would mire the Social Security system in kitchen-sink filings.

I. Claimants Need Not Challenge the Constitutionality of ALJs' Appointments Before Those ALJs

Every reason why *Sims* declined to impose an issue-exhaustion requirement in non-adversarial SSA Appeals Council proceedings applies to ALJ proceedings. The government's counterarguments misapprehend ALJ proceedings and SSA regulations. Independently, under standard exhaustion principles, petitioners did not need to raise their constitutional challenges to the agency, especially since doing so would have been futile.

A. *Sims* Forecloses Imposing Implied Issue-Exhaustion Requirements in Non-Adversarial SSA Proceedings

1. **SSA Statutes and Regulations**. Contrary to the government's mischaracterizations (at 27, 28), petitioners do not contend that courts can never imply an issue-exhaustion requirement. Congress's express imposition of issue-exhaustion requirements for some agency proceedings and not others does, however, suggest that implied issue-exhaustion requirements should be infrequent. The government never explains why Congress would superfluously mandate issue exhaustion in other contexts were that always the default rule. Carr Br. 20; Davis Br. 23-24.

Here, just like in *Sims*, no statute or regulation requires claimants to exhaust issues before ALJs. The government (at 35 n.2) concedes this point. Congress's express imposition of an issue-exhaustion requirement in one particular SSA context further cuts against courts requiring issue exhaustion in other SSA proceedings. Congress mandated that when the SSA proceeds against parties for knowingly making false statements during benefits determinations, those parties must raise all objections to the agency to preserve judicial review. 42 U.S.C. § 1320a-8(a)-(d). That proceeding *is* adversarial, unlike benefits determinations. Carr. Br. 35; Davis Br. 23. Congress also imposed express remedy-exhaustion requirements. Davis Br. 22. These features weigh against reading an extra barrier to relief into a statutory scheme that is "unusually protective" of claimants. *See Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (quoting *Bowen v. City of New York*, 476 U.S. 467, 480 (1986)).

The government (at 20) contends that 42 U.S.C. § 405(g) bars courts from "decid[ing] issues in the first instance" by directing the SSA to make "findings of fact" and "decisions as to the rights" of claimants and courts to "review" SSA's decisions. *Sims* rejected this argument,

explaining that "nothing in § 405(g) … bars judicial review of [petitioner's] claims," even though the SSA had never passed upon two of those claims. 530 U.S. at 107 (majority op.). Section 405(g) requires the presentment of claims, not particular issues. *Smith*, 139 S. Ct. at 1779-80.

2. **Non-Adversarial Nature**. Under *Sims*, the dispositive question is whether SSA ALJ proceedings are "not adversarial," in which case "the rationale" for courts to read in an issue-exhaustion requirement is "much weaker." 530 U.S. at 110 (majority op.). The *Sims* plurality refused to imply an issue-exhaustion requirement for non-adversarial Appeals Council proceedings because the SSA depends on Appeals Council judges, not claimants, to raise issues. *Id.* at 112 (plurality op.).

The same is true of ALJ proceedings. *Id.* at 111-12 (plurality op.); Carr Br. 24-27; Davis Br. 25-27. In all SSA proceedings, the agency is the investigator, not the adversary, prompting hundreds of thousands of claimants to forgo representation. Carr. Br. 24-27, 42. ALJs tell claimants that proceedings will be informal, like "sitting in your living room and talking about your life," not "Law and Order." NOSSCR Br. 23 (internal quotation marks omitted); Professors' Br. 18-19. "It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits," and Appeals Council judges function similarly. *Sims*, 530 U.S. at 111. At both steps, the SSA charges these adjudicators with conducting a plenary review and spotting all relevant issues. *Id.*; Carr Br. 24-27; NOSSCR Br. 14-18.

The government also ignores the critical point that the Appeals Council exercises plenary review *after* ALJ proceedings. Carr Br. 26-27. Unlike appellate courts, the Appeals Council raises issues *sua sponte* even if the ALJ or claimants missed them, and does not treat omissions in ALJ proceedings as forfeitures. *See Sims*, 530 U.S. at 111

(plurality op.); 20 C.F.R. §§ 404.900(b), 404.970(b), 404.976; HALLEX §§ I-3-3-1, I-3-3-3. The agency thus considers it irrelevant for purposes of further *agency* review whether claimants raised issues in ALJ proceedings. If the SSA is indifferent to whether claimants preserve issues before ALJs, courts should not seize upon a nonexistent shortcoming to block judicial review.

