No.

In the Supreme Court of the United States

WILLIE EARL CARR AND KIM L. MINOR,
PETITIONERS,

v.

COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether claimants seeking disability benefits under the Social Security Act must exhaust Appointments Clause challenges before the Administrative Law Judge as a prerequisite to obtaining judicial review.

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Petitioners Willie Earl Carr and Kim L. Minor respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit below. Under Rule 12.4, petitioners file this petition covering the judgments in both of their cases, as the Tenth Circuit consolidated their cases and issued a single decision.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at --- F.3d ----, and available at 2020 WL 3167896; *see* Pet.App.1a-31a, *infra*. Both parties consented to a proceeding before a magistrate judge in lieu of the district court. *See* 28 U.S.C. §§ 636(c)(1) &

(3). The opinion and order of the magistrate judge in *Willie Earl C v. Saul* is unreported and is available at 2019 WL 2613819. Pet.App.32a-56a. The opinion and order of the magistrate judge in *Kim L. M. v. Saul* is unreported and is available at 2019 WL 3318112. Pet.App.57a-83a.

JURISDICTION

The judgments of the court of appeals were entered on June 15, 2020. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

STATEMENT

This case presents an optimal vehicle for resolving a pressing and acknowledged circuit conflict over whether Social Security claimants must raise Appointments Clause challenges before an Administrative Law Judge (ALJ) to preserve them for judicial review. This Court in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044, held that the Securities and Exchange Commission's Administrative Law Judges are inferior officers within the meaning of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, who cannot be appointed by agency

staff. In the wake of *Lucia*, the Commissioner of the Social Security Administration (SSA) ratified the appointments of the agency's 1,600-plus ALJs to cure widespread, undisputed Appointments Clause violations.

That left thousands of cases in which unconstitutionally appointed ALJs had denied claimants' requests for disability benefits. In many of those cases, claimants did not raise Appointments Clause challenges before the agency. This Court has held that Social Security claimants—who are often unrepresented, unsophisticated, and debilitated—categorically do not forfeit judicial review of any type of issue by failing to raise it before the Appeals Council, the final stage of SSA review. *Sims v. Apfel*, 530 U.S. 103, 107 (2000). But many claimants did not press (or know to press) an Appointments Clause challenge before their ALJs, either. Now, by the government's own estimates, over a thousand such claimants have already sought relief for that conceded constitutional violation in federal district courts nationwide, with more suits to come. And there is no question what that relief would entail if claimants need not have pressed the issue before the ALJ. Under *Lucia*, claimants must receive a new hearing before a new, properly appointed adjudicator.

But the courts of appeals have intractably divided over whether claimants' failure to raise Appointments Clause objections before their ALJs should stop courts from reviewing that claim now. All agree that the Social Security Act and accompanying agency regulations impose no such issue-exhaustion requirement. The Third Circuit has refused to superimpose a judge-crafted exhaustion mandate, relying on the non-adversarial, claimant-friendly nature of Social Security ALJ proceedings, the nature of Appointments Clause challenges, and claimants' enormous interest in proceeding before constitutionally appointed adjudicators. Within the Third Circuit,

dozens of claimants are already receiving remands to the agency so they can pursue their disability benefits claims before new, constitutionally appointed adjudicators.

In other circuits, however, claimants are out of luck. In the decision below, the Tenth Circuit expressly disagreed with the Third Circuit and created an issue-exhaustion requirement for Appointments Clause claims, concluding that claimants should be expected to develop these challenges before ALJs. The Eighth Circuit just agreed with the Tenth Circuit. And the First and Ninth Circuits have long espoused a categorical issue-exhaustion rule. In all of those circuits, petitioners and thousands of similarly situated claimants have suffered conceded constitutional violations but have no further recourse.

Only this Court can resolve this widely acknowledged and entrenched split, and now is the time. There is no point in waiting further for the dozens of appeals pending in other circuits in the face of this already clear disagreement. The split was outcome-determinative in this case, which is a clean vehicle for its resolution. This Court should act immediately to restore uniformity on a hugely important issue central to the administration of a vast federal program.

