No. 20-105

In the Supreme Court of the United States

JOHN J. DAVIS, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

THOMAS HILLIARD, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

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

REPLY BRIEF FOR THE PETITIONERS

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There is a clear path for the Court to resolve this case. In *Sims* v. *Apfel*, 530 U.S. 103 (2000), a majority of the Court agreed that whether a court should impose an administrative issue-exhaustion requirement in the absence of a statute or regulation depends on whether the agency proceedings at issue resemble normal adversarial litigation. The Court then held that a Social Security claimant

is not required to exhaust particular issues before the Appeals Council in order to preserve them for judicial review.

The Court need only apply the rationale of *Sims* to conclude that petitioners were not required to raise their Appointments Clause challenges before the Social Security administrative law judges whose appointments they were challenging. No statute or regulation imposes such a requirement. And proceedings before Social Security ALJs are not adversarial in nature and are materially indistinguishable from proceedings before the Appeals Council.

Sims is unquestionably the most relevant decision to the question presented here. Yet the government treats it like an inconvenient corpse, burying it at the back of its brief. The government instead urges the Court to apply what it describes as a century-old, judicially created "background" rule of issue exhaustion applicable to all administrative proceedings. But the government tried that same argument in *Sims*, and a majority of the Court rejected it. And for good reason, because the government offers only feeble support for its supposed default rule. Indeed, the government cannot identify a single case from this Court since the Korean War holding that a party failed to exhaust an issue under a judicially created issue-exhaustion requirement.

The government quickly retreats to policy arguments, contending that "equity" and "fairness" require the enforcement of an issue-exhaustion rule against Social Security claimants and that the system would be "unworkable" without one. It is somewhere between ironic and appalling to see the government invoke considerations of fairness *against* Social Security claimants, given that Congress designed the entire system to protect them. Regardless, the government has come nowhere close to

showing that the absence of an issue-exhaustion rule would materially affect the Social Security system, let alone break it.

In any event, even if issue exhaustion were otherwise required, petitioners would not have needed to raise their Appointments Clause challenges before their ALJs. The agency conceded—and the government does not dispute—that petitioners' ALJs were powerless to grant relief on those challenges. The government attempts to conjure up an exhaustion rule specific to Appointments Clause challenges, but the two cases on which it relies do not establish such a rule.

It would be grossly inequitable to hold that a Social Security claimant could not raise an Appointments Clause challenge because the claimant failed to raise it before an improperly appointed official who could not resolve it. The judgments of the court of appeals should be reversed, and the case remanded for further proceedings.

A. Under The Reasoning Of *Sims* v. *Apfel*, A Social Security Claimant Need Not Exhaust Particular Issues Before An Administrative Law Judge

This Court's decision in *Sims* demonstrates that a Social Security claimant need not exhaust issues before an ALJ in order to preserve those issues for judicial review.

1. As the Court explained in *Sims*, "[r]equirements of administrative issue exhaustion" are "largely creatures of statute." 530 U.S. at 107. It is also "common" for agencies to impose them by regulation. See *id.* at 108. But here, as the government concedes (Br. 12), no statute requires a Social Security claimant to exhaust particular issues before an ALJ. As the government also concedes (Br. 12, 35 n.2), the Social Security Administration has chosen not to promulgate a regulation adopting an issue-exhaustion requirement in the 20 years since *Sims*—even though the

Court recognized the possibility that it could do so. See 530 U.S. at 108.

2. Absent a statute or regulation, the only way issue exhaustion could be required before a Social Security ALJ would be for the Court to impose such a requirement itself. In *Sims*, the Court recognized that it had taken that step in some contexts based on an "analogy" to forfeiture rules in appellate courts. See 530 U.S. at 108-109. Reasoning from that analogy, a majority of the Court joined the portion of Justice Thomas's opinion concluding 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.* at 109. According to the Court, the rationale for imposing a judicially created issue-exhaustion requirement is "at its greatest" in adversarial administrative proceedings and is "much weaker" in inquisitorial proceedings. *Id.* at 110.

The government asks the Court simply to ignore the framework from Justice Thomas's opinion; it argues that "no basis exists" to treat the adversarial or inquisitorial nature of an agency proceeding as "controlling." Br. 36-37. At the same time, the government says the Court "should not follow" the approach set forth in Justice O'Connor's concurring opinion either. Br. 38. If the government believes that neither of those opinions is controlling, one is left to wonder whether it thinks *Sims* has any precedential value at all. The government would seemingly reduce *Sims* to mere filler in the United States Reports.

The Court should apply the framework set forth in Justice Thomas's opinion. Not only did a majority of the Court endorse it, see *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 17 (1983), but

it was "necessary to th[e] result" the Court reached, *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996). As the government concedes, even Justice O'Connor's concurring opinion "rest[ed] on the premise that courts should fine-tune forfeiture rules to account for the characteristics of the administrative scheme at hand." Br. 38; see *Sims*, 530 U.S. at 113.

The government contends (Br. 37) that the framework from *Sims* "contradict[s]" the Court's earlier decisions in *Richardson* v. *Perales*, 402 U.S. 389 (1971), and *Hormel* v. *Helvering*, 312 U.S. 552 (1941). But the *Sims* Court appears not to have agreed. The government there made a nearly identical argument based on *Perales*, but the Court did not accept it. See Resp. Br. at 33-34, *Sims*, *supra* (No. 98-9537); *Sims*, 530 U.S. at 111 (plurality opinion) (citing *Perales*). And the portion of Justice Thomas's opinion that commanded a majority quoted from and discussed *Hormel* at length. See *Sims*, 530 U.S. at 109-110.

It is hardly surprising that the Court did not share the government's concerns about "contradicting" *Perales* and *Hormel*. In *Perales*, the Court held only that a claimant's inability to cross-examine a physician who drafted an adverse medical report posed no due process problem because (among numerous other reasons) the claimant had the ability to subpoena the physician but failed to exercise that right. See 402 U.S. at 402-406. That conclusion had nothing to do with issue exhaustion and everything to do with the merits of the procedural due process claim at issue. And as for *Hormel*, it "involved an adversarial proceeding," as the Court noted in *Sims*. 530 U.S. at 110.

The government additionally suggests that the reasoning in *Sims* is incomplete because the "rationales" for issue exhaustion "go beyond the analogy to litigation." Br. 37. But that is little more than an effort to relitigate *Sims*. The government in *Sims* made similar overtures to

fairness, and the Court dismissed them. See Resp. Br. at 18-24, 29-30, *Sims*, *supra*. That is unsurprising. One of the primary "fairness" concerns the Court has articulated is that the failure to raise an issue may deprive *the opposing party* of the opportunity to present evidence and argument on that issue. See *Sims*, 530 U.S. at 109. But Congress "designed" the Social Security system to be "unusually protective of claimants." *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1776 (2019) (internal quotation marks and citation omitted). Accordingly, the Commissioner of Social Security does not oppose the claimant in benefits proceedings, and it is the "ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims*, 530 U.S. at 111 (plurality opinion). It is hardly unfair to *SSA* to allow claimants to raise new issues during judicial review.

The government raises concerns about courts "usurp[ing] the agency's function." Br. 14 (citation omitted). As an initial matter, many Social Security claimants seek judicial review of alleged errors in the ALJ's decision—objections that can be resolved first by the Appeals Council. See, *e.g.*, *Sims*, 530 U.S. at 105-106. Yet the Court in *Sims* expressed no concern about courts resolving such objections "in the first instance." Resp. Br. 20.

In any event, the government's concerns are misplaced. Even under petitioners' approach, claimants cannot present evidence in court that was not presented to SSA. See Pet. Br. 35-36; 42 U.S.C. 405(g). In addition, Social Security ALJs are not permitted to interpret and apply relevant case law when making benefits decisions; they apply SSA's nationwide regulations unless the Commissioner has issued an acquiescence ruling. See 20 C.F.R. 404.985; 55 Fed. Reg. 1,013 (Jan. 11, 1990). A federal district court is thus usually tasked with applying case law to the benefits decision under review for the first

time. And if SSA believes the court would benefit from further administrative adjudication in a particular case, it can move to have the case remanded for that purpose. See 42 U.S.C. 405(g).

3. The framework from *Sims* is dispositive here. Proceedings before a Social Security ALJ are "informal" and "non-adversarial." 20 C.F.R. 404.900(b); see Pet. Br. 25; Professors Br. 8-12. Indeed, they share all of the salient features that led the Court in *Sims* to decline to require issue exhaustion before the Appeals Council. See Pet. Br. 25-27. The government's efforts to distinguish ALJ proceedings are unavailing.

a. The government first argues (Br. 33) that, because a claimant has more of an opportunity to raise issues before the ALJ than the Appeals Council, considerations of "equity" and "fairness" support a judicially created issue-exhaustion requirement in the former context but not the latter. The relevant question under *Sims*, however, is not to what extent a party has the opportunity to raise an issue in the administrative proceedings; it is whether the party is "expected to develop the issues" in an "adversarial" setting. 530 U.S. at 110. And the government's resort to "fairness" gets it exactly backwards in the context of a regime that is specifically designed to protect claimants. See *Smith*, 139 S. Ct. at 1776.

b. The government next contends that an issue-exhaustion requirement is warranted because ALJ proceedings "depend on the active participation of claimants." Br. 34. But the government does not dispute that, by regulation, the ALJ is required to "look[] fully into the issues," "question[] [the claimant] and the other witnesses," and receive material evidence. 20 C.F.R. 404.944. That responsibility even includes obtaining the claimants' medical records and investigating impairments obvious to the ALJ but not raised by the claimant. See NOSSCR Br. 14-

16. While it is true that a claimant is required to submit certain factual evidence in the claimant's possession, see 20 C.F.R. 404.935(a), the critical point is that the ALJ, not the claimant, has the "primary responsibility" to develop the issues. See *Sims*, 530 U.S. at 112 (plurality opinion).

As it did at the certiorari stage, the government heavily relies on 20 C.F.R. 404.939, which states that, if a claimant "object[s] to the issues to be decided at the hearing," the claimant "must notify the administrative law judge in writing at the earliest possible opportunity." See Resp. Br. 35. But as petitioners have already explained (Br. 28-29), that regulation requires a claimant only to *object* to an issue expressly listed in the advance notice of the issues the ALJ will decide at the hearing. As the government concedes (Br. 35 n.2), a claimant does not have an affirmative obligation under the regulations to *identify* issues on pain of forfeiture.

c. The government further argues that, because SSA "conducts its principal and most thorough review of [a] disability claim" at the ALJ stage, the lack of an issue-exhaustion requirement there could be "far more disruptive" than at the Appeals Council stage. Br. 35-36 (citation omitted). But there is no reason to believe that will be true. If anything, an issue-exhaustion requirement creates incentives for parties to raise additional objections, however meritless, in order to preserve them for judicial review—and an ALJ has limited tools to deal with those additional objections, because the ALJ's review is mandatory (unlike the Appeals Council's). See NOSSCR Br. 20-22; 20 C.F.R. 404.967. And as explained above, many claimants challenge various aspects of the ALJ's decision—objections that can be resolved first by the Appeals Council. See p. 6, *supra*. In any event, the ALJ already has the primary responsibility to identify and develop the issues; if the ALJ fulfills that responsibility, the absence

of an issue-exhaustion requirement should have little effect. See pp. 7-8, *supra*.

d. The government additionally contends that, for purposes of Justice O'Connor's concurrence in *Sims*, the Court's "general rule of administrative forfeiture" provides sufficient notice that issue preservation is required. Br. 38. But the government invoked the same purported general rule in *Sims*, and it did not move the needle. See Resp. Br. at 29-31, *Sims*, *supra*.

The government makes no effort to suggest that SSA provided actual notice of an issue-exhaustion requirement to petitioners (or any other claimants); the most that can be said is that SSA tells claimants they need to make a request in order to initiate ALJ review. See Pet. Br. 26-27. That is plainly insufficient to provide notice, just as it was in *Sims*. See 530 U.S. at 114 (O'Connor, J., concurring in part and concurring in the judgment). And given the multi-step administrative process, the obligation of an ALJ to identify and develop the issues, and the absence of affirmative notice of an issue-exhaustion requirement at the ALJ stage, it is reasonable for claimants to expect that they "need only show up at the hearing, explain their situation, and let the [ALJ] do the rest." NOSSCR Br. 12.

B. The Court Should Not Otherwise Require A Social Security Claimant To Exhaust Issues Before An Administrative Law Judge

The government primarily argues that the Court should require Social Security claimants to exhaust issues before their ALJs based on a "general rule of administrative law" that a party cannot seek judicial review of an agency action on a ground that the party did not raise before the agency. Br. 11-15, 25-28. But the government made exactly the same argument in *Sims*, primarily relying there (as here) on the Court's decision in *United*

States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). See Resp. Br. at 29-31, *Sims*, *supra*. The Court correctly rejected that argument when it refused to adopt an issue-exhaustion requirement in *Sims*, and it should reject the government's warmed-over version of that argument now.

1. The government asserts that the general issue-exhaustion requirement it asks the Court to apply is an "old rule[]" with "deep roots" extending back for a "century." Br. 12, 25, 27. But as petitioners have explained (Br. 30), the Court has not actually held that a party has failed to exhaust an issue under a judicially created issue-exhaustion requirement in the nearly 70 years since *L.A. Tucker*.

The government nevertheless contends that the Court has "continued to apply" a general rule of administrative issue exhaustion in the ensuing decades. Br. 13. But none of the modern cases cited by the government supports that proposition. In *Sims*, of course, the Court declined to require issue exhaustion. See p. 7, *supra*. In *Woodford* v. *Ngo*, 548 U.S. 81 (2006), the Court addressed an express statutory requirement to exhaust administrative *remedies*. See *id.* at 87-88, 90. And in *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court referred to the concept of exhaustion in a single sentence when deciding the distinct question of whether sovereign immunity prevented a federal agency from adjudicating a private party's complaint against a state agency. See *id.* at 747, 762.

Even the earlier cases cited by the government (Br. 12-14) provide little support for its general rule. As a preliminary matter, the government does not dispute that those cases fail to explain the source of a court's authority to require administrative issue exhaustion. See *Island Creek Coal Co.* v. *Bryan*, 937 F.3d 738, 747 (6th Cir. 2019).

Each of those cases also involved adversarial administrative proceedings—as the Court explained in *Sims*. See 530 U.S. at 109-110. And the government has no answer to the point that many of the earlier cases can be explained as applications of other doctrines—for example, the standard for judicial review of agency actions. See Pet. Br. 31-33.

2. In order to provide a firmer basis for its general rule, the government contends that administrative issue-exhaustion rules are no different from forfeiture rules that govern what arguments courts will entertain in the course of litigation. See Br. 27. Indeed, in a bout of verbal gamesmanship, the government repeatedly refers to the rule it is seeking as a "forfeiture" rule and studiously avoids calling it an "issue-exhaustion" rule. See, *e.g.*, Br. 8-11; but see *Sims*, 530 U.S. at 107; *Ngo*, 548 U.S. at 91 n.2.

In this regard, at least, the government seems to embrace some of the reasoning of *Sims*, where the Court explained that judicially created issue-exhaustion rules are premised on the "analogy to the rule that appellate courts will not consider arguments not raised before trial courts." 530 U.S. at 108-109. But the Court proceeded to "warn[] against" assimilating the relationship between "administrative bodies and the courts" to the relationship between "lower and upper courts." *Id.* at 110 (citation omitted). For that reason, a majority of the Court agreed 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." *Ibid.* The Court has thus made clear that it does not believe the analogy between administrative issue-exhaustion rules and litigation forfeiture rules is an automatic one.

Even with respect to adversarial administrative proceedings, moreover, the analogy is imperfect. Litigation forfeiture rules are derived from the "inherent powers" of federal courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1891 (2016) (citation omitted). In other words, those rules govern procedure *within* the court system. Administrative issue-exhaustion rules, on the other hand, impose requirements *outside* the court system and within executive-branch agencies. Such rules directly implicate the separation of powers: where Congress has authorized the Judiciary to review the action of the Executive Branch, judicially created issue-exhaustion rules place artificial limits on the scope of review that Congress has authorized. Yet it is Congress, not the courts, that has the "power to prescribe the basic procedural scheme under which a claim may be heard in a federal court." *Darby* v. *Cisneros*, 509 U.S. 137, 153 (1993) (citation omitted).

In this context, a judicially created issue-exhaustion requirement would be affirmatively in tension with congressional intent. See *Darby*, 509 U.S. at 144-145. In the Social Security Act, Congress authorized judicial review of "any final decision" by SSA—language that "reflects Congress' intent to define the scope of review expansively." *Salinas* v. *United States Railroad Retirement Board*, No. 19-199, slip op. 6 (Feb. 3, 2021) (internal quotation marks and citation omitted); see 42 U.S.C. 405(g). The "strong" and "well-settled" presumption "favoring judicial review of administrative action" confirms that expansive interpretation, see *Salinas*, slip op. 8 (citations omitted), as does the fact that Congress "intended" the "claimant-protective" Social Security Act not to "leave a claimant without recourse to the courts," *Smith*, 139 S. Ct. at 1776.

In addition, Congress has imposed an issue-exhaustion requirement for a narrow type of SSA proceeding, see 42 U.S.C. 1320a-8(d)(1), but not for judicial review of SSA's benefits determinations. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The applicable judicial-review provision also includes a series of other limitations on the scope of a court's review of an SSA decision, but no issue-exhaustion requirement. See 42 U.S.C. 405(g). Given that Congress is well aware of how to create an issue-exhaustion requirement, see Pet. Br. 22-23 (citing requirements under other statutes), this Court should give weight to Congress's seemingly conscious decision not to create a rule of issue exhaustion for SSA benefits determinations, but instead to leave that to SSA in the first instance. See 42 U.S.C. 405(a).

Remarkably, in the 20 years since *Sims*, SSA has chosen not to promulgate a regulation adopting an issue-exhaustion requirement, see pp. 3-4, *supra*, and it has taken no steps to do so even since the Court granted review in this case. If (as appears to be the case) SSA is unwilling to subject a proposed issue-exhaustion requirement to public scrutiny through the notice-and-comment process, there is no reason why this Court should do SSA's dirty work for it.

3. The government spends much of its brief arguing that various practical considerations counsel in favor of an issue-exhaustion requirement. Those arguments lack merit.

The government suggests that the failure to require issue exhaustion in proceedings before a Social Security ALJ would "unsettle existing law" in the courts of appeals. Br. 30. The law is hardly settled. At the certiorari stage, the government conceded the existence of a circuit conflict on the question presented. See Resp. Cert. Br. 8. And many of the cases the government cites in support of

requiring issue exhaustion at the ALJ stage preceded *Sims*. Of those that came later, many did not even cite *Sims*. See *Shapiro* v. *Saul*, 833 Fed. Appx. 695 (9th Cir. 2021); *Sullivan* v. *Commissioner of Social Security*, 694 Fed. Appx. 670 (11th Cir. 2017); *Anderson* v. *Barnhart*, 344 F.3d 809 (8th Cir. 2003).

The government next argues that petitioners' "expansive theory" would require courts to address "questions concerning the application of SSA's own regulations and policies on technical and often fact-based issues that the agency has never considered." Br. 31. That concern is vastly overblown. As petitioners have explained, claimants ordinarily cannot present new evidence in court. See p. 6, *supra*; cf. *Meanel* v. *Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999). And SSA can move to have the case remanded for further consideration if pertinent. See p. 7, *supra*. In other cases, as in this one, the newly raised issue may be sufficiently straightforward for the court to address it in the first instance. Cf. *Gonzalez-Ayala* v. *Secretary of Health & Human Services*, 807 F.2d 255, 256 (1st Cir. 1986) (per curiam).

The government warns that, if issue exhaustion is not required, claimants will be able to file a "bare-bones application" with SSA and then wait to bring all of their objections until they go to court. Br. 20. That suggestion is divorced from reality. For disabled individuals, Social Security benefits often provide "most of their income." SSA, *The Faces and Facts of Disability: Facts* (2020) <tinyurl.com/ssadisabilityfacts>. Those individuals must trudge through the multi-step administrative review process before they even get to federal court. See Pet. Br. 6. And because that process can "drag on for years," *Smith*, 139 S. Ct. at 1776, claimants have every incentive to raise potentially dispositive arguments at the earliest possible juncture.

The government next asserts that the Social Security system would be "unworkable" if SSA were forced to "redecide old claims every time a new issue was raised in court." Br. 21. But claimants have only 60 days to challenge SSA's final decision, see 42 U.S.C. 405(g), so the ability of claimants to challenge proceedings long after the fact is limited. While the government notes how many claimants receive ALJ hearings (Br. 21), far fewer file claims in federal court. See Pet. Br. 36. Fewer still have meritorious claims. See NADR Br. 7, 9. And fewer still have meritorious claims that they failed to raise before SSA. The government makes no attempt to quantify *that* figure, but that is the one relevant to the government's argument.

If any rule will prove "unworkable," it is the government's. See NOSSCR Br. 20-22; Professors Br. 27-30. As the government points out (Br. 38), the most recent available data suggest that 70% to 75% of Social Security claimants are represented by attorneys in SSA proceedings. Faced with an issue-exhaustion requirement, attorneys will have strong incentives to raise any colorable issue at the ALJ stage—which the ALJ will then be required to resolve. See p. 8, *supra*. The remaining 25% to 30% of unrepresented claimants—which amounts to hundreds of thousands of individuals—will have strong incentives to hire attorneys. The unintended consequence of an issue-exhaustion rule could thus be to formalize Social Security proceedings in a way that leads to the multiplication of issues—reducing efficiency and thereby imposing significant hardship on claimants from the concomitant delay. See Professors Br. 29.

In any event, the fact that reasonable minds can differ on whether a Social Security issue-exhaustion rule would cause more harm than good simply underscores the fundamental flaw in the government's position. Ultimately,

it is Congress or the agency—not the Court—that should craft the contours of any issue-exhaustion requirement. See Professors Br. 30-33. Although the government asserts (Br. 23-24) that SSA's post-*Lucia* policy reflects its "considered judgment" on which claimants with Appointments Clause challenges should receive new hearings, that policy does not say anything about issue exhaustion. See 84 Fed. Reg. 9,582 (Mar. 15, 2019).

Nothing is stopping SSA from acting; it could issue a notice of proposed rulemaking tomorrow. Indeed, the government argued at the certiorari stage in *Sims* that the agency's ability to address the question of issue exhaustion by regulation was a reason the Court should deny review. See Br. in Opp. at 12-13, *Sims*, *supra*. The Court should not do by judicial lawmaking what SSA could have done by regulation at any point over the last two decades.

C. Petitioners' Appointments Clause Challenges Would Be Exempt From Any Rule That Requires A Social Security Claimant To Exhaust Issues Before An Administrative Law Judge

Even if it were appropriate to impose an issue-exhaustion requirement more generally in proceedings before a Social Security ALJ, any such requirement would not apply to petitioners' Appointments Clause challenges. The Court's decisions, including in the Social Security context, "establish[]" that a claimant need not exhaust either claims that are constitutional in nature or claims that it would be futile to raise before the agency. See *Sims*, 530 U.S. at 115 (Breyer, J., dissenting); Pet. Br. 37-38. The government's efforts to create an exemption from that principle for Appointments Clause challenges are unavailing.

1. Although the government initially suggests (Br. 40) that only jurisdictional claims are exempt from its issue-exhaustion requirement, it ultimately retreats to the position that a claimant need not exhaust a claim if the claim involves a constitutional violation that is "unfixable" or if bringing the claim would be "utterly futile." Br. 41, 44-45.

As an initial matter, none of the cases the government cites applies a distinction between "fixable" and "unfixable" constitutional violations to determine whether exhaustion of administrative remedies is required. See Br. 41. And as the Court has already explained, any such distinction is not "significant" in the context of SSA, because it would be "unrealistic to expect" the agency to "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." *Mathews* v. *Eldridge*, 424 U.S. 319, 329-330 (1976).

In any event, the government does not dispute that the adjudicators to whom petitioners would have actually presented their Appointments Clause challenges—namely, their ALJs—were powerless to resolve them. See Pet. Br. 39-40. Instead, the government contends that, if enough claimants had raised the same Appointments Clause challenges, the Commissioner of Social Security might have decided to "solve[] the problem" by "ratifying the ALJs' appointments or appointing new ALJs to adjudicate petitioners' benefits applications." Br. 42. That is an eccentric view of futility: it faults a party for failing to raise an argument before an adjudicator who indisputably lacked the power to provide a remedy on the ground that, if a sufficient number of *other* claimants had raised the same argument, a high-level agency official might have heard about the problem and taken corrective action.

To support its view of futility, the government points to *L.A. Tucker*, where the Court stated that "[r]epetition of the objection" in multiple cases might have led "to a change in policy" by the Interstate Commerce Commission. 344 U.S. at 37. But there, the party had an opportunity to seek reconsideration *by the full Commission*. See *id.* at 34; cf. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018) (noting that a party had the opportunity to appeal to the full Securities and Exchange Commission). That is not the case here; a Social Security claimant does not have recourse to the Commissioner. See 20 C.F.R. 404.981.

The idea that the Commissioner would have fixed the Appointments Clause problem at issue here if only enough parties had raised the issue is particularly farfetched. In its January 2018 "emergency message," SSA instructed ALJs not to "discuss or make any findings related to the Appointments Clause issue" because SSA "lack[ed] the authority to finally decide constitutional issues such as these." SSA, EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (Jan. 30, 2018) (*Davis* C.A. App. 61-63). Even at that time, therefore, SSA "conceded[]" that such claims were "beyond [its] competence" to address. *Weinberger* v. *Salfi*, 422 U.S. 749, 767 (1975). The government discounts that message because it occurred *after* the claimants' hearings, see Br. 45-46, but it is implausible to believe that SSA would somehow have remedied the Appointments Clause problem if only the volume of claimant objections had been greater.

2. The government also contends that *Ryder* v. *United States*, 515 U.S. 177 (1995), and *Lucia*, *supra*, established a special rule requiring "a timely challenge before granting relief under the Appointments Clause." Br. 9. That is incorrect.

In *Ryder*, the Court granted relief on an Appointments Clause challenge to the appointment of judges on a military court, refusing to invoke the *de facto* officer doctrine. See 515 U.S. at 179-180. The Court distinguished its previous cases applying that doctrine on the grounds that the instant challenge was constitutional in nature and that the party had raised it before the military judges whose appointment he was challenging. See *id.* at 182. But the Court did not purport to be imposing a requirement that all Appointments Clause challenges must first be raised before the challenged official. In addition, the "military justice system's essential character" is "judicial," *Ortiz* v. *United States*, 138 S. Ct. 2165, 2168 (2018), and the military courts have adopted forfeiture rules much like civilian courts, see, *e.g.*, *United States* v. *Greene*, 41 M.J. 57, 58 (C.M.A. 1994). For that reason as well, *Ryder* is inapposite here.

Lucia is similarly unhelpful for the government. While the Court did say there that a party making a "timely challenge" under the Appointments Clause is entitled to relief, it was simply quoting *Ryder*. See 138 S. Ct. at 2055. What is more, the challenger in *Lucia* did not raise the Appointments Clause challenge before the ALJ whose appointment he was contesting; he raised the issue for the first time on appeal to the full Securities and Exchange Commission. See *id.* at 2050; Joint Motion & Stipulation, *In re Raymond J. Lucia Cos.*, File No. 3-15006 (S.E.C. June 16, 2015) <tinyurl.com/luciastip>. And even if *Lucia* did implicitly apply an issue-exhaustion requirement, it would provide no support here, because the requirement was statutory rather than judicially created. See 15 U.S.C. 78y(c)(1).

3. The government's remaining Appointments Clause-specific arguments fare no better.

The government contends that a special exhaustion rule for Appointments Clause challenges would "promot[e] stability." Br. 17. But again, petitioners' position is not that agencies should be required to "annul everything that [an] appointee has done in the past" and "start over from scratch." *Ibid.*; see p. 15, *supra*. Rather, petitioners are arguing only that *they* are entitled to relief because they filed timely petitions for judicial review of SSA's benefits determinations in their cases and raised their Appointments Clause challenges in those proceedings.

Noting that *Ryder* departed from "strict application of the *de facto* officer doctrine" in order to create "incentives" to raise Appointments Clause challenges, the government argues that the "best way" to create such incentives is to "reward parties who raise Appointments Clause claims at the right time." Br. 18 (citation omitted). But that just raises the question of when the "right time" is. And the "right time" is before a federal judge who has the power to remedy the constitutional defect—not an administrative law judge who does not.

The government also contends that providing a remedy to petitioners on their Appointments Clause challenges would not serve "any useful purpose" because SSA has "changed its appointment practices" and petitioners have shown no "personal injustice" from the constitutional violation. Br. 22. But whatever SSA's current practices, the fact remains that petitioners' benefits determinations were made by unconstitutionally appointed officers. And as the Court explained just last Term, a party raising a structural constitutional challenge is not required to prove that the government would have acted differently in a "'counterfactual world' in which the [g]overnment had acted with constitutional authority." *Seila Law*

LLC v. *Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2196 (2020) (citation omitted).

Finally on this score, the government argues that an Appointments Clause-specific exhaustion rule is warranted because agencies have expertise in "identifying the circumstances to which the Clause must be applied." Br. 44. But the Court has already concluded that Appointments Clause challenges (like other constitutional challenges) are beyond a typical agency's "competence and expertise." *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 491 (2010). There is certainly no reason to believe that the ALJs who adjudicated petitioners' benefits claims have expertise in determining which SSA employees are "Officers" for purposes of the Appointments Clause.

D. The Court Should Excuse Petitioners' Failure To Raise Their Appointments Clause Challenges Before Their Administrative Law Judges

If the Court were to conclude that an issue-exhaustion requirement should apply to petitioners' Appointments Clause challenges, the Court should exercise its discretion to excuse petitioners' failure to raise those claims before their Social Security ALJs. The government concedes that courts should "forgive a failure to raise a timely objection" in "exceptional cases" or "particular circumstances" where "injustice might otherwise result." Br. 46-47 (citation omitted).

That is the case here. It is undisputed that the ALJs who adjudicated petitioners' claims were "Officers of the United States" who were not appointed according to a method prescribed by the Appointments Clause. The appropriate remedy for that violation is also undisputed: a new hearing before a properly appointed adjudicator. See Pet. Br. 45. And because of the short fuse for judicial review under Section 405(g), there will not be a future surge

of similar Appointments Clause challenges. Rehearings in the approximately 1,000 affected cases would amount to around 0.1% of the total number of hearings that Social Security ALJs conduct in a year. See Br. 21, 47.

It is more than a little puzzling that the government has not simply afforded new hearings to petitioners and the small number of similarly situated claimants. Given the government's concession of error and the limited future impact of the Appointments Clause problem at issue, the Court should excuse petitioners' failure to exhaust their challenges, to the extent that exhaustion is required at all.

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The judgments of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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