The government (at 19-20, 33-34) emphasizes that ALJs must hold hearings, whereas the Appeals Council has discretion to decline requests for further review. The government infers from these facts that claimants have more opportunities to raise issues to ALJs. But *every* opportunity in ALJ or Appeals Council proceedings occurs against the backdrop of the agency's reassurances that raising issues is voluntary. The government (at 14, 19, 33) invokes equity, but there is nothing equitable about the government's bait-and-switch of telling claimants that ALJs will issue-spot, then branding claimants "less diligen[t]" for bypassing "opportunities" to raise issues themselves, U.S. Br. 34.

Further, *Sims* held that claimants need not exhaust issues even where the Appeals Council *grants* review, in which case claimants have many of the same chances to raise issues as in ALJ proceedings. Raising issues is still optional throughout. Thus, when claimants request review in both ALJ and Appeals Council proceedings, claimants need not identify any issues, and can even obtain review by cursorily suggesting that they disagree with the agency's determination. Carr Br. 26.

The government (at 8, 19, 33-34) similarly chastises claimants for "sleeping on their rights" by opting against raising issues in written statements, briefs, or oral arguments before the ALJ. *See* 20 C.F.R. §§ 404.946(b), 404.949. But Appeals Council proceedings afford similar

opportunities. *Sims*, 530 U.S. at 111 (plurality op.). Regardless, this Court should not retroactively punish claimants for bypassing voluntary opportunities.

The government (at 34-35) emphasizes that in ALJ proceedings, 20 C.F.R. § 404.935(a) informs claimants that they "should submit information or evidence" with their hearing requests and should identify any additional evidence. But those instructions nowhere suggest that claimants should raise legal issues, like Appointments Clause challenges. Moreover, even when claimants fail to submit information or evidence, ALJs—not claimants—shoulder the "duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims*, 530 U.S. at 111 (plurality op.). ALJs commit reversible error if they fail to obtain medical records and experts for claimants, and ALJs must even look into impairments that claimants do not raise, but which come to the ALJ's attention. NOSSCR Br. 14-18.

The government (at 19, 35) faults claimants for not raising additional issues after receiving the ALJ's Notice of Hearing identifying the issues to be decided. *See* 20 C.F.R. §§ 404.938, 404.939. But the SSA interprets these regulations to mean that claimants should object if ALJs have erroneously framed the *identified* issues, not if ALJs failed to raise other issues. Carr Br. 22 (citing HALLEX § I-2-2-20); Professors' Br. 15-17. The SSA expects review of a Notice of Hearing to take 30 minutes, and expects just 10 claimants per year to object, which is incompatible with requiring claimants to spot any issues the ALJ did not list. *See* Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Levels, 72 Fed. Reg. 61,218, 61,227 (Oct. 29, 2007). Further, ALJs keep looking for issues after any response to a Notice of Hearing, so failing to object is

meaningless. Carr Br. 23. In any event, claimants' opportunity to respond to the Notice of Hearing also does not distinguish ALJs from the Appeals Council, which similarly notifies claimants of "the reasons for the review and the issues to be considered." 20 C.F.R. § 404.973. Under the government's theory, because claimants could theoretically ask the Appeals Council to add issues, *Sims* was wrongly decided.

The government (at 35-36) concludes that because the ALJ hearing "is the main event in the SSA administrative process," failing to raise issues before ALJs is "more disruptive" than before the Appeals Council. But precisely because ALJs are the investigative stars of the SSA system, it would be especially irrational to punish claimants for missing issues that the ALJ ignored.

Finally, the government (at 39) absolves ALJs for "failing to investigate issues concerning the Appointments Clause," because ALJs' "purpose" is "to investigate the claim, not to investigate the investigator." If ALJs have jurisdiction over Appointments Clause challenges, ALJs could and should have raised the issue. And if ALJs lack jurisdiction over Appointments Clause challenges, raising the issue to ALJs would be futile. Carr Br. 27-28; IJ Br. 17; *infra* pp. 10-12. Either way, the government should not be punishing claimants for this omission.