Waiting to resolve this split would also impose an intolerable price. The agency requires the ALJ, not the claimant, to raise issues for review. And the agency's rules and practices encourage claimants to believe the agency's promises of non-adversarial proceedings. Punishing claimants for not challenging the appointments of the very ALJs before whom they appear and who are powerless to correct the error is perverse. And there is a conceded constitutional violation here, making an issue-exhaustion rule especially harsh. Receiving a new hearing before a different ALJ can make all the difference in the

world to the ultimate benefits determination, and Social Security disability claimants are uniquely needy.

In sum, this case is an ideal vehicle for resolving a profoundly important and entrenched split on an issue that affects thousands of vulnerable claimants in over a thousand pending cases so far. Only this Court's intervention can solve this problem and create uniform rules for the Nation's largest federal program.

A. Legal Background

1. Since its enactment in 1935, the Social Security Act has helped millions of vulnerable Americans stay afloat. "Today the Social Security Act provides disability benefits under two programs, known by their statutory headings as Title II and Title XVI." *Smith v. Berryhill*, 139 S. Ct. 1765, 1772 (2019) (citing 42 U.S.C § 401 *et seq.* (Title II); § 1381 *et seq.* (Title XVI)). Title II affords monthly benefits to disabled individuals who have contributed to the program through payroll deductions, "irrespective of financial need." *Id.* (internal quotation marks omitted). Title XVI extends benefits "to financially needy individuals who are aged, blind, or disabled" regardless of whether they contributed to the program. *Id.* (internal quotation marks omitted). Congress designed this statutory scheme to be "unusually protective of claimants." *Id.* at 1776 (internal quotation marks omitted).

For both programs, regulations promulgated by the Social Security Administration (SSA) prescribe a materially identical "four-step process" that claimants must follow to obtain a final decision reviewable in federal court. *Id.* at 1772; 42 U.S.C. § 405(g) (providing for judicial review of "any final decision of the Commissioner … made after a hearing").

First, employees at Social Security offices or at state agencies authorized by SSA make initial determinations

on claimants' benefits applications. 20 C.F.R. §§ 404.603, 404.614, 416.305, 416.325; *see Smith*, 139 S. Ct. at 1776 n.14.

Second, claimants dissatisfied with SSA's initial determination may seek reconsideration of that decision. 20 C.F.R. §§ 404.907, 416.1407.

Third, dissatisfied claimants may request a hearing before an ALJ. *Id.* §§ 404.929, 416.1429. ALJs must issue a "written decision that gives the findings of fact and the reasons for the decision" based "on the preponderance of the evidence offered at the hearing or otherwise included in the record." *Id.* §§ 404.953(a), 416.1453(a).

Fourth, claimants "may request that the Appeals Council review" the ALJ's decision. *Id.* §§ 404.967, 416.1467. "The Appeals Council's review is discretionary: It may deny even a timely request without issuing a decision," *Smith*, 139 S. Ct. at 1772, in which case the ALJ's denial of the claim becomes the SSA's final decision, *see Sims*, 530 U.S. at 107.

Although the SSA regulations prescribe detailed exhaustion rules with respect to benefits determinations, neither the Social Security Act nor the SSA regulations require claimants to have raised in administrative proceedings every *issue* they wish to litigate in court. *Id.* at 106-07. Agency regulations inform claimants that if they fail timely to invoke every step of the administrative process, "you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure." 20 C.F.R. §§ 404.900(b), 416.1400(b). But the regulations omit any similar warning about the consequences (if any) of failing to raise particular issues before the agency.

2. The administrative process for seeking Social Security disability benefits is "inquisitorial rather than adversarial," and does not rely on claimants to raise the issues to be reviewed. *Sims*, 530 U.S. at 110-11 (plurality op.). Agency regulations reassure claimants that "we conduct the administrative review process in an informal, non-adversarial manner." 20 C.F.R. §§ 404.900(b), 416.1400(b). Claimants fill out a one-page form to request an ALJ hearing or Appeals Council review. The agency instructs that filling out the forms should take just 10 minutes. The ALJ hearing request form gives claimants four lines to summarize why "I disagree with the determination," and the Appeals Council form provides three lines to make the case for further review. Neither form tells claimants whether their failure to raise issues now could preclude judicial review of those issues later.[1]

