No. 17-130

In The
Supreme Court of the United States

RAYMOND J. LUCIA AND
RAYMOND J. LUCIA COMPANIES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

ERIC SCHNAUFER
Counsel of Record
ERIC SCHNAUFER,
ATTORNEY AT LAW, P.C.
1555 Sherman Ave. #303
Evanston, Illinois 60201
(847) 733-1232
eric@schnaufer.com

April 2, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

REGULATIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICUS CURIAE*[1]

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a nonprofit, voluntary membership association. NOSSCR has more than 2,900 members, mostly attorneys, who represent individuals seeking disability and other benefits under the Social Security Act. Individuals seeking such benefits have a right to request a hearing. *See* 42 U.S.C. § 405(b)(1). The Social Security Administration (SSA) employs more than 1,600 administrative law judges (ALJs) to preside over non-adversarial hearings to adjudicate individual claims for benefits.[2] SSA also uses ALJs to conduct adversarial hearings to enforce its rules of conduct and standards of responsibility for representatives. *See* 20 C.F.R. § 404.1765(b). NOSSCR members represent individuals at many of the hundreds of thousands of non-adversarial ALJ hearings held each year. While this case involves the question whether an ALJ employed by the Securities and Exchange Commission (SEC) is an "inferior Officer[]" for the purpose of the Appointments Clause, *see* U.S. Const. art. II, § 2, cl. 2, and thus directly affects the SEC's five ALJs,[3] the Court's answer to that question

---

[1] Under Supreme Court Rule 37.6, NOSSCR states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than NOSSCR and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs.

[2] Office of Personnel Mgt., *ALJs by Agency*, https://tinyurl.com/OPM-ALJs-By-Agency. All sites visited March 29, 2018.

[3] *ALJs by Agency*, *supra*.

may affect the much larger number of SSA ALJs as well as SSA's programs generally.

NOSSCR has two interests in this case. First, NOSSCR has an interest in SSA's ability to provide timely non-adversarial hearings for individuals seeking Social Security benefits. If this Court's decision spawns litigation over whether SSA ALJs are inferior Officers, then the adjudication of more than a million Social Security benefit claims may be delayed regardless of the outcome of such litigation. Second, NOSSCR has an interest in SSA ALJs providing full and fair non-adversarial hearings to individuals seeking Social Security benefits and, thus, an interest in the continuing decisional independence of SSA ALJs. If SSA ALJs are inferior Officers, then their decisional independence may be diminished.

INTRODUCTION

The Court granted certiorari on the question of whether an *SEC* ALJ is an Officer of the United States within the meaning of the Appointments Clause. *See* U.S. Const. art. II, § 2, cl. 2; *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991). As of March 2017, there were five SEC ALJs but more than 1,600 SSA ALJs.[4] Since an SEC ALJ and an SSA ALJ are both ALJs, the Court's decision will likely inform if not control the analysis whether an SSA ALJ is an inferior

[4] *ALJs by Agency*, *supra*.

Officer within the meaning of the Appointments Clause.

Since 1940, an individual seeking Social Security benefits has had a right to request a "hearing" to challenge SSA's denial of those benefits. *See* Social Security Act Amendments of 1939, 53 Stat. 1360; *see also* 42 U.S.C. § 405(b)(1). Since 1972, the adjudicator presiding over a hearing for Social Security benefits has been called an "administrative law judge." *See* 37 Fed. Reg. 16,787 (Aug. 19, 1972); *see also* Pub. L. No. 95-251, 92 Stat. 183 (1978) (renaming "hearing examiners" "administrative law judges"); 20 C.F.R. § 404.929 ("If you are dissatisfied with one of the determinations or decisions listed in [20 C.F.R.] § 404.930, you may request a hearing. The Deputy Commissioner for Disability Adjudication and Review, or his or her delegate, will appoint an [ALJ] to conduct the hearing."). SSA is the nation's largest adjudicative agency.[5] Its ALJs have conducted millions of non-adversarial hearings over the past three-quarters of a century.[6] In Fiscal Year 2016 alone, SSA ALJs disposed of more than 650,000 hearing requests, including after in-person or

---

[5] *Cf. Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983) ("The Social Security hearing system is 'probably the largest adjudicative agency in the western world.' ") (*quoting* J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, *Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System* xi (1978)).

[6] *See* 20 C.F.R. § 404.900(b) ("In making a . . . decision in your case, we conduct the administrative review process in an informal, non-adversarial manner.").

video-conference hearings.[7] At the end of Fiscal Year 2017, more than one million hearing requests were pending before SSA ALJs.[8]

To NOSSCR's knowledge, the Commissioner of Social Security, acting as the Head of a Department, has not appointed SSA ALJs as inferior Officers.[9] *See* U.S. Const. art. II, § 2, cl. 2. NOSSCR is unaware of any public database specifying who appointed each of SSA's more than 1,600 ALJs. Since 1940, SSA's hearing examiners and (later) ALJs have decided millions of claims for Social Security benefits without controversy even though the hearing examiners and ALJs were not appointed as inferior Officers. Since 1940, stakeholders have assumed that SSA hearing examiners and ALJs did not need to be inferior Officers to decide individual claims for Social Security benefits after conducting non-adversarial hearings. Consistent with that assumption, NOSSCR is unaware of any precedent holding that an SSA ALJ who presides over a

---

[7] Office of Retirement Policy, Soc. Sec. Admin., *Annual Statistical Supplement* (2017), tbl.2.F.9, https://tinyurl.com/SSA-Statistical-Supp-2017.

[8] Soc. Sec. Admin., *Agency Financial Report: Fiscal Year 2017* (Nov. 2017) (*Agency Financial Report*), 121, https://tinyurl.com/SSA-Financial-Report-FY2017.

[9] There is currently neither a Commissioner of Social Security nor an Acting Commissioner of Social Security to act as the Head of a Department to appoint SSA ALJs as inferior Officers. *See* U.S. Const. art. II, § 2, cl. 2. Nancy A. Berryhill, Deputy Commissioner for Operations, is performing the duties and functions not reserved for the Commissioner of Social Security. *See* Soc. Sec. Admin., *Nancy A. Berryhill*, https://www.ssa.gov/agency/commissioner.html.

non-adversarial hearing concerning an individual's claim for Social Security benefits is an inferior Officer with the meaning of the Appointments Clause.

If the Court holds that an SEC ALJ is not an inferior Officer, then almost certainly an SSA ALJ is likewise not an inferior Officer. However, if the Court concludes that an SEC ALJ is an inferior Officer, the Court should be cognizant of the looming question whether an SSA ALJ is also an inferior Officer. *See Bandimere v. SEC*, 844 F.3d 1168, 1190 (10th Cir. 2016), *petition for cert. pending*, No. 17-475 (filed Sept. 29, 2017) (commenting on possible consequences if an SSA ALJ is an inferior Officer); *id.* at 1200 (McKay, J., dissenting) (suggesting that an SSA ALJ is similar to an SEC ALJ). In articulating a rationale for any holding that an SEC ALJ is an inferior Officer, the Court should clearly distinguish between an SEC ALJ and an SSA ALJ, noting that the former, but not the latter, presides over an adversarial hearing and that whether a hearing is adversarial is relevant to determining whether the adjudicator is an inferior Officer for the purpose of the Appointments Clause. The Court should also take into account that well over one million pending and non-final claims for Social Security benefits would likely be affected if SSA ALJs are later found to be inferior Officers. At the end of Fiscal Year 2017, more than one million requests for hearing were pending before ALJs, and more than 94,000 requests for review of ALJ decisions were pending at SSA's Appeals

Council.[10] In Fiscal Year 2017, more than 18,000 civil actions were filed challenging SSA's final administrative decisions.[11] This case thus has the potential to disrupt SSA's programs and, consequently, to delay the payment of Social Security benefits to which individuals are entitled.

Finally, the Court should consider whether the decisional independence of SSA ALJs would be diminished if they were inferior Officers. For about the last decade, there has been a significant decline in the rate at which SSA ALJs decide that individuals are entitled to Social Security benefits.[12] There has been effective pressure on SSA ALJs to deny individuals Social Security benefits to which they are entitled, notwithstanding the existing civil service protections for SSA ALJs.[13] If SSA ALJs are inferior Officers, they may be under even greater political pressure to deny

---

[10] *Agency Financial Report*, *supra*, 121. According to SSA's Inspector General, "The hearings and appeals process has experienced worsening timeliness and growing backlogs." *Id.*

[11] Soc. Sec. Admin., *Appeals to Court as a Percentage of Appealable AC Dispositions*, https://tinyurl.com/SSA-Appeals-Data.

[12] Government Accountability Office, *Social Security Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearing Decisions* (Dec. 2017), 15, https://www.gao.gov/assets/690/688824.pdf.

[13] *See*, *e.g.*, Chris Joyner, "Judges pressured to deny disability appeals, one judge tells the AJC," *The Atlanta Journal Constitution* (Dec. 21, 2017) (reporting that Marilyn Zahm, President of the Ass'n of Admin. Law Judges, stated that "there is definite pressure from the agency to get judges to find against workers"), https://tinyurl.com/AJC-2017-Dec-21-Quote.

individuals the Social Security benefits to which they are entitled.

SUMMARY OF THE ARGUMENT

The Court should affirm the judgment below. Petitioners and Respondent demand a sea change in the constitutional status of ALJs within the SEC and, by necessary implication, in many other federal agencies. Both Petitioners and Respondent rely in part on the Administrative Procedure Act to support their view. *See* Pub. L. No. 79-404, 60 Stat. 237 (1946) (*codified at* 5 U.S.C. §§ 551-559). But that reliance is incongruent with the decades of ALJ adjudications pursuant to and consistent with the Administrative Procedure Act. The Administrative Procedure Act does not itself answer the question presented; the answer did not lie undiscovered in that statute for decades.

In addition, the Court below was correct in emphasizing that an SEC ALJ is not an inferior Officer because the ALJ's decision does not become final until the Commission issues an order.

ARGUMENT

I. The Administrative Procedure Act Itself Does Not Answer the Question Presented; the Administrative Procedure Act Applies to Both Adversarial and Non-Adversarial Adjudications

In *Freytag*, this Court held that special trial judges (STJs) of the Tax Court are inferior Officers for the purpose of the Appointments Clause based on three characteristics. 501 U.S. at 881-82. The office of STJ is established by law; the duties, salary, and means of appointment for that office are specified by statute; and STJs "exercise significant discretion" in "carrying out . . . important functions." *Id.* The question presented is whether SEC ALJs are inferior Officers of the United States within the meaning of the Appointments Clause. Petitioners and Respondent rely in part on the Administrative Procedure Act as a statute establishing ALJs by law and as authority that SEC ALJs in particular exercise significant discretion in carrying out important functions. Brief for Petitioners at 3, 12, 35-38, *Lucia v. SEC*, No. 17-130 (Feb. 21, 2018) (Pet'rs Br.); Brief for Respondent Supporting Petitioners at 11, 25, 29, *Lucia v. SEC*, No. 17-130 (Feb. 21, 2018) (Resp't Br.). The Administrative Procedure Act by itself does not answer the question presented.

Petitioners and Respondent correctly state that SEC ALJs conduct adversarial hearings. Pet'rs Br. at 2 ("Administrative law judges of the [SEC] preside over trial-like adversarial hearings"); Resp't Br. at 14 ("The Commission's ALJs, who preside over complex

adversarial disputes and issue initial decisions that often become the final decisions of the agency, wield significant authority on behalf of the United States. They are thus 'inferior Officers' who must be appointed in conformance with the Appointments Clause."). However, Petitioners and Respondent incorrectly assume or imply that any ALJ who conducts a hearing pursuant to or consistent with the Administrative Procedure Act conducts an *adversarial* hearing. The Administrative Procedure Act does not require an adversarial hearing. *See Richardson v. Perales*, 402 U.S. 389, 409 (1971).

An ALJ hearing under 42 U.S.C. § 405(b)(1) to determine whether an individual is entitled to Social Security benefits is non-adversarial. *See* 20 C.F.R. § 404.900(b) ("we conduct the administrative review process in an informal, non-adversarial manner"). In *Sims v. Apfel*, 530 U.S. 103 (2000), this Court recognized that proceedings before an SSA ALJ are "inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 110-11 (2000); *see also id.* at 111 (*citing* 20 C.F.R. § 404.900(b)). Likewise, in *Perales*, the Court stated that SSA's predecessor agency "operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary." *Perales*, 402 U.S. at 403; *see also id.* 410 ("The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts."); 20 C.F.R. § 404.944 (SSA ALJ's regulatory duty to develop an adequate record); 20 C.F.R. § 404.1512(b)(1)-(2)

(describing SSA's responsibility to develop the medical record); 20 C.F.R. § 404.1512(b)(3) (describing SSA's responsibility to obtain vocational evidence).[14]

Consistent with the non-adversarial nature of an ALJ hearing under 42 U.S.C. § 405(b)(1) to adjudicate whether an individual is entitled to Social Security benefits, the Commissioner of Social Security is not represented by an attorney or a non-attorney at such a hearing. *See Sims*, 530 U.S. at 111. Because the Commissioner of Social Security is not represented by an attorney at a hearing under 42 U.S.C. § 405(b)(1), such a hearing is not an "adversary adjudication" for the purpose of the Equal Access to Justice Act (EAJA). *See* 5 U.S.C. § 504(a)(1) ("An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."); 5 U.S.C. § 504(b)(1)(C) (defining "adversary adjudication" in part as "an adjudication under section

[14] The SSA has extensive subregulatory guidance requiring its adjudicators, including ALJs, to develop the record with respect to specific issues. *E.g.*, Soc. Sec. Ruling 82-62 ("The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision. Since this is an important and, in some instances, a controlling issue, every effort must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit."). Social Security Rulings are binding on SSA adjudicators, including ALJs. *See* 20 C.F.R. § 402.35(b).

554 of this title in which the position of the United States is represented by counsel or otherwise"); *Sullivan v. Hudson*, 490 U.S. 877, 891 (1989) ("We agree with the Secretary that for purposes of the EAJA Social Security benefit proceedings are not 'adversarial' within the meaning of [5 U.S.C.] § 504(b)(1)(C)") (*citing Perales*, 402 U.S. at 403). The SEC ALJ who sanctioned Petitioners presided over an "adversary adjudication" for the purpose of 5 U.S.C. § 504.

In *Perales*, this Court did "not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act." 402 U.S. at 409.[15] Because the Court recognized that hearings for Social Security benefits under 42 U.S.C. § 405(b)(1) are consistent with the Administrative Procedure Act *and* non-adversarial, the Court recognized that the Administrative Procedure Act itself does not require an adversarial adjudication. In answering the question presented in *Lucia*, the Court should adhere to its analysis in *Perales* that an adjudication pursuant to or consistent with the Administrative Procedure Act may be adversarial *or* non-adversarial. Whether an ALJ "exercises significant discretion" in "carrying out . . . important functions" for the purpose of *Freytag* should depend in part on

---

[15] *Cf. Mullen v. Bowen*, 800 F.2d 535, 536 n.1 (6th Cir. 1986) (en banc) ("Hearings under section 205(b), 42 U.S.C. § 405(b), must also conform to the Administrative Procedure Act, 5 U.S.C. §§ 556-557.").

whether the ALJ carries out those functions as part of an adversarial or a non-adversarial adjudication. Even if an SEC ALJ is an inferior Officer, an SSA ALJ who presides over a non-adversarial hearing concerning an individual's claim for Social Security benefits is not an inferior Officer but merely an agent of a principal. *Cf.* Brief for Court-Appointed *Amicus Curiae* in Support of the Judgment Below at 32-43, *Lucia v. SEC*, No. 17-130 (Mar. 26, 2018).

Because both SEC ALJs and SSA ALJs preside over administrative proceedings consistent with the Administrative Procedure Act, they not unexpectedly perform many of the same duties for their respective agencies. *See Bandimere*, 844 F.3d at 1200 (McKay, J., dissenting) ("SSA ALJs have largely the same duties as SEC ALJs"). Administrative law judges in both agencies perform basic adjudicative duties such as taking testimony from witnesses under oath, *see* 17 C.F.R. §§ 200.14(a)(1), (4), 201.325; 20 C.F.R. § 404.950(e); making evidentiary rulings, *see* 17 C.F.R. §§ 200.14(a)(3), 201.230; 20 C.F.R. §§ 404.935, 404.944, 404.950(c); and issuing subpoenas and denying requests for subpoenas, *see* 17 C.F.R. § 200.14(a)(2); 20 C.F.R. § 404.950(d).

Of necessity, ALJs in both agencies must *apply* the law to render decisions. But ALJs in both agencies do not have similar responsibilities to *interpret* the law. Whether an ALJ is an inferior Officer should depend, in part, on whether the ALJ has any policy-making role. The five SEC ALJs may *interpret* the law as a routine function. *See* Resp't Br. at 11 (SEC "ALJs issue

initial decisions that *interpret* and apply the law") (emphasis added). The more than 1,600 SSA ALJs have little, if any, occasion to *interpret* the law. The SSA requires its ALJs to apply the same law, including detailed subregulatory guidance, that its non-attorney adjudicators apply:

> We require adjudicators at all levels of administrative review to follow agency policy, as set out in the Commissioner's regulations, SSRs, Social Security Acquiescence Rulings (ARs), and other instructions, such as the Program Operations Manual System (POMS), Emergency Messages, and the Hearings, Appeals and Litigation Law manual (HALLEX). Under sections 205(a) and (b) and 1631(c) and (d) of the Act, the Commissioner has the power and authority to make rules and regulations and to establish procedures, not inconsistent with the Act, which are necessary or appropriate to carry out the provisions of the Act. The Commissioner also has the power and authority to make findings of fact and decisions as to the rights of any individual applying for payment under the Act. Because of the Commissioner's delegated authority to implement the provisions of the Act, we may, from time to time, issue instructions that explain the agency's policies, regulations, rules, or procedures. *All adjudicators must follow our instructions.*

Soc. Sec. Ruling 13-2p (emphasis added) (published at 78 Fed. Reg. 11,939, 11,946 (Feb. 20, 2013)).

II. Initial Decisions of SEC ALJs Become Administratively Final Only After the Commission Takes Action; Likewise, Some Decisions of SSA ALJs Become Administratively Final Only After SSA's Appeals Council Takes Action

The court below held that an SEC ALJ, who presides over an adversarial proceeding, is not an inferior Officer because the ALJ does not exercise "significant authority pursuant to the law of the United States" under *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277, 283-84 (D.C. Cir. 2016) (*citing Landry v. FDIC*, 204 F.3d 1125, 1133-34 (D.C. Cir. 2000)). For that holding, the court below emphasized that an SEC ALJ's initial decision is subject to discretionary review by the Commission and that an SEC ALJ's initial decision "becomes final when, and only when, the Commission issues the finality order, and not before." *Lucia*, 832 F.3d at 286 (*citing*, *e.g.*, 17 C.F.R. § 201.360(d)). "[T]he Commission has retained full decision-making powers, and the mere passage of time is not enough to establish finality." *Id.* The regulations governing the finality of an SSA ALJ's decision are similar, in part, to the regulations governing the finality of an SEC ALJ's initial decision.

The Social Security Act left it for the agency to determine if and when an SSA ALJ's decision becomes administratively final. *See Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). The Appeals Council is SSA's highest

adjudicative body.[16] Some SSA ALJ decisions do not become administratively final until the Appeals Council takes action. An SSA ALJ may issue a "decision" or a "recommended decision." *See* 20 C.F.R. § 404.953(c) ("Although an [ALJ] will usually make a decision, the [ALJ] may send the case to the Appeals Council with a recommended decision based on a preponderance of the evidence when appropriate."). When an SSA ALJ issues a "recommended decision" that decision is not final until the Appeals Council issues its own "decision." *See* 20 C.F.R. § 404.979; *Hearings, Appeals and Litigation Law Manual* (*HALLEX*), § I-2-8-15(A). Thus, when an SSA ALJ issues a "recommended decision," that decision is similar in terms of administratively finality to an SEC ALJ's initial decision. An SEC ALJ's initial decision and an SSA ALJ's "recommended decision" are not final until the highest adjudicative body in the respective agency takes action.[17]

In the SEC's regulatory scheme, a party or aggrieved person has a right to file a petition for review of an ALJ's initial decision. 17 C.F.R. § 201.360(d)(1). A timely petition for review of an initial decision renders that decision non-final. 17 C.F.R. § 201.360(d)(1). In the SSA's regulatory scheme, an individual has a

---

[16] *See* Soc. Sec. Admin., *Brief History and Current Information about the Appeals Council*, https://www.ssa.gov/appeals/about_ac.html.

[17] After receiving a "recommended decision," the Appeals Council need not issue its own "decision," but may instead remand a claim to an ALJ for further proceedings. *See HALLEX*, § I-2-8-15(A). A claim for Social Security benefits is not administratively final when it is remanded to an SSA ALJ for readjudication.

similar right, namely, a right to request Appeals Council review of an ALJ's decision. 20 C.F.R. §§ 404.967, 404.968; *see also Sims*, 530 U.S. at 106-07 (summarizing part of SSA's regulatory scheme). A timely request for Appeals Council review of an SSA ALJ's "decision" renders that decision non-final. *See* 20 C.F.R. § 404.955. When an individual files a timely request for Appeals Council review of an SSA ALJ's "decision," that "decision" becomes SSA's final administrative decision only if and when the Appeals Council denies the individual's request for review. *See* 20 C.F.R. § 404.981.

The Commission has a discretionary right to review the initial decision of an SEC ALJ. *See* 15 U.S.C. § 78d-1(b); 17 C.F.R. §§ 201.360(d)(2), 201.411(c). The Appeals Council has essentially the same authority when an SSA ALJ issues a "decision," including after a court remand.[18] *See* 20 C.F.R. § 404.969(a) ("[Any time] within 60 days after the date of a decision or dismissal that is subject to review under this section, the Appeals Council may decide on its own motion to review the action that was taken in your case."); 20 C.F.R. § 404.984(c) ("Any time within 60 days after the date of the decision of the [ALJ] [in a court-remand case], the Appeals Council may decide to assume jurisdiction of your case even though no written exceptions have

[18] There are different regulations governing the finality of an SSA ALJ's "decision" depending on whether the "decision" is rendered after a court remand. *See* 20 C.F.R. § 404.970 (Appeals Council review in non-court remand case); 20 C.F.R. § 404.984 (Appeals Council review in court remand case).

been filed."). If the Appeals Council reviews an SSA ALJ's "decision" on its own motion in a non-court-remand case or assumes jurisdiction in a court-remand case, the SSA ALJ's "decision" is not administratively final. Rather, a later "decision" by the Appeals Council is SSA's administratively final decision. *See* 20 C.F.R. §§ 404.979, 404.984(c). If the Appeals Council remands a case to an SSA ALJ for further administrative proceedings instead of rendering a "decision," the ALJ's "decision" is vacated and the Appeals Council's remand order is not a final agency action. *See* 20 C.F.R. § 404.977.

An SEC ALJ's initial decision does not become administratively final merely due to passage of time. *See Lucia*, 832 F.3d at 286 (*citing* 17 C.F.R. § 201.360(d)). However, in some instances, an SSA ALJ's "decision" may become administratively final merely due to the passage of time. If an individual disagrees with an SSA ALJ's "decision" in a non-court-remand case, the individual must request Appeals Council review within sixty days of receipt of the "decision" to exhaust his or her administrative remedies. *See* 20 C.F.R. §§ 404.967, 404.968. If the individual does not request Appeals Council review of the ALJ's "decision" and if the Appeals Council does not review the ALJ's "decision" on its own motion within sixty days of the date of the "decision," the ALJ's "decision" is final and binding on both the individual and SSA. *See* 20 C.F.R. § 404.955.

The passage of time may also render administratively final an SSA ALJ's "decision" rendered on court remand. An individual who disagrees with an SSA

ALJ's "decision" on court-remand is not required to file exceptions to that "decision" with the Appeals Council to exhaust his or her administrative remedies; filing exceptions to an SSA ALJ's court-remand "decision" is optional. *See* 20 C.F.R. § 404.984. If an individual does not file exceptions to an SSA ALJ's "decision" on court remand within thirty days of receipt of the "decision" and if the Appeals Council does not assume jurisdiction within sixty days of that "decision," the ALJ's "decision" is administratively final without any further agency action. *See* 20 C.F.R. § 404.984(d). The passage of time thus may render administratively final an SSA ALJ's decision.

———♦———

CONCLUSION

The Court should affirm the judgment below. An SEC ALJ is not an inferior Officer within the meaning of the Appointments Clause. But if the Court reverses the judgment below, it should take care to fashion its decision narrowly to avoid unwarranted implications putting at risk the well-established largest adjudicatory system in the Western World handling literally millions of Social Security claims.

Respectfully submitted,

ERIC SCHNAUFER
Counsel of Record
ERIC SCHNAUFER,
ATTORNEY AT LAW, P.C.
1555 Sherman Ave. #303
Evanston, Illinois 60201
(847) 733-1232
eric@schnaufer.com

April 2, 2018