3. **Lack of Notice.** The government (at 24, 35 n.2) admits that the SSA has never notified claimants that they must raise issues to ALJs to preserve them for judicial review. That same lack of notice regarding an Appeals Council issue-exhaustion requirement underpinned Justice O'Connor's *Sims* concurrence. 530 U.S. at 113-14; Carr Br. 28-31.

The government responds (at 38) that "this Court's general rule of administrative forfeiture *already* provides

sufficient notice." But the government made a similar argument in *Sims*. Br. of United States, *Sims v. Apfel*, No. 98-9537 (Jan. 20, 2000), at 45. After *Sims* ruled out an implied issue-exhaustion requirement in Appeals Council proceedings, claimants would have even less reason to expect a default forfeiture rule to apply in materially similar ALJ proceedings.

The government (at 35 n.2, 38) contends that because SSA regulations do not expressly relieve claimants of the need to exhaust specific issues before ALJs, "even unrepresented claimants" should know to exhaust issues before ALJs. But as Justice O'Connor observed, SSA regulations that apply both to ALJs and the Appeals Council "affirmatively suggest that specific issues need not be raised" by prescribing a one-page, 10-minute form for requesting review, telling claimants they need not file a brief, and stating that adjudicators undertake "plenary" review of cases for issues. 530 U.S. at 113-14. And the SSA adds further reassurances about ALJs' issue-spotting throughout the proceedings. Carr Br. 24-26, 29-30.

Finally, the government (at 38) sidesteps the punitive consequences of requiring unrepresented claimants to exhaust issues before ALJs, describing them as a "small fraction" of claimants. That "small fraction" comprised 215,050 individuals in 2018 alone. SSA, Hearing Disability Decisions and Representation Rates by Title and Fiscal Year (Jan. 8, 2019), https://tinyurl.com/ssa-rate-of-representation.

The idea that hundreds of thousands of unrepresented claimants are equipped to search for lurking Appointments Clause violations or to second-guess ALJs' legal interpretations is ludicrous, and would impose cruel hardships. Creating an issue-exhaustion exception for unrepresented claimants, as the government (at 38) floats, is no answer. That approach could perversely encourage

claimants to forgo representation, which generally improves claimants' odds of obtaining benefits. ALJs would also presumably have to monitor if claimants have a lawyer (or non-lawyer representative) at every stage, and calibrate instructions and investigations accordingly. The Social Security process is complex enough without throwing a new spanner in the works.

B. Under Remedy-Exhaustion Principles, Claimants' Appointments Clause Challenges Are Reviewable

Had claimants simply forgone ALJ proceedings, their Appointments Clause challenges would be judicially reviewable under established rules allowing review of constitutional challenges and for futility. Applying a harsher rule to claimants who merely failed to exhaust the issue, not their full administrative remedies, would be senseless. Carr Br. 36-39.

1. **Constitutional challenges.** "[W]hen constitutional questions are in issue, the availability of judicial review is presumed," because such issues "obviously are unsuited to resolution in administrative hearing procedures." *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *see Sims*, 530 U.S. at 115 (Breyer, J., dissenting) (recognizing "established exception" to "ordinary 'exhaustion'" rules for "constitutional claims"); IJ Br. 5-8; Professors' Br. 23-24; PLF Br. 10.

The government (at 41) asserts that parties can only raise constitutional challenges for the first time in court if they would be "unfixable" in the agency. But *Mathews v. Eldridge* rejected the fixable/unfixable distinction as "not … significant," allowing the claimant to raise his constitutional challenge for the first time in court even though the SSA could have adjusted the challenged procedures had the claimant raised his challenge there first. 424 U.S. 319, 329-30 (1976); *accord Bowen*, 476 U.S. at

483-86 (claimants could challenge unstated SSA policy for the first time in court); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490-91 (2010) (addressing Appointments Clause challenge not raised before agency). The government (at 42-43) shoehorns these cases into an "interests of justice" exception to issue exhaustion, but if the exception is broad enough to cover those cases, it should apply here, too.