The above regulations and procedures accordingly impose on ALJs and Appeals Council judges the "duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims*, 530 U.S. at 111 (plurality op.); *see* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1302, 1325 (1997). While the SSA permits claimants to raise or object to the issues to be decided, the regulations provide that ALJs can consider new issues that claimants did not raise. 20 C.F.R. §§ 404.939, 404.946, 416.1439, 416.1446. The regulations do not require claimants to provide briefing or oral arguments before ALJs. *Id.* §§ 404.949, 416.1449. "[T]here is no counsel for the

[1] Soc. Sec. Admin., Form No. HA-501, Request for a Hearing by Administrative Law Judge (Jan. 2015), https://www.ssa.gov/forms/ha-501.pdf; Soc. Sec. Admin., Form No. HA-520, Request for Review of Hearing Decision/Order (Jan. 2016), https://www.ssa.gov/forms/ha-520.pdf.

government," and "[e]ven in cases where claimants are represented, the ALJ typically conducts questioning of the claimant and all witnesses." Dubin, *supra*, at 1303; *see* 20 C.F.R. §§ 404.944, 416.1444. Indeed, claimants do not even need to appear at the hearing unless the ALJ determines their appearance and testimony is necessary. *See* 20 C.F.R. §§ 404.950, 416.1450.

Given the cost of obtaining counsel, the claimant-protective nature of SSA proceedings, and the ALJ's duty to develop arguments for claimants, "a large portion of Social Security claimants either have no representation at all or are represented by non-attorneys." *Sims*, 530 U.S. at 112 (plurality op.).

B. Factual and Procedural Background

1. Petitioner Willie Earl Carr is a 49-year-old resident of Tulsa, Oklahoma. He has a high school education. He worked as an electrician until his disability made that work impossible. Pet.App.34a-35a.

For nearly 20 years, Mr. Carr has suffered from multiple medical conditions that have compromised his ability to earn a living. Gov't C.A. App.10-11. He seriously injured his neck and back; doctors have diagnosed him with herniated cervical disks, herniated lumbar disks, cervical disk bulge, and severe and constant pain in his neck, back, legs, wrist, and fingers. *Id.* He has undergone six back surgeries, including lumbar laminectomy surgery, lumbar fusion surgery, and cervical fusion surgery. Gov't C.A. App.7, 10-11. Mr. Carr also suffers from high blood pressure, high cholesterol, and obesity. Pet.App.35a. Still, Mr. Carr worked through the pain until 2008, when his injuries worsened too much for him to continue work.

In January 2014, Mr. Carr filed his application for Title II disability benefits. Gov't C.A. Addendum (Add.) 19. Over a year later, on February 13, 2015, the SSA made an

initial determination denying benefits. *Id.* Mr. Carr timely sought reconsideration, and the SSA again denied his claim on August 28, 2015. *Id.* On October 7, 2015, he timely requested a hearing before an ALJ, but did not raise an Appointments Clause challenge. *Id.*

A year and a half later, on April 10, 2017, an ALJ held a hearing on Mr. Carr's claim. *Id.* The ALJ "was not appointed by the Commissioner of Social Security, but rather, by [a] lower-level official[]." Gov't C.A. Br. at 6. On June 15, 2017, the ALJ denied Mr. Carr's claim, concluding that while he had many severe impairments, he could still perform some occupations with his limitations. Pet.App.35a-37a. On March 16, 2018, the Appeals Council denied Mr. Carr's timely request for further review. Pet.App.33a n.2.

2. Petitioner Kim L. Minor is a 63-year-old resident of Tulsa, Oklahoma. She has a two-year college degree in secretarial science. She worked as a bus driver until January 2010, when the combined toll of numerous surgeries and other serious medical conditions left her unable to continue. Pet.App.59a-60a. In a two-year span, Ms. Minor suffered a herniated disk in her back, then required surgery on both knees to repair tears, lumbar decompression surgery, and another back surgery for spinal stenosis. Gov't C.A. App.58-59. On top of that, doctors diagnosed her with chronic pain, anxiety, hypertension, irregular heart rhythm, and arthritis. Gov't C.A. App.60.

On December 10, 2014, Ms. Minor filed her application for Title II disability benefits. Add.56. On May 11, 2015, the SSA made an initial determination denying benefits. *Id.* She timely sought reconsideration, and the SSA again denied her claim on August 26, 2015. *Id.* On September 17, 2015, she timely requested a hearing before an ALJ, but did not raise an Appointments Clause challenge. *Id.*

A year and a half later, on March 29, 2017, Ms. Minor received her hearing, and that ALJ too "was not appointed by the Commissioner of Social Security." Gov't C.A. Br. at 6. On June 7, 2017, the ALJ denied her claim, determining that although she suffered from many "severe impairments," she was still capable of work. Pet.App.60a-61a. On March 16, 2018, the Appeals Council denied Ms. Minor's timely request for further review. Pet.App.58a n.2.

3. On June 21, 2018, after the Appeals Council had denied both petitioners' requests for review, this Court in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), held that ALJs of the Securities and Exchange Commission are inferior "Officers of the United States" under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, who must be subjected to Senate confirmation or appointed by "only the President, a court of law, or a head of department." *Id.* at 2051 & n.3. Because SEC staff, not the Commission, appointed the ALJ in *Lucia*, the Court found an Appointments Clause violation and ordered "a new hearing before a properly appointed official." *Id.* at 2055 (internal quotation marks omitted). The Court further held that the original ALJ could not rehear the case "even if he has by now received (or receives sometime in the future) a constitutional appointment" because "[h]e cannot be expected to consider the matter as though he had not adjudicated it before." *Id.*

SSA ALJs and Appeals Council judges share many similarities with SEC ALJs. On January 30, 2018, while *Lucia* was pending before this Court, the SSA's Office of General Counsel issued an Emergency Message instructing SSA ALJs to note on the record any Appointments Clause challenges claimants might make, but not to "discuss or make any findings related to the Appointments

Clause issue," because the "SSA lacks the authority to finally decide constitutional issues such as these."[2] Similarly, on June 25—four days after this Court issued *Lucia*—the SSA reiterated its instruction that ALJs should note, but not address, any Appointments Clause challenges that claimants raised.[3]

On July 16, 2018, nearly a month after *Lucia* issued, the Acting Commissioner "ratified" the appointment of SSA ALJs and Appeals Council judges and "approved their appointments as her own in order to address any Appointments Clause questions involving SSA claims." On August 6, 2018, SSA revised its emergency instructions to SSA ALJs to reflect the Commissioner's ratification of ALJ appointments, but again instructed ALJs merely to note any Appointments Clause challenges raised before the July 16, 2018 ratification date.[4]

On March 15, 2019, the SSA instituted a policy for addressing Appointments Clause challenges to decisions that ALJs issued before the Acting Commissioner's July 16, 2018 ratification. *See* Social Security Ruling 19-1p; Titles II and XVI: Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) On Cases Pending

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[2] Soc. Sec. Admin., EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process [January 2018 Emergency Message] (2018).

[3] Soc. Sec. Admin., EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative-Law Judges in SSA's Administrative Process – UPDATE (June 25, 2018), https://bit.ly/2ZaDCbG.

[4] Soc. Sec. Admin., EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative-Law Judges in SSA's Administrative Process – UPDATE, (Aug. 6, 2018), https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM.

at the Appeals Council, 84 Fed. Reg. 9582. This policy applies only to cases where claimants timely requested Appeals Council review of decisions that ALJs had issued before July 16, 2018. *Id.* at 9583. If claimants had raised an Appointments Clause challenge before the ALJ and the case was pending before the Appeals Council, the agency ordered the Appeals Council to grant review, vacate the decision, and order new proceedings before different, properly appointed adjudicators regardless whether claimants also pressed the issue before the Appeals Council. *Id.* Claimants who failed to raise Appointments Clause challenges before ALJs but raised them before the Appeals Council likewise receive new adjudications before new, properly appointed adjudicators. *Id.*

4. Meanwhile, having exhausted their administrative remedies, Mr. Carr in May 2018 and Ms. Minor in August 2018 each timely sought judicial review of the denial of their disability benefits claims in the United States District Court for the Northern District of Oklahoma, where they agreed to proceed before the same magistrate judge. Pet.App.32a-33a, 58a; Gov't C.A. App.2, 54. Both petitioners challenged the ALJs' rationales for denying disability benefits, but also the ALJs' appointments under *Lucia*, arguing that "the decision in this case was rendered by an Administrative Law Judge whose appointment was invalid at the time she rendered her decision." Pet.App.37a, 62a. The agency conceded that in both cases, "the ALJ was not constitutionally appointed," but urged that "the court should not consider the argument because Plaintiff[s] did not raise the issue during the administrative proceedings on [their] claim for benefits." Pet.App.50a, 77a.

In both cases, the magistrate judge agreed with petitioners' Appointments Clause challenges and further held that claimants need not exhaust specific issues in Social

Security administrative proceedings to preserve them for judicial review. Pet.App.55a, 82a-83a. The judge relied on this Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000), which held that Social Security claimants must exhaust all administrative *remedies*, but need not preserve specific issues before the Appeals Council as a prerequisite to judicial review. The judge reasoned that "the reasons cited [in *Sims*] … to reject an issue exhaustion requirement before the Appeals Council also apply to the other steps in the Social Security Administration process." Pet.App.55a, 82a-83a. He observed that in the two decades since *Sims*, neither the Social Security Act nor agency regulations have required issue exhaustion. He explained that the "[a]dministrative process remains non-adversarial and claimants, many of whom are unrepresented, are still not notified of any issue exhaustion requirement." Pet.App.54a, 82a. And he noted that "a ruling that *Sims* does not apply to the other steps in the administrative process would result in an issue exhaustion requirement at some steps of the process and not at subsequent steps." Pet.App.54a-55a, 82a.

Given the government's concession that the ALJs who adjudicated petitioners' claims were unconstitutionally appointed, the magistrate judge reversed the ALJs' decisions and remanded "for further proceedings before a different constitutionally appointed ALJ." Pet.App.55a, 83a.

5. On appeal, the Tenth Circuit consolidated petitioners' cases and reversed, holding that claimants forfeit Appointments Clause challenges if they do not raise them in administrative proceedings below. Pet.App.1a-31a. The Tenth Circuit acknowledged the government's concessions that the SSA ALJs who denied petitioners' disability benefits applications were unconstitutionally appointed, and that neither the Social Security Act nor regulations

require issue exhaustion. Pet.App.10a-11a. And the court acknowledged that under this Court's decision in *Sims*, claimants need not raise issues before the Appeals Council to preserve them for judicial review. Pet.App.15a.

But the Tenth Circuit considered *Sims* relevant to issue exhaustion only before the Appeals Council, not ALJs. The Tenth Circuit concluded that the purposes behind issue exhaustion favor requiring claimants to challenge the constitutionality of their ALJs' appointments before the ALJ. Pet.App.20a-24a. The court reasoned that petitioners' "failure to exhaust their Appointments Clause challenges deprived the SSA of its interest in internal error-correction." Pet.App.21a. The court also considered SSA ALJ proceedings more adversarial than Appeals Council proceedings. Pet.App.27a-28a. And the court stated that while SSA ALJs "typically develop[] issues regarding benefits, a claimant must object to an ALJ's authority." Pet.App.28a. Finally, the court refused to excuse petitioners' failure to raise an Appointments Clause challenge "for substantially the same reasons we have found an issue exhaustion requirement." Pet.App.31a n.10.

The Tenth Circuit acknowledged that its decision conflicted with the Third Circuit's decision in *Cirko ex rel. Cirko v. Comm'r, SSA*, 948 F.3d 148, 159 (3d Cir. 2020), *reh'g denied* Mar. 26, 2020, which held that claimants do not forfeit Appointments Clause challenges by failing to raise them before SSA ALJs. Pet.App.29a. The Tenth Circuit stated its agreement with "other circuits [that] have imposed an exhaustion requirement in the SSA ALJ context." Pet.App.20a n.3 (citing *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017); *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003); *Mills v. Apfel*, 244 F.3d 1, 4-5 (1st Cir. 2001)).

REASONS FOR GRANTING THE PETITION

This petition presents an acknowledged conflict in the courts of appeals on an important and recurring question concerning the intersection of the Appointments Clause and judicially created forfeiture rules. The Tenth Circuit admitted that the decision below directly conflicts with a decision of the Third Circuit holding that Social Security claimants need not exhaust challenges to the appointment of ALJs during administrative proceedings to preserve them for judicial review. The Eighth Circuit has since sided with the Tenth Circuit, again acknowledging the existence of the circuit conflict. Similarly, the First and Ninth Circuits impose general rules requiring issue exhaustion before SSA ALJs.

This clear circuit split calls out for this Court's immediate review. The question presented is one of substantial legal and practical importance, potentially affecting thousands of vulnerable Social Security disability claimants. The circuit split will not resolve without this Court's intervention. Waiting only prejudices all claimants in petitioners' shoes, who have been denied a chance at a hearing before a new, constitutionally appointed ALJ purely from bad geographical luck. And this case, which presents the question squarely and cleanly, is an optimal vehicle in which to address the question presented.

I. The Decision Below Sharpens a Clear Circuit Split Over Whether Claimants Must Raise Appointments Clause Challenges Before the SSA

1. If petitioners resided within the Third Circuit, they unquestionably would have obtained a new hearing before a new, properly appointed adjudicator based on their Appointments Clause challenges. As a unanimous Third Circuit panel recently held in a thorough opinion, failing to

challenge the constitutionality of SSA ALJs' appointments before those very ALJs does not bar judicial review of the issue. *See Cirko*, 948 F.3d at 152.

As here, improperly appointed ALJs denied the *Cirko* plaintiffs' disability claims. As here, the *Cirko* plaintiffs did not raise Appointments Clause challenges before the agency, instead raising Appointments Clause challenges before the district court shortly after this Court's *Lucia* decision. As here, the Commissioner conceded that plaintiffs' ALJs had been unconstitutionally appointed, but claimed forfeiture. *See id.*

But unlike here, the Third Circuit held that requiring claimants to raise Appointments Clause challenges before SSA ALJs "is not required in this context." *Id.* The court noted that, in the absence of a statutory or regulatory mandate, courts look to the nature of the claim, the administrative process at issue, and individual versus governmental interests to determine whether to require issue exhaustion. *Id.* at 153 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). All those factors, the Third Circuit concluded, point against requiring issue exhaustion of Appointments Clause claims before the ALJs whose appointments claimants would be challenging.

First, the court reasoned, the nature of Appointments Clause claims weighs against demanding issue exhaustion, which "is generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges, which implicate both individual constitutional rights and the structural imperative of separation of powers." *Id.*

Second, the Third Circuit held that the non-adversarial nature of Social Security administrative proceedings counseled against requiring issue exhaustion. While acknowledging that this Court's decision in *Sims* addressed

only issue exhaustion before the Appeals Council, the Third Circuit explained that the "rationales driving *Sims* [] generally apply to ALJs no less than AAJs." *Id.* at 156. Like the statutory and regulatory provisions governing the Appeals Council, nothing in the Social Security Act or regulations requires exhaustion before ALJs, and *Sims* reasoned that imposing an implied issue-exhaustion requirement "would penalize claimants who did 'everything that the agency asked.'" *Id.* at 155 (quoting *Sims*, 530 U.S. at 114 (O'Connor, J., concurring in part and concurring in the judgment)). Further, like Appeals Council proceedings, ALJ hearings are inquisitorial rather than adversarial, and rely on the judges, not claimants, to issue-spot. *Id.* at 155-56.

Finally, the Third Circuit concluded that claimants' interest in judicial review far outweighed governmental interests in requiring issue exhaustion. *Id.* at 156-60. The court found that imposing an exhaustion requirement for Appointments Clause claims "would impose an unprecedented burden on SSA claimants" by jettisoning a process where the ALJ ordinarily "plays a starring role" in developing issues and instead forcing claimants "to root out a constitutional claim." *Id.* at 156-57. That result would be especially prejudicial for the many claimants who lack legal representation in ALJ hearings, and would produce harsh consequences given the financial and physical vulnerability of Social Security claimants. *Id.* at 157.

Conversely, the Third Circuit considered the government's interest in requiring exhaustion "negligible at best." *Id.* The Commissioner had conceded that claimants "have 'no access … to the [C]ommissioner directly,'" and thus "the only avenues … available to claimants to seek a remedy—hearings before the ALJs or AAJs—were incapable of providing it." *Id.* at 158-59.

The Third Circuit accordingly "remand[ed] these … cases to the [SSA] for new hearings before constitutionally appointed ALJs other than those who presided over Appellees' first hearings." *Id.* at 159-60.

2. By contrast, as a result of the decision below, petitioners and every other similarly situated claimant within the Tenth Circuit cannot obtain a judicial remedy for conceded Appointments Clause violations. As the Tenth Circuit recognized, its decision directly conflicts with the Third Circuit's decision in *Cirko*, which the Tenth Circuit deemed "unpersuasive and counter to [its] precedent." Pet.App.29a.

The Eighth Circuit has also rejected the Third Circuit's approach. *See Davis. v. Saul*, -- F.3d --, 2020 WL 3479626 (8th Cir. June 26, 2020). The Eighth Circuit acknowledged that "circuits presented with the issue have disagreed on whether exhaustion of the issue before the agency is required." *Id.* at *2 (citing *Carr* and *Cirko*). The court of appeals then agreed with the Tenth Circuit, holding that claimants must exhaust Appointments Clause issues before the ALJ. *Id.* at *3-*4.

Further, despite *Sims*, "other circuits have imposed an issue exhaustion requirement in the SSA ALJ context," as the Tenth Circuit recognized. Pet.App.20a n.8. In the First Circuit, "the failure of an applicant to raise an issue at the ALJ level" forfeits the issue for judicial review. *Mills*, 244 F.3d at 8. And in the Ninth Circuit, claimants "must raise all issues and evidence at their administrative hearings in order to preserve them on appeal." *Shaibi*, 883 F.3d at 1109 (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999)). Those circuits have thus imposed a general rule that claimants who fail to raise an issue before the SSA ALJ forfeit the issue for judicial review.

This division of authority over whether claimants must exhaust Appointments Clause challenges before SSA ALJs is clear, indisputable, and acknowledged. The question presented has a binary answer—either claimants must raise Appointments Clause challenges to ALJs as a precondition of judicial review, or not. Given that the Third Circuit denied the government's request for rehearing in *Cirko*, *see* Order Den. Pet. for Reh'g, *Cirko v. Comm'r, SSA*, No. 19-1172 (3d Cir. Mar. 26, 2020), ECF No. 77, and the Tenth and Eighth Circuits pointedly disagreed with *Cirko*, there is little possibility that lower courts will settle on a single answer. Only this Court can resolve this conflict and restore national uniformity for exhaustion rules in the country's largest federal program.

II. The Question Presented Is Important and Squarely Presented

1. The question presented affects thousands of claimants for disability benefits who are similarly situated to petitioners. "[T]he Social Security hearing system is probably the largest adjudicative agency in the western world." *Barnhart v. Thomas*, 540 U.S. 20, 28-29 (2003) (internal quotation marks omitted). When this Court decided *Lucia*, the SSA employed some 1,600 ALJs, Pet.App.3a n.1, who adjudicated some 761,000 hearings per year. Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification* 3 (2018). Most, if not all, of those ALJs appear to have been unconstitutionally appointed through July 16, 2018. *Supra* p. 10. And petitioners are just two of the approximately 18,000 claimants per year who seek judicial review of SSA decisions in federal district court. Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification* 3 (2018); Soc. Sec. Admin., *Fiscal Year 2020 Congressional Justification* 16 (2019).

The number of cases across the nation implicating the question presented is significant by any metric. The government estimated that as of March 2020, over a thousand district-court cases raise the issue, with more potentially to come. Gov't Pet. for Reh'g En Banc, *Cirko v. Comm'r, SSA*, No. 19-1772 (3d Cir. Mar. 9, 2020), ECF No. 76 at 2. Scores of district courts across the country have already staked out diverging positions on whether claimants must have raised Appointments Clause challenges before ALJs to remedy conceded Appointments Clause violations in court.[5] As of March 2020, the government had identified "more than fifty appeals spread across" the Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits raising the question presented. Gov't Pet. for Reh'g En Banc, *Cirko v. Comm'r, SSA*, No. 19-1172 (3d Cir. Mar. 9, 2020), ECF No. 76 at 2 & n.1; *see* Gov't C.A. Br. viii-xi (listing 49 pending federal appeals with this issue as of December

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[5] *Compare, e.g.*, *Myers v. Comm'r, SSA*, No. 1:19-CV-10010-ADB, 2020 WL 1514547 (D. Mass. Mar. 30, 2020); *Danielle R. v. Comm'r, SSA*, No. 5:19-CV-538, 2020 WL 2062138 (N.D.N.Y. Apr. 29, 2020); *Ricks v. Comm'r, SSA*, No. CV 18-1097-RLB, 2020 WL 488285 (M.D. La. Jan. 30, 2020); *Chamberlin v. Comm'r, SSA*, No. 19-10412, 2020 WL 2300240 (E.D. Mich. May 8, 2020); *Herring v. Saul*, No. C18-120-LTS, 2020 WL 1528163 (N.D. Iowa Mar. 31, 2020); *Latosha N. v. Saul*, No. ED CV 18-2475-SP, 2020 WL 1853310 (C.D. Cal. Apr. 13, 2020); *Gagliardi v. SSA*, No. 18-CV-62106, 2020 WL 966595 (S.D. Fla. Feb. 28, 2020); *Jason D. v. Saul*, No. 3:19-CV-00176-SLG, 2020 WL 1816470 (D. Alaska Apr. 10, 2020) (requiring issue exhaustion of SSA ALJ Appointments Clause challenges) *with, e.g.*, *Suarez v. Saul*, No. 3:19-CV-00173 (JAM), 2020 WL 913809 (D. Conn. Feb. 26, 2020); *Duane H. v. Saul*, No. 3:19-CV-138-JVB-SLC, 2020 WL 1493487 (N.D. Ind. Mar. 27, 2020); *Jenny R. v. Comm'r, SSA*, No. 5:18-CV-1451 (DEP), 2020 WL 1282482 (N.D.N.Y. Mar. 12, 2020); *Morse-Lewis v. Saul*, No. 2:18-CV-48-D, 2020 WL 1228678 (E.D.N.C. Mar. 12, 2020); *McCary-Banister v. Saul*, No. SA-19-CV-00782-XR, 2020 WL 3410919, at *8 (W.D. Tex. June 19, 2020); *Morris W. v. Saul*, No. 2:19-CV-320-JVB, 2020 WL 2316598 (N.D. Ind. May 11, 2020) (no exhaustion needed).

2019). And the numbers of cases and circuits confronting the question presented has only grown since then.

The Third Circuit's estimate of a closed set of "hundreds (not hundreds of thousands) of claimants whose cases are already pending in the district courts," would be significant in its own right. *Cirko*, 948 F.3d at 159. But that estimate also undercounts the universe of cases. The Appeals Council can often take more than a year to render a final decision. Gov't Pet. for Reh'g En Banc, *Cirko v. Comm'r, SSA*, No. 19-1172 (3d Cir. Mar. 9, 2020), ECF No. 76 at 14. Because the Acting Commissioner ratified ALJs' appointments on July 16, 2018, some claimants challenging decisions rendered by improperly appointed ALJs have yet even to receive final decisions, and thus the time to seek judicial review in district court is still open. *See id.* at 14-15.

The circuit split over the question presented also produces stark differences in outcomes for similarly situated claimants who did not invoke an Appointments Clause challenge before their ALJs. The SSA undisputedly violated the Appointments Clause nationwide in its longstanding manner of appointing ALJs. And the government does not dispute that the proper remedy for all cognizable claims is a new hearing before a different, properly appointed SSA adjudicator. Yet, based on the fortuity of where a claimant lives, claimants in one part of the country get a new chance to establish their entitlement to benefits before constitutionally appointed ALJs, while claimants elsewhere get nothing.

That disparity is unacceptable in any federal program requiring uniformity, and is especially intolerable given that Social Security disability benefits "provide[] a crucial lifeline for some of the nation's most vulnerable citizens." Melissa M. Favreault et al., Urban Inst., *How Important Is Social Security Disability Insurance to U.S. Workers?*

1 (June 2013), https://urbn.is/2YFL1AP. Disability payments "account for the majority of family income for nearly half" of recipients and "more than two-thirds" of unmarried recipients. *Id.* And getting another look before a new ALJ can make all the difference for disabled claimants and their families. Overall, SSA ALJs reversed earlier determinations and granted benefits in about 55% of cases. GAO, *SOCIAL SECURITY DISABILITY Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions*, GAO-18-37 at 14 (Dec. 7, 2017), https://www.gao.gov/assets/690/688824.pdf. But individual ALJs' grant rates have varied significantly, and so the identity of the individual ALJ adjudicating the claim may matter greatly to the outcome. *See id.*; Admin. Conf. of the U.S., Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudication, 78 Fed. Reg. 41,352, 41,353 (July 10, 2013).

2. For thousands of Social Security claimants, there is no time to lose in resolving the acknowledged circuit split, and this case is an optimal vehicle for doing so. Further percolation is counterproductive, and would needlessly require courts of appeals, as well as countless district courts, to choose sