No. 17-1606

In The Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL,
Acting Commissioner, Social Security Administration,

Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

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

SUMMARY OF THE ARGUMENT

The Social Security Administration's policy disallowing judicial review of Appeals Council dismissals is unfair, harmful to claimants, and contrary to this Court's precedent.

Prior decisions by this Court establish that exhaustion of administrative remedies is not required for jurisdiction of the federal courts. In *Bowen v. City of New York*, 476 U.S. 467 (1986), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Weinberger v. Salfi*, 422 U.S. 749 (1975), this Court recognized the rights of

[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. Petitioner, Respondent, and Appointed Amicus have consented to NOSSCR filing an amicus brief.

claimants to seek judicial review despite failure to exhaust administrative remedies. The Eleventh Circuit's decision in *Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983) is consistent with this Court's precedent.

The Social Security Administration makes errors in reviewing claims, and its policy deprives claimants of an opportunity to correct those errors. Claimants who cannot seek judicial review of Appeals Council dismissals lose any opportunity to collect benefits to which they may be entitled. Several factors suggest that some Appeals Council dismissals are incorrect and should be reversed. The Appeals Council is understaffed and overwhelmed, and therefore prone to error. The Appeals Council devotes fewer resources to dismissals than other dispositions, as they require review of only a single adjudicator, while other dispositions require the review of two or three adjudicators. There is a high rate of error in Appeals Council determinations, as half of the cases denied by the Appeals Council on the merits which are appealed to federal court are reversed.

The Social Security Administration acknowledges the possibility of error in the dismissal of claims, as it permits review to claimants whose cases are dismissed at earlier stages of the application process. However, the Administration precludes review of dismissals at the Appeals Council stage, without explaining why it does not permit correction of errors by the Appeals Council. Cases from within the Eleventh Circuit, and more recently the Seventh Circuit, demonstrate that

the Appeals Council does in fact make errors, and judicial review is necessary to correct those errors. Claimants who do not live within the Seventh or Eleventh Circuits are foreclosed from seeking review of erroneous Appeals Council dismissals. Permitting judicial review of Appeals Council denials would result in a miniscule increase in the federal court caseload, but would prevent a significant loss of benefits to claimants.

ARGUMENT

I. The disability claims process is long, complicated, and can be confusing to claimants.

The federal disability program is comprised of two programs. The first, Social Security Disability Insurance Benefits (SSDIB), are paid to disabled persons who have contributed to the Disability Insurance Program through FICA[2] withholding, and to their dependents. 42 U.S.C. § 423(a)(1); *City of New York*, 476 U.S. at 470. The amount of the monthly benefit is based upon the amount the individual has paid into the program through FICA withholding. The second, Supplemental Security Income (SSI), is paid to financially needy disabled persons, including children, whose income and assets fall below specified levels. 42 U.S.C. § 1382(a); *Washington State Dept. of Social and Health*

[2] FICA, the Federal Insurance Contributions Act, is a payroll tax. Soc. Sec. Admin., *What is FICA?*, https://www.ssa.gov/thirdparty/materials/pdfs/educators/What-is-FICA-Infographic-EN-05-10297.pdf.

Services v. Guardianship Estate of Keffeler, 537 U.S. 371, 375 (2003). The amount of the monthly benefit is set by federal law, although each State has an option of supplementing the federal benefit amount, and many States do so.

The definition of disability is virtually the same for both programs:[3] the inability to do one's former job or any other job which exists in significant numbers in the national economy, considering the applicant's age, education, and past work experience. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); 20 C.F.R. §§ 404.1505(a), 416.905(a).[4]

For both the SSDIB and SSI programs, the lengthy and complex application process is identical. Indeed, the process is so complicated that it has been called a "byzantine labyrinth." *Wallschlaeger v. Schweiker*, 705 F.2d 191, 194 (7th Cir. 1983).

First, the individual must file a written or electronic application and provide medical documents or medical releases to supply proof of her disability.[5] 20 C.F.R. §§ 416.310, 422.505. If her application is denied, the Social Security Administration will provide her with a written notice of denial. She then must submit a written request for reconsideration, along with any

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[3] The one exception – the definition of disability for disabled indigent children in the SSI program – is not relevant to this case. *Sullivan v. Zebley*, 593 U.S. 521 (1990).

[4] All citations are to the April 1, 2018 20 C.F.R.

[5] The Social Security Administration does not accept oral requests at any stage of the process.

additional information she possesses regarding her inability to work. 20 C.F.R. §§ 404.909(a), 416.1409(a). The request for reconsideration form may be completed and submitted online. Social Security Administration Program Operations Manual System (POMS) DI 27001.001(B)(4).

The Social Security Administration will provide a written determination of the reconsideration request. 20 C.F.R. §§ 404.922, 416.1422. If the determination is unfavorable, the applicant has the right to request, in writing, a hearing before an Administrative Law Judge.[6]

A Social Security hearing is inquisitorial, not adversarial. 20 C.F.R. §§ 404.900(b), 416.1400(b); *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000). At the hearing, which is recorded, the applicant has the burden of proving that she suffers from mental or physical impairments which make it impossible for her to perform any of her "past relevant work."[7] 20 C.F.R. §§ 404.1520,

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[6] The Social Security Administration regularly reviews the cases of disability benefits recipients in order to determine whether they are still disabled. If, during one of those reviews, the Social Security Administration decides that a recipient is no longer disabled, the agency will send a written notice of termination of benefits to the recipient. The recipient has a right to challenge that determination through the same administrative process described for applicants. This process begins at the reconsideration hearing stage. 20 C.F.R. §§ 404.914, 416.1414.

[7] "Past relevant work" is work that the applicant did during the 15 years before the hearing date. The fact that one or more of the applicant's past jobs has become obsolete and may no longer exist is legally irrelevant. *Barnhart v. Thomas*, 540 U.S. 20 (2003).

416.920. She may give sworn testimony, may be represented by counsel or a non-attorney representative if she chooses, may bring witnesses to testify on her behalf, and may cross-examine witnesses whom the Social Security Administration has called to give evidence. 20 C.F.R. §§ 404.950, 416.1450. As the Federal Rules of Evidence do not apply in administrative hearings, 42 U.S.C. § 405(b)(1), the applicant has the right to submit written evidence without concern for the rule against hearsay. Fed. R. Evid. 802. Therefore, most, if not all, of the medical evidence at the hearing – medical records, prescription records, laboratory test results, reports from physicians – is in written form.

If the applicant shows that she cannot perform any of her past work, the burden shifts to the Social Security Administration to show that other jobs exist which she can perform. 20 C.F.R. §§ 404.1560(c), 416.960(c). The Social Security Administration may be able to satisfy that burden by relying on its own Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, Appendix 2, known as the "Grids."[8] If the applicant's individual characteristics do not match any of the Grid categories, the Administrative Law Judge may obtain the testimony of a vocational expert.[9] 20 C.F.R. §§ 404.1566(e), 416.966(e). The applicant has the option of cross-examining the vocational expert or providing testimony from her own expert.

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[8] *See Heckler v. Campbell*, 461 U.S. 458 (1983).

[9] *See also Biestek v. Berryhill*, No. 17-1184, which is sub judice in this Court.

If the applicant testifies at the administrative hearing, and most applicants do testify,[10] the Administrative Law Judge has the option of questioning her, and most Administrative Law Judges exercise that option. Since all Administrative Law Judges are lawyers, 5 C.F.R. § 930.204(b), and many have trial experience, the questioning can get intense. Applicants sometimes exit their hearings feeling that they have been the targets of an inquisition.

After the hearing, the Administrative Law Judge issues a written decision, which the Social Security Administration mails to the applicant. If the applicant was represented at the hearing, the Social Security Administration will mail a copy of the decision to the applicant's attorney or other representative. 20 C.F.R. §§ 404.953(a), 416.1453(a). The Social Security Administration does not send its decisions electronically.

The Administrative Law Judge must decide whether the applicant was disabled at any time from the date upon which she said that the disability began up to and including the date of the administrative hearing. 42 U.S.C. § 423(b); *Bastien v. Califano*, 572 F.2d 908, 912 (2d Cir. 1978); 20 C.F.R. §§ 404.620(a); 416.330(a). If the Administrative Law Judge's decision is unfavorable to the applicant, she has a fourth, and final, step in the administrative labyrinth – she can file a written

[10] She can waive her own testimony and rely on the testimony of others. 20 C.F.R. §§ 404.950(a), 416.1450(a). She can even waive the entire hearing and ask that the Administrative Law Judge decide her case upon the written record alone. 20 C.F.R. §§ 404.950(b), 416.1450(b).

request for the Social Security Appeals Council to review the Administrative Law Judge's decision. The Social Security Administration's "preferred method" for requesting Appeals Council review of an Administrative Law Judge's decision or dismissal is "via the internet."[11] That method (which was not available in 2014, when Ricky Smith's case was pending) strongly reduces the possibility that the Appeals Council will lose the paper Request for Review document or misfile it in the wrong claimant's folder, thereby reducing the likelihood that the Appeals Council will mistakenly dismiss timely-filed Requests for Review.[12]

The Social Security Administration will assign one or more Administrative Appeals Judges to review the records in the applicant's file, listen to the audiotape of the administrative hearing, and consider whatever additional evidence the applicant has submitted and whatever legal arguments the applicant or her lawyer have made in support of her case. Then the Appeals Council will issue a disposition. The Appeals Council issues four types of dispositions: decisions (which can be fully favorable, partially favorable,

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[11] Soc. Sec. Admin., *Appointed Representative Guide to Requesting Appeals Council Review*, https://www.ssa.gov/appeals/reps/Appt_Rep_Guide_Req_AC_Review_Submit_Evidence.pdf.

[12] With any system that involves large amounts of paper, requiring filing in the proper folder, human error is not uncommon. For example, in *Yenik v. Commissioner of Social Sec.*, 522 Fed. Appx. 65, 65-66 (2d Cir. 2013), a Social Security case proceeded all the way to the United States Court of Appeals before it was noticed that the Social Security file contained medical records belonging to someone other than the claimant.

or unfavorable), remands to an Administrative Law Judge, denials of requests for review, and dismissals of requests for review. 20 C.F.R. §§ 404.967, 416.1467.

If the Appeals Council decision is not favorable to the applicant, she can file a civil action in the United States District Court, seeking judicial review of the decision. 42 U.S.C. §§ 405(g), 1383(c)(3).

Needless to say, the lengthy and sometimes confusing application process is a daunting task for applicants, who all suffer from some kind of health issues, and many of whom are poorly educated and impecunious. Therefore, at each stage of the administrative process, many non-prevailing applicants simply drop their claims, and do not move to the next step of the process. For example, in Fiscal Year 2016, 2,582,092 individuals applied for SSDIB or SSI benefits.[13] 852,090 (33%) were awarded benefits while 1,730,002 (67%) were denied. *Id*. Of those whose applications the Social Security Administration denied, only 633,474 (37%) sought reconsideration. *Id*.

At the reconsideration stage, the Social Security Administration awarded benefits to 76,017 applicants (12%), while denying benefits to 557,457 applicants (88%). *Id*.

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[13] Soc. Sec. Admin., *Fiscal Year 2018 Congressional Justification*, https://www.ssa.gov/budget/FY18Files/2018JEAC.pdf. Some applicants file concurrently for SSI and SSDIB benefits. Individuals whose claims are filed under both programs are counted as a single claim.

At their administrative hearings, 219,022 (46%) of the applicants were awarded benefits, while a total of 261,874 were either denied or dismissed: 166,647 (35%) were denied, and another 95,227 (20%) were dismissed. *Id*. Again, there was attrition: only 133,840 applicants appealed to the Appeals Council. *Id*.

The Appeals Council ruled in favor of claimants or remanded to an Administrative Law Judge for new hearings in 17,399 (13%) of the cases. It dismissed 5,353 (4%) of the cases on procedural grounds, not the merits. *Id*. In Fiscal Year 2017, the 57 Administrative Appeals Judges, assisted by 46 Appeals Officers, and several hundred support personnel,[14] ruled on more than 160,000 cases.[15]

At every stage of the administrative process, the applicant (or recipient challenging the termination of her benefits) must comply with short time deadlines which are strictly enforced. She must submit the appropriate request for review within 60 days of receiving the written decision that she is challenging.[16] The

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

[15] *Id*.

[16] Thus, she must submit a written request for reconsideration within 60 days of receiving the notice that her application has been denied. 20 C.F.R. §§ 404.909(a)(1), 416.1409(a). She must file a request for an administrative hearing within 60 days of receiving the notice that her request for reconsideration has been denied. 20 C.F.R. §§ 404.933(b)(1), 416.1433(b). She must file a request for Appeals Council review within 60 days of receiving the Administrative Law Judge's decision. 20 C.F.R. §§ 404.968(a)(1), 416.1468(a).

Social Security Administration presumes that the notice to the applicant has been mailed on the day that it was signed, 20 C.F.R. § 422.210(c); POMS GN 03101.010(A)(1), and that the mail was delivered within five days of mailing. 20 C.F.R. §§ 404.901, 416.1401. Thus, if the applicant does not file the appropriate request within 65 days of the date on the document from which she seeks review, the Social Security Administration will dismiss her case as untimely. The dismissal of an applicant's request for Appeals Council review of an unfavorable Administrative Law Judge decision is the subject of the instant case.

By contrast, the regulations impose no such time limits on the Social Security Administration itself. At each of the four stages of the administrative process, the agency may take as much time as it pleases to make a determination or decision on the applicant's case. Enormous delays are common. It can take years for an applicant to complete the process from the date that she applies until the date that the Appeals Council denies her case. The average processing time in Fiscal Year 2017 was 111 days for an initial determination, 101 additional days for a reconsideration determination, and 605 additional days for a decision from an Administrative Law Judge at the hearing level.[17] There is a large variation in wait times at the hearing level of the administrative process, depending upon where the claimant lives – claimants in

[17] Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification*, p. 13 (This figure comes from adding processing times for initial, reconsideration, and hearing decisions).

Providence, Rhode Island wait 265 days, on average, to receive decisions on their cases, while claimants in San Juan, Puerto Rico must wait an average of 867 days for their decisions.[18] The average processing time from the filing of a request for review and the date of the Appeals Council's disposition in Fiscal Year 2016 was 364 days.[19] A typical Social Security claim thus takes over three years from the date of filing to the date of a decision at the final stage of administrative review, while an unlucky claimant in Puerto Rico must wait an average of nearly four years for a determination from the Appeals Council. The applicant or recipient has no alternative but to wait for the agency to act.

If the applicant waits more than 65 days to file a civil action in the United States District Court after a decision from the Appeals Council which has upheld the denial of her application or which has denied review and adopted the decision of the Administrative Law Judge as the final decision of the Commissioner, the law is clear that the applicant has, at most, missed a statute of limitations, i.e., the applicant's failure to file timely has not deprived the court of jurisdiction. *City of New York*, 476 U.S. at 478. And the defense of statute of limitations can be waived, when appropriate, by the Commissioner of Social Security or by the court.

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[18] Soc. Sec. Admin., *Hearing Office Average Processing Time Ranking Report FY 2019*, https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html.

[19] Soc. Sec. Admin., *Annual Data for Average Processing Time of Appeals Council Requests for Review*, https://www.ssa.gov/open/data/Appeals-Council-Avg-Proc-Time.html.

Federal courts, in considering such defenses, have regularly found that the Commissioner was wrong, and that applicants have in fact filed their cases within the 60-day statute of limitations. In *Matsibekker v. Heckler*, 738 F.2d 79 (2d Cir. 1984), the court ruled that a claimant had timely filed his civil action where he had filed within 60 days of actually receiving the Appeals Council denial notice, even though his filing (due to delay in the delivery of the mail) was more than 90 days after the date on the notice itself.

In *Nguyen v. Colvin*, No. 16-cv-1535-JAH-AGS, 2018 WL 1510460 at *3 (S.D. Cal., Mar. 27, 2018), the Commissioner alleged that the claimant had filed late, i.e., more than 65 days after the April 12, 2016, date on the Appeals Council denial notice. However, because the envelope containing the denial notice was postmarked April 26, 2016, the Court concluded that the filing on June 18, 2016 was timely. *Id*. In *Ritchie v. Apfel*, No. 98-226-B, 1999 WL 1995198 at *2 (D. Me., Mar. 11, 1999), the Commissioner moved to dismiss an action as untimely, despite unrebutted evidence that, although the claimant had informed the Social Security Administration of his change of address from New Mexico to Maine, the Appeals Council nonetheless sent the notice to the previous New Mexico address. The court denied the motion to dismiss.

II. Prior decisions of this court resolve the issue of jurisdiction.

This Court has concluded that federal courts have jurisdiction to hear a Social Security case, despite a claimant's failure to exhaust all administrative remedies, i.e., to obtain a final decision on the merits of her claim from the Appeals Council.[20] Indeed, this Court has done so repeatedly.

In *Salfi*, 422 U.S. 749, this Court first considered the question of whether the federal courts have jurisdiction, under 42 U.S.C. § 405(g), to hear cases filed by Social Security claimants whose applications for benefits have been rejected at both the initial and reconsideration stages of the administrative process, but who have not sought either administrative hearings or Appeals Council review of the decisions. *Id*. at 753-54. This Court ruled explicitly that the federal courts possess jurisdiction, under 42 U.S.C. § 405(g), to consider the individuals' claims that the Social Security Administration (which was then a branch of the United States Department of Health and Human Services) had wrongfully deprived them of Social Security benefits by applying an unconstitutional statute, notwithstanding the claimants' failure to complete all four stages of the administrative process.

This Court, examining its jurisdiction *sua sponte*, rejected the contention that 42 U.S.C. § 405(g) requires

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[20] A final decision on the merits includes a denial of the claimant's request for review of a decision by an Administrative Law Judge. *See* pp. 8-9, *supra*.

a final decision from the Appeals Council on the merits of a claim as a prerequisite to a federal court's exercise of jurisdiction. This Court also rejected the contention that the jurisdictional requirement of a "final decision . . . made after a hearing," 42 U.S.C. § 405(g), was limited to decisions of Administrative Law Judges, issued after full, trial-type administrative hearings. Instead, this Court concluded that, "for purposes of this litigation the reconsideration determination is 'final.'" *Id*. at 767.

However, this Court found that the federal courts lack jurisdiction over unnamed members of the proposed plaintiff class because there was no allegation that those class members had filed applications for benefits and had been denied. *Id.* at 764. The requirement of a decision by the agency on a claim for benefits is "central to the requisite grant of subject-matter jurisdiction." *Id*. at 764.

A year later, this Court again considered the question of federal court jurisdiction over claims for Social Security benefits where the claimants had not exhausted all of their administrative remedies by completing the four-step review process. In *Eldridge*, 424 U.S. 319, this Court held that § 405(g)'s jurisdictional requirement of a "final decision by the Secretary after a hearing" had two elements, only one of which was jurisdictional "in the sense that it cannot be 'waived,'" *id*. at 328, rejecting a challenge to jurisdiction by the Secretary of Health and Human Services. That nonwaivable element is the requirement that a "claim for benefits shall have been presented to the Secretary,"

id. at 328, which is "an essential and distinct precondition for § 405(g) jurisdiction." *Id*. at 329. This Court found that, by challenging in writing the Secretary's decision to terminate his Social Security benefits, "Eldridge has fulfilled this crucial prerequisite." *Id*. at 329. This Court further ruled that the requirement that a claimant complete the administrative process, including review by the Appeals Council, is waivable, and hence not jurisdictional, thereby allowing the federal courts to review Eldridge's case. *Id*. at 330-31.

Finally, in *City of New York*, 476 U.S. 467, this Court again rejected the Secretary's argument that the federal courts lacked jurisdiction over Social Security claimant class members who had raised their claims for benefits but failed to exhaust administrative remedies, including those whose time to request administrative or judicial review had lapsed. Id. at 478. This Court concluded that that argument was "foreclosed" by *Eldridge* and *Salfi*. *Id*. at 478.

With regard to individuals who had presented their claims for benefits to the Social Security Administration but had not pursued those claims through all levels of administrative review, this Court upheld the inclusion of those claimants in the plaintiff class. This Court quoted *Eldridge* for the proposition that those claimants, having satisfied the non-waivable, jurisdictional element of the exhaustion of remedies requirement, could seek and obtain waiver of the waivable element of the exhaustion requirement. *Id*. at 483-84. Those elements may implicate the statutes of limitations, but are not jurisdictional.

Using that analysis, Ricky Lee Smith satisfied the non-waivable, jurisdictional component of the exhaustion requirement when he applied for benefits in August 2012, again when he sought reconsideration in 2012, and yet again when he participated in an administrative hearing, which resulted in a decision on the merits by an Administrative Law Judge, in 2014.

III. The Appeals Council's wrongful dismissals cause harm to claimants.

The disruption of 9/11 in lower Manhattan was insufficient to dissuade the Social Security Administration from finding untimely and dismissing the Request for Review by Jeanette Jones. *Jones v. Astrue*, 526 F.Supp.2d 455 (S.D.N.Y. 2007). In disputing the assertion of untimeliness, Ms. Jones swore that she had hand-delivered her timely Request for Review to the agency's Office of Hearings and Appeals in Federal Plaza in Manhattan, a few days before that area was devastated by the attack. *Id*. at 460. The Request for Review must have been lost or misplaced by the Social Security Administration during the ensuing chaos, and never transmitted to the Appeals Council office for review. Jones then retained counsel, who filed another Request for Review after contacting the Appeals Council office about the status of Jones's pro se appeal and learning that the Appeals Council had never received the paperwork which Jones swore that she had filed in Manhattan. The Appeals Council dismissed that request as untimely, leading Ms. Jones to file a mandamus action in court. In response to the Social Security

Administration's motion to dismiss for lack of jurisdiction, the court concluded that it had mandamus jurisdiction, under 28 U.S.C. § 1361. In remanding the case to the Appeals Council with the directive to make findings of fact as to the truth of Jones's claim of timely filing, the court noted that, in the aftermath of the attack "it is not surprising that the Commissioner has no record of receiving the request." *Id*. at 460.[21]

Claimants with equally compelling cases who reside outside the Eleventh, Seventh, and Second Circuits have suffered seriously, and without recourse to the courts. Betty Hart's lawyer, for example, averred that he had timely sought review of Ms. Hart's case in the Appeals Council, taking special care to ensure that his clients were looked after while he underwent serious surgery that would take him away from his practice for a period of time. Despite those efforts, and despite "significant evidence that the Appeals Council overlooked his final submission," the District Court dismissed Ms. Hart's case, holding that it lacked "jurisdiction to grant Plaintiff a remedy." *Hart v. U.S. Com'r Social Sec. Admin.*, Civ. No. 09-cv-1401, 2011 WL 1211548 *4 (W.D. La., Mar. 10, 2011).

Cases like Ms. Jones's and Ms. Hart's occur with notable frequency: the Appeals Council dismisses requests for review, hastily and incorrectly deciding that

[21] The Appeals Council subsequently found that Jones had good cause for late filing. *Jones v. Astrue*, No. 09 Civ. 5577 (DAB) (FM), 2011 WL 3423771 *1 (S.D.N.Y., Jul. 15, 2011). And an Administrative Law Judge eventually found Jones disabled, and entitled to benefits.

the claimants filed the requests for review late and that they lacked good cause for the late filing. While there are a number of reasons why the Appeals Council makes such errors, the reasons are irrelevant if no tribunal can review the dismissals.

A. The stage at which a claim is dismissed arbitrarily determines whether the claimant may obtain review of the dismissal.

If an Administrative Law Judge dismisses a claimant's request for a hearing, the claimant has a remedy. She can request that the Administrative Law Judge vacate the dismissal order, or she can ask the Appeals Council to vacate the dismissal. *See* 20 C.F.R. §§ 404.960(a); 416.1460(a). However, Social Security regulations provide no recourse whatsoever to a claimant to challenge the Appeals Council's dismissal of her request for review. 20 C.F.R. §§ 404.972, 416.1472. The Social Security Administration provides no justification for its policy that a claimant is entitled to review when her request for a hearing has been wrongfully dismissed, but not when her request for Appeals Council review has been wrongfully dismissed.

The annual number of Administrative Law Judge dismissals which either the Administrative Law Judges or the Appeals Council vacates is unknown; the Social Security Administration does not publish those statistics. However, the collective experience of amicus curiae has been that such orders vacating dismissals happen with some frequency. And published judicial opinions in Social Security cases occasionally mention

that the Administrative Law Judge's dismissal of the claimant's request for a hearing had been vacated by the Appeals Council. *Barnes v. Astrue*, No. 08-2294, 2010 WL 1416884 at *1 (C.D. Ill., Apr. 1, 2010) (mentioning the Appeals Council's finding of good cause for late filing of a request for hearing after dismissal by an Administrative Law Judge); *Richards v. Apfel*, No. C-98-4132-CAL, 1999 WL 252477 at *3 (N.D. Cal., Apr. 14, 1999) (Appeals Council remanded for the Administrative Law Judge to reconsider whether the claimant had good cause for late filing); *Howard v. Apfel*, 17 F.Supp.2d 955, 961 (W.D. Mo. 1998) (Appeals Council remanded to Administrative Law Judge "for further consideration of whether good cause exists for the claimant's untimely filing of the request for hearing.") Cases from Courts within the Eleventh Circuit show that the Appeals Council makes similar errors, yet the majority of claimants across the country have no opportunity for review of Appeals Council dismissals, absent a Constitutional claim.

B. Appeals Council dismissals entail less rigorous review than other types of Appeals Council dispositions.

The Appeals Council issues four types of dispositions: decisions (which can be fully favorable, partially favorable, or unfavorable), remands to an Administrative Law Judge, denials of requests for review, and dismissals of requests for review. 20 C.F.R. §§ 404.967, 416.1467. If the Appeals Council issues a decision on a case or remands the claim to an Administrative Law

Judge, the decision or remand requires the concurrence of two Administrative Appeal Judges.[22] 20 C.F.R. § 422.205(b). If the two assigned Administrative Appeals Judges do not agree, a third is brought in to act as tiebreaker. However, decisions to dismiss or deny requests for review are made by only one Administrative Appeals Judge. 20 C.F.R. § 422.205(c). The Appeals Council requires that multiple Administrative Appeals Judges review a case before issuing any order which gives a claimant a favorable outcome, but most cases which result in unfavorable outcomes require only a single reviewer. In nearly all Appeals Council dispositions other than dismissals, the claimant's case is under review on the merits for a fourth time. In the case of dismissals for untimely filing, the only issues are whether the filing was timely and, if not, whether the claimant had good cause for late filing. The first and only time that issue is decided, it is disposed of by a single Administrative Appeals Judge, and, under current regulations, that decision is binding and unreviewable.

C. The Appeals Council has an enormous workload, resulting in hasty and erroneous decisions.

The Appeals Council's workload is staggering. In Fiscal Year 2017, the 57 Administrative Appeals

[22] Office of the Inspector General, *Request for Review Workloads at the Appeals Council*, Report Number A-12-13-13039, March 7, 2014, p. 14, https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13039.pdf.

Judges ruled on more than 160,000 cases.[23] The judges were assisted in their Herculean task by only 46 Appeals Officers, and a few hundred support personnel.[24] Individual Administrative Appeals Judges dispose of high numbers of cases each year. The median number of dispositions by an Administrative Appeals Judge in Fiscal Year 2012 was 1,283.[25] The most productive Administrative Appeals Judges issued over 3,000 dispositions. The Administrative Appeals Judges at the median disposed of approximately five cases per day, while the Administrative Appeals Judges at the high end disposed of 12 cases per day.[26] With that heavy output, Administrative Appeals Judges typically spend only 10 to 15 minutes reviewing an average case.[27] With such a high caseload and such pressure to reduce a colossal backlog, Administrative Appeals Judges are guaranteed to make mistakes. When an Administrative Appeals Judge errs on the merits of an individual's claim, the individual can seek judicial review of that mistake in the United States District Court. Yet when the Administrative Appeals Judge's mistake concerns

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[23] Soc. Sec. Admin., *Brief History and Current Information About the Appeals Council,* https://www.ssa.gov/appeals/about_ac.html (Last visited December 15, 2018).

[24] *Id*.

[25] Office of the Inspector General, *Request for Review Workloads at the Appeals Council*, p. 10.

[26] *Id*.

[27] Petition for a Writ of Certiorari, p. 14; Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199, 257 (1990).

the claimant's compliance with filing deadlines, or having good cause for late filing, the Social Security Administration says that the claimant is out of luck – she may not obtain review of the error.

In addition to the Administrative Appeals Judges, the support staff also have enormous workloads. Historically, the Appeals Council has relied upon paper filing rather than electronic filing. When claimants submit requests for review on paper, the papers sometimes are lost or misfiled at the Appeals Council. That is precisely what Ricky Lee Smith says happened in his case: his lawyer mailed a written request for review, and the Appeals Council lost or misfiled the paperwork containing that request.

The Appeals Council now permits electronic filing of requests for review,[28] a development which will reduce the loss and misfiling of paper requests for review. Electronic filing also enables the Appeals Council to keep a record of every request for review that it receives, and the date upon which the request for review was filed.

D. Appeals Council denials on the merits are often erroneous, resulting in frequent federal court reversals.

It is impossible to know how often the cases that the Appeals Council has dismissed cases as untimely

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[28] Soc. Sec. Admin., *Appeals Council Request for Review*, https://secure.ssa.gov/iApplNMD/oao.

would have been reversed by a federal court. However, existing data on other types of Social Security cases – those in which claimants seek review of denials on the merits – show a high rate of error.

The Social Security Administration keeps data on the number of cases denied, remanded, dismissed, and allowed (i.e., awarded benefits) at both the Appeals Council and in federal courts.[29] In Fiscal Year 2017, the Appeals Council ruled in claimants' favor in only 10% of cases that it reviewed, remanding 9% of cases and awarding benefits in 1% of the cases.[30] When disappointed claimants appealed by filing civil actions in federal court, the courts ruled in claimants' favor in 50% of cases, remanding 48% and awarding benefits in the other 2%. *Id*.[31] Federal courts reversed or remanded a total of 9,245 cases,[32] demonstrating a large number of erroneous decisions by Administrative Law

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[29] Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification*, p. 206, https://www.ssa.gov/budget/FY19Files/2019CJ.pdf.

[30] *Id*.

[31] The numbers for prior years are similar. In Fiscal Year 2016, the Appeals Council remanded 13% of cases and allowed 1%, while the federal courts remanded 49% and allowed 2%. Soc. Sec. Admin., *Fiscal Year 2018 Congressional Justification*, p. 183, https://www.ssa.gov/budget/FY18Files/2018JEAC.pdf. In Fiscal Year 2015, the Appeals Council remanded 13% of cases and allowed 1%, while the federal courts remanded 45% and allowed 2%. Soc. Sec. Admin., *Fiscal Year 2017 Congressional Justification*, p. 169, https://www.ssa.gov/budget/FY17Files/2017FCJ.pdf.

[32] Soc. Sec. Admin., *Court Remands as a Percentage of New Court Cases Filed*, https://www.ssa.gov/appeals/DataSets/AC05_Court_Remands_NCC_Filed.html.

Judges that the Appeals Council, by denying review, had effectively affirmed.[33]

Thus, in fully half of the cases which claimants filed, the federal judiciary concluded that the Social Security Administration had erred in denying benefits. The extremely high rate of error cannot be explained by difference in the standards of review. The Appeals Council and the federal courts apply essentially the same legal standards. The Appeals Council will review a case if the Administrative Law Judge has made an error of law or abused his or her discretion, if the Administrative Law Judge's findings or conclusions are not supported by substantial evidence, if the case has a broad policy or procedural issue that may affect the general public interest; or if the Appeals Council receives new and material evidence relating to the period at issue and there is a reasonable probability that the new evidence would change the outcome of the decision. 20 C.F.R. §§ 404.970(a), 416.1470(a). Likewise, the federal court will reverse an Administrative Law Judge's decision if it is not supported by substantial evidence, 42 U.S.C. § 405(g), is based on legal error, *Hopgood ex rel. L.G. v. Astrue*, 578 F.3d 696, 698 (7th Cir. 2009), if the Administrative Law Judge abused his

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[33] "The Appeals Council [ ] struggles to fulfill its error-correction and quality-review roles. That these steps may have room for improvement is evidenced by the 45% rate at which cases are remanded back to the agency from federal courts in recent years." Administrative Conference of the United States, *Improving Consistency in Social Security Disability Adjudications*, p. 5, https://www.acus.gov/recommendation/improving-consistency-social-security-disability-adjudications#_ftnref18.

or her discretion, *Barrett v. Berryhill*, 906 F.3d 340, 345 (5th Cir. 2018), or if "there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g). Thus, in half of the cases filed, the federal courts had to right the mistakes that the Appeals Council had committed or upheld. The high degree of errors on the merits suggests that the Appeals Council also makes a large number of errors in dismissing cases. Claimants must be able to seek review in the federal courts in order to correct those errors.

IV. Allowing review of Appeals Council dismissals will cause only a slight increase in federal court filings.

Social Security Administration records show that disappointed claimants filed civil actions in federal court from only 14% of "appealable" Appeals Council dispositions.[34] In Fiscal Year 2017, claimants filed 19,020 cases in United States District Court.[35]

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[34] Appealable dispositions are denials of the request for review and unfavorable or partially favorable Appeals Council decisions on the merits. Soc. Sec. Admin., *Appeals to Court as a Percentage of Appealable AC Dispositions*, https://www.ssa.gov/appeals/DataSets/AC04_NCC_Filed_Appealable.html.

[35] United States Courts, *Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2017*, http://www.uscourts.gov/sites/default/files/data_tables/jb_c3_0930.2017.pdf.

In fiscal year 2017, the Appeals Council dismissed approximately 4,000 cases, including approximately 2,500 on untimeliness grounds.[36] If claimants challenge Appeals Council dismissals with the same frequency that they challenge Appeals Council denials, there would be, at most, 560 new federal court filings each year. That number represents a miniscule percentage of the 358,563 cases filed in District Court during the 12-month period ending March 31, 2018.[37] And, as was stated above, the development of electronic filing of requests for Appeals Council review will reduce the incidence of cases in which the claimant timely files a written request for review but the Social Security Administration loses or misfiles that request, as happened in Jeanette Jones's case.

Moreover, compared to civil actions challenging the denial of Social Security benefits, civil actions challenging Appeals Council dismissals are simple cases. They only require briefing on a single question: did the Appeals Council err in dismissing the case? In order to answer this question, the court does not need to review the claimant's entire administrative record, but only the evidence related to timeliness.

Experience in the Eleventh Circuit has shown both that Social Security claimants' civil actions challenging Appeals Council dismissals have not overwhelmed

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[36] Brief for the Respondent, p. 29.

[37] United States Courts, *Federal Judicial Caseload Statistics 2018*, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018.

the District Court docket, and that the Appeals Council has erred in dismissing requests for review. *See Quarles v. Colvin*, No. 15-00572-N, 2016 WL 4250399 (S.D. Ala., Aug. 10, 2016) (remanding where evidence presented to the court demonstrated good cause for late filing); *Vargas v. Colvin*, No. 14-20133-CR, 2014 WL 6384150 (S.D. Fla., Oct. 28, 2014), report and recommendation adopted, 2014 WL 6455366 (S.D. Fla., Nov. 13, 2014) (Appeals Council abused its discretion in dismissing request for review); *Walker v. Commissioner of Social Sec.*, 2013 WL 3833199 No. 6:12-cv-1025-Orl-DAB (M.D. Fla., Jul. 23, 2013) (remanding where claimant submitted records of psychiatric treatment to the court around the time the request for review was due, which could reasonably demonstrate good cause for late filing). Had these cases been in any of the majority of Circuits, the claimants' cases would be dismissed for lack of jurisdiction, despite the erroneous Appeals Council dismissals.

This small increase in federal court cases would prevent deserving claimants from losing years of past-due benefits. The delays in Social Security claims are long. The average processing time from the date of filing of an initial application until a claimant receives a decision from an Administrative Law Judge is 817 days.[38] If the Appeals Council dismisses a claimant's request for review as untimely, and does not find good cause for late filing, the claimant loses all opportunity

[38] Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification*, p. 13 (This figure comes from adding processing times for initial, reconsideration, and hearing decisions).

to claim up to three years of past-due benefits, i.e., benefits which accrue during the waiting period.[39]

In addition to losing months or years of past-due benefits after a wrongful Appeals Council dismissal, some claimants lose the opportunity to ever qualify for future disability benefits. In all claims for Social Security Disability Insurance Benefits, there is a date on which the claimant's insurance coverage lapses, a "Date Last Insured," which is the date by which the claimant must establish disability in order to qualify for benefits. If the claimant's Date Last Insured expired before the Administrative Law Judge issued a decision, any new claim filed would be barred by administrative res judicata.[40] An unreviewable dismissal by the Appeals Council, no matter how wrong it is, will foreclose such a claimant from ever obtaining Social Security Disability Insurance Benefits.

[39] A claimant who applies for Social Security Disability Insurance Benefits can receive past-due benefits for up to a year prior to the date of filing. 20 C.F.R. § 404.621(a)(1).

[40] 20 C.F.R. § 404.957(c)(1); HALLEX I-2-4-40(J); *accord Dugan v. Sullivan*, 957 F.2d 1384 (7th Cir. 1992); *Draper v. Sullivan*, 899 F.2d 1127 (11th Cir. 1990); *Lively v. Secretary of Health and Human Services*, 820 F.2d 1391 (4th Cir. 1987); *Oberg v. Astrue*, 472 Fed. Appx. 488, 489 (9th Cir. 2012); *Aguiniga v. Colvin*, 833 F.3d 896, 900 (8th Cir. 2016).

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit Court of Appeals and rule that the District Court has jurisdiction over Ricky Lee Smith's civil action.

Respectfully submitted,

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