The government's purported counterexamples (at 41) do not hold otherwise. None of the cited cases rest on a fixable/unfixable distinction within constitutional challenges; some do not even involve exhaustion. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 20-23 (1974) (resting on unique limits on judicial review in the Renegotiation Act); *United States v. Ill. Cent. R.R.*, 291 U.S. 457, 463 (1934) (because of agency concession, "constitutional question … vanish[ed] from the case"); *White v. Johnson*, 282 U.S. 367, 369, 374 (1931) (resting on unique procedural features of Radio Act); *Dalton Adding Mach. Co. v. State Corp. Comm'n*, 236 U.S. 699, 700-01 (1915) (resting on ripeness grounds).

United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927) (cited at U.S. Br. 43) is also far afield. That case rests on a Fifth Amendment-specific rule: witnesses who wish to rely on the Fifth Amendment guarantee against self-incrimination must invoke the privilege during adversarial proceedings. *Id.* at 113; *see Salinas v. Texas*, 570 U.S. 178, 183, 187 (2013).

2. **Futility.** The government (at 44-45) agrees that parties need not exhaust issues before an agency when doing so would be futile. But the government rewrites that standard, contending that the hypothetical possibility that the SSA Commissioner could have ratified ALJs' appointments earlier defeats futility.

This argument is baseless. Futility exists when the agency "lack[s] authority to grant the type of relief requested" or "lacks institutional competence to resolve the particular type of issue." *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992); *see* Carr Br. 39; Davis Br. 38; Professors' Br. 23-24. Even in courts, forfeiture involves "the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). It is irrelevant that Appointments Clause violations do not deprive ALJs of jurisdiction to render decisions, U.S. Br. 40; if ALJs lacked jurisdiction to *resolve* Appointments Clause challenges, objecting would have been futile.

The government (at 45-46) protests that the SSA only barred ALJs from resolving Appointments Clause challenges in January 2018, after petitioners' ALJ proceedings completed. But the government elsewhere (at 46) suggests that ALJs have always lacked the authority to resolve Appointments Clause challenges. Nor could ALJs have granted relief; they could not reappoint themselves, and all ALJs were appointed in the same unconstitutional manner. Forcing claimants to raise an issue that the ALJ could not adjudicate or remedy is, by definition, futile. NCLA Br. 11-14; NOSSCR Br. 26-29.

The government incredibly claims (at 45-46) that a "rash" of Appointments Clause objections might have prompted the Commissioner to ratify ALJs' appointments earlier. But it defies credulity that some critical mass of claimants' objections would have made a difference when the government's concession that many ALJs across agencies were unconstitutionally appointed was insufficient motivation. Carr Br. 31. The SSA's preemptive instruction that ALJs should not entertain Appointments Clause challenges plainly determined that ALJs not adjudicate those claims, no matter their number. SSA, EM-

18003 (Jan. 30, 2018), *Davis* C.A. App. 61-63. This Court should not deprive claimants of a hearing in a forum that can entertain their Appointments Clause challenges just because claimants failed to perform the empty gesture of raising those challenges to ALJs. IJ Br. 17-19; NCLA Br. 14-15.

II. The Government's Other Arguments Are Meritless

Sims already rejected the government's arguments for applying a "general rule" of issue exhaustion to all agency proceedings. Other precedents likewise refute the government's argument that the Appointments Clause imposes its own issue-exhaustion requirement.

A. *Sims* Rejected the Government's General Issue-Exhaustion Rule

Most of the government's brief rehashes an argument that *Sims* rejected: that, regardless of agency context, "a party who fails to raise an objection in administrative proceedings may not raise it for the first time in court." U.S. Br. 11; *see id.* 11-15, 18-24, 25-39. Only in the very back of its brief (at 36) does the government concede that "a majority of the Court" in *Sims* concluded that the case "for requiring issue exhaustion" is "much weaker" in non-adversarial agency proceedings, 530 U.S. at 109. Yet the government turns around and claims that "no basis exists to turn the investigative nature of a proceeding into a controlling legal test." U.S. Br. 36; *see id.* 28-32, 38.

Stare decisis, administrative-law principles, and common sense say otherwise. *Sims* refutes the government's mantra (at 36-37) that issue exhaustion is the "general" rule even in "less formal" administrative proceedings. 530 U.S. at 109 (majority op.). The majority in *Sims* interpreted the government's primary authorities—*Hormel* and *L. A. Tucker*—to "suggest [that] the desirability of a court imposing a requirement of issue exhaustion depends

on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.*; *accord McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (whether to require remedy exhaustion depends on "the characteristics of the particular administrative procedure").

The *Sims* majority also rejected the government's reliance (at 12-13, 38, rehashed from its *Sims* brief) on the Court's description of issue exhaustion as a "general rule." Instead, *Sims* explained that the rule is "general" only because "it is *usually* appropriate under an agency's practice for contestants *in an adversary proceeding* before it to develop fully all issues there." 530 U.S. at 109 (emphases added) (internal quotation marks omitted); *accord id.* at 113 (O'Connor, J. concurring in part and concurring in the judgment). Given how frequently the government's arguments contravene *Sims*, the government's accusation (at 27) that petitioners are trying to jettison "a century of precedent concerning administrative law" rings hollow.

For instance, the government (at 22-23) portrays *L. A. Tucker*, not *Sims*, as the closest analogue to this case. That *Sims* distinguished *L. A. Tucker* is reason enough to reject that argument. *See* 530 U.S. at 110 (majority op.). Besides, *L. A. Tucker* supports an agency-specific approach. The rule that courts should respect the agency's decision unless the agency "erred against objection made at the time appropriate under its practice," *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), begs the question of when (if at all) parties should object under the relevant agency's practice. And *L. A. Tucker* involved an adversarial administrative proceeding and a non-constitutional claim. *Id.* at 34-35. *Sims*, by contrast, involved the SSA and repeatedly discussed the non-adversarial nature of ALJ proceedings.

The government (at 12-13) overstates the "deep roots" of its forfeiture rule. *L. A. Tucker* culminated a line of early twentieth-century cases requiring litigants to raise technical issues implicating agency expertise. Carr Br. 33-34; Davis Br. 31-32; *see, e.g.*, *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S 143, 155 (1946); *Helvering v. Pfeiffer*, 302 U.S. 247, 249-50 (1937). Even in their heyday, courts applied those issue-exhaustion rules inconsistently. *E.g.*, *Hormel v. Helvering*, 312 U.S. 552, 559 (1941); *Sung v. McGrath*, 339 U.S. 33 (1950). This Court has not applied those rules to find forfeiture since 1952, and ensuing doctrinal developments weigh against extending an atextual, prudential rule to thwart judicial review. NCLA Br. 21-27.

The government (at 13-14, 25-26) responds that its rule applies consistently, but just has myriad exceptions. A rule subject to an "ends of justice" exception is hardly predictable. *Contra* U.S. Br. 13, 29. The government also admits exceptions for futility, criminal cases, jurisdictional objections, and for other "exceptional cases or particular circumstances." U.S. Br. 13-14 (quoting *Hormel*, 312 U.S. at 557). All of those caveats just confirm *Sims*'s wisdom in returning to first principles and eschewing reflexive judicial imposition of issue-exhaustion rules to agency proceedings that do not resemble adversarial litigation. Professors' Br. 30-32.

Sims also forecloses the government's argument (at 14) that courts "usurp[] the agency's function" if they "consider[] an issue never presented to the agency." Even when a claimed error arises only in an ALJ's opinion, and thus was never raised earlier, *Sims* dictates that claimants need not exhaust the issue to the Appeals Council to preserve judicial review. *See* 530 U.S. at 110-12 (plurality op.). The government also overstates administrative-law

principles, which at most suggest that agencies in adversarial proceedings should get first crack at technical questions requiring expertise. That rationale is inapplicable to structural constitutional issues like the Appointments Clause. Carr Br. 35-36. The government's rejoinder (at 44) that Appointments Clause challenges implicate agency expertise contradicts *Free Enterprise Fund*, which considered such constitutional questions "outside [the agency's] competence and expertise." 561 U.S. at 491.

The government (at 37) continues its assault on *Sims* by mischaracterizing *Richardson v. Perales*, 402 U.S. 389 (1971), as an example of where this Court required Social Security claimants to exhaust an issue before an ALJ. *Sims* rightly disregarded this argument when the government floated it then. Br. of United States, *Sims v. Apfel*, No. 98-9537 (Jan. 20, 2000), at 33-34. *Perales* held that due process does not require giving claimants an opportunity to cross-examine physicians who provided adverse evidence. 402 U.S. at 402. The Court listed nine rationales; number six was the claimant's failure to seek subpoenas to compel cross-examination. *Id.* at 404-05. Self-evidently, if the agency offered the claimant a way to obtain the very process he was purportedly denied, the agency provided adequate process.

B. There Is No Appointments Clause Exception to *Sims*

The government (at 15-18, 27-28, 38-39) alternatively contends that *Sims* is not controlling based on a purported rule of issue exhaustion specific to the Appointments Clause. Were it up to the government, nobody injured by an Appointments Clause violation would receive a remedy, because the *de facto* officer doctrine would insulate every past act of an unconstitutionally appointed officer from invalidation. The government acknowledges that this Court "took a different approach" in *Ryder v.*

United States, 515 U.S. 177 (1995), which held that the *de facto* officer doctrine does not apply to Appointments Clause violations. But the government urges adoption of an Appointments Clause issue-exhaustion rule to "perform[] (in a more limited way) the same function" of avoiding "disruption" from invalidating unconstitutional acts. U.S. Br. 15-16.

The government's theory is nonsensical. As the government (at 16) concedes, *Ryder* rejected the government's spin on the common-law history: "[C]ases in which [the Court] had relied on [the *de facto* officer] doctrine did not involve basic constitutional protections designed in part for the benefit of litigants." 515 U.S. at 182 (internal quotation marks omitted); *see Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality op.) (similar). The government does not need a substitute for a doctrine that never protected officers' unconstitutional acts in the first place.

Nor do the Court's precedents support fashioning a special Appointments Clause issue-exhaustion rule. The government (at 16) points to the Court's observation in *Lucia v. SEC* that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." 138 S. Ct. 2044, 2055 (2018) (quoting *Ryder*, 515 U.S. at 182). But neither *Lucia* nor *Ryder* holds the inverse—that failing to timely raise an Appointments Clause challenge before the agency forfeits relief. Instead, the parties in both cases objected in agency proceedings, so the Court went no further. *See Ryder*, 515 U.S. at 182; *Lucia*, 138 S. Ct. at 2055.

Moreover, the concept of a "timely challenge" in agency proceedings just raises the question of when parties should raise Appointments Clause challenges under a particular agency's procedures. In *Lucia*, which involved SEC proceedings, Congress required parties to exhaust issues before the SEC. 15 U.S.C. § 78y(c); Carr Br. 35.

Ryder involved adversarial court-martial proceedings, which follow similar waiver and forfeiture rules as federal courts. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). But because the SSA charges ALJs with raising all relevant issues within their jurisdiction and no regulations require exhaustion, no prescribed time exists for SSA claimants to raise Appointments Clause objections.

The government (at 9, 17-18) argues that remedying Appointments Clause violations would be "disrupti[ve]." That objection would reward the government for allowing constitutional problems to persist, and would invite the invention of other issue-exhaustion requirements for other "disrupt[ive]" constitutional or statutory errors. For similar reasons, this Court should reject the government's self-serving suggestion (at 18) that judges might ignore Appointments Clause violations if the remedies seem too administratively inconvenient.

The government's fears are also unfounded. A year ago, the government was fine with invalidating unconstitutionally appointed adjudicators' past acts, because "the costs of invalidating past acts tend to be lower for adjudicators," where the remedy is a new hearing. Reply and Response Br. of United States, *Fin. Oversight Mgmt. Bd. v. Aurelius Inv., LLC*, No. 18-1334 (Sept. 19, 2019), at 39-40. The government contended: "The rigid application of the *de facto* officer doctrine" to adjudicators would "systematically deprive challengers of the only meaningful remedy (namely, invalidation of the adjudicator's past acts)," which would deter injured parties from "rais[ing] Appointments Clause challenges." *Id.* If the *de facto* officer doctrine should not apply to adjudicators, the government's proposed substitute should not apply either.

The government (at 18) defends its Appointments Clause issue-exhaustion requirement as necessary incentive for parties to "raise Appointments Clause challenges at the right time." But in the SSA, no right or wrong time exists for claimants to mention the Appointments Clause because doing so is voluntary. Anyway, the "best" way to encourage Appointments Clause challenges is to "provid[e] a successful litigant with a hearing before a new judge." *Lucia*, 138 S. Ct. at 2055 n.5.

Ultimately, the government's Appointments Clause issue-exhaustion rule is just another attack on *Sims*, which nowhere suggests an exception to its categorical holding that claimants need not exhaust issues to the Appeals Council. Contrary to the government's argument (at 39), the "goals" of "avoiding disruption while providing incentives to raise Appointments Clause claims" have plenty to do with the "character" of agency proceedings. It is hard to see why courts should incentivize claimants to raise issues that ALJs are powerless to resolve, especially when doing so would deluge overburdened ALJs with extra paperwork.

C. Requiring Issue Exhaustion in SSA ALJ Proceedings Would Be Unworkable and Inequitable

There is no issue-exhaustion requirement in SSA ALJ proceedings now, and upsetting that status quo would inflict intolerable costs. NOSSCR Br. 20-22; Professors' Br. 28-30. The SSA did not invoke issue exhaustion until the 1980s. Carr Br. 41. Were an issue-exhaustion requirement truly indispensable (U.S. Br. 21-22), it is inexplicable that the SSA had no occasion to enforce that purported rule in the first 50 years of the agency's existence, and has never promulgated regulations requiring issue exhaustion. And if ALJ proceedings really required issue exhaustion, it is unfathomable why *zero* of the 760,000 claim-

ants per year who appear before ALJs raised Appointments Clause challenges to ALJs before *Lucia*, or why only a handful did thereafter. Carr Br. 31.

The government's authorities (at 30-31) do not show otherwise. *Sims* repudiated *Brewer v. Chater*, 103 F.3d 1384, 1393 (7th Cir. 1997), and *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999). The government's post-*Sims* authorities either ignore *Sims*, *e.g.*, *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003); *Sullivan v. Comm'r of Soc. Sec.*, 694 F. App'x 670, 671 (11th Cir. 2017), or apply pre-*Sims* law, *e.g.*, *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017). These cases incorrectly assume that the same forfeiture rules in court automatically apply in SSA proceedings, and often proceed to reject claimants' arguments on the merits, illustrating that courts have no difficulty with these issues. Professors' Br. 20-23.

The government (at 9, 20-22) gets it backwards in claiming that the lack of an issue-exhaustion requirement in ALJ proceedings would be "unworkable" and "wreak havoc on the orderly and efficient disposition" of claims. It is the government's issue-exhaustion rule that would disrupt ALJ proceedings. Claimants would face pressure to preemptively raise every issue under the sun to avoid forfeitures. ALJ hearings currently take about 30 minutes; handling the flood of kitchen-sink claims under the government's new regime could dramatically increase that time, overwhelming the system and producing disastrous backlogs. Professors' Br. 28-30.

The numbers bear this out. The government (at 21-22) focuses on the 760,000 ALJ hearings and 191,734 Appeals Council proceedings per year, but fewer than 20,000

cases—2.6% of the cases heard by ALJs—end up in federal court.[1] Allowing that comparatively small number of claimants to raise issues for the first time in court is far less disruptive than transforming ALJ proceedings for 38 times as many people.

The government's fears of being sandbagged by claimants who file "bare-bones application[s]" and accumulate issues later on (at 20) suggest unfamiliarity with the Social Security scheme, where applications are "bare-bones" by the SSA's design. The overwhelming majority of claimants lack representation when applying, so the SSA often fills out applications for claimants, who need not even detail impairments. NOSSCR Br. 8-10. Claimants have every incentive to raise any helpful point as soon as possible, because the SSA pays benefits upon a favorable decision. Holding issues back through a multi-year, multi-stage administrative process would be irrational. NADR Br. 16-17. Regardless, independent issue-spotting by ALJs and Appeals Council judges defeats any sandbagging strategy. Carr Br. 42-43.

The government (at 31-32) contends that without an issue-exhaustion requirement, courts would confront "technical and often fact-based issues" without the benefit of SSA's expertise. But the Appointments Clause is the purest of legal issues. Carr Br. 35; *contra* U.S. Br. 44. And *Sims* already mandates judicial review of many technical issues that the SSA never considered. Generally, errors in applying the law to facts only become apparent when ALJs issue their opinions, so the only place to raise those errors within the agency is the Appeals Council. Two issues in *Sims* fell in that category: whether (1)

[1] SSA, *General Statistics on Civil Actions*, https://www.ssa.gov/appeals/court_process.html.

"questions the ALJ had posed to a vocational expert" improperly "omitted several of [the claimant's] ailments," and (2) "peculiarities in the medical evidence" should have prompted the ALJ to "order[] a consultative examination." 530 U.S. at 105-06 (majority op.). But *Sims* allows claimants to raise those issues for the first time in court, even though the agency never passed on them. *See id.* at 112 (plurality op.).

Meanwhile, 42 U.S.C. § 405(g) generally prohibits claimants from introducing new evidence in district court proceedings and allows the SSA to move for a remand to address issues that arise on judicial review. Further, under section 405(g)'s substantial-evidence standard of judicial review, claimants cannot prevail so long as more than a mere scintilla of evidence supports the agency's determination. *See Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019); Davis Br. 35-36.

2. In any event, the narrowest way to resolve this case—holding that claimants need not challenge the constitutionality of ALJs' appointments before those ALJs—would sidestep these concerns. Having acknowledged in November 2017 that ALJ appointments government-wide were likely unconstitutional, the government did nothing and continued allowing ALJs to hear thousands of cases. Any disruption is a problem of the government's own making. Carr Br. 31-33.

Besides, the government's current estimate is that the Appointments Clause ALJ issue affects a closed universe of several hundred cases. Resp. Cert. Br. 13. The government's assertion (at 22) that giving these claimants new hearings would "delay" other hearings is laughable given that ALJs process 760,000 claims per year. NADR Br. 11-12.

The government (at 23-24) praises the "fairness" of SSA's "considered judgment" in Ruling 19-1p in providing new hearings only to claimants who raised Appointments Clause challenges to ALJs or Appeals Council judges. But that policy issued after it was too late for claimants already in district court to change their conduct in agency proceedings. Carr Br. 32. The policy does not even comport with Appeals Council procedures, and would deny relief to any claimant who did not raise an Appointments Clause challenge to either ALJs or the Appeals Council even though the Appeals Council would normally exercise plenary review and remedy the problem itself.

Finally, the government (at 22) sees no "useful purpose at all" in remedying these Appointments Clause violations because they produced no "personal injustice." That would be news to the founding generation, which believed that "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). Regardless, the injustice here *is* personal: petitioners may well get a different result from a different ALJ. The Constitution would be an empty promise if the government could avoid remedying rampant, undisputed violations based on inconvenience. And there would be no surer way to deter future challenges than to refuse to redress *past* constitutional violations simply because the agency has changed its practices prospectively.

III. The Court Should Excuse Any Forfeiture

In any event, this Court should follow *Freytag v. Commissioner*, 501 U.S. 868, 878-79 (1991), and excuse any forfeiture by petitioners. Carr Br. 39-40; Davis Br. 44-46. In *Freytag*, the party consented to proceeding before the tax-court judge before challenging his appointment. This Court nonetheless entertained the Appointments Clause challenge because it was non-frivolous and important to

the proceedings' validity and to "maintaining the constitutional plan of separation of powers." 501 U.S. at 879 (cleaned up).

The government does not distinguish *Freytag*, instead (at 46-48) proposing an "exceptional circumstances" test that *Freytag* would have failed. That petitioners' Appointments Clause challenge implicates "over 1000 cases in district court," U.S. Br. 47, does not make these cases anodyne. By their nature, Appointments Clause violations often affect many similarly situated people. Here, the SSA never told claimants of any issue-exhaustion requirement, even as the SSA suspected its ALJs were unconstitutionally appointed. This Court should not shut the courthouse doors to a challenge that the SSA never asked claimants to raise and would not have heard if they tried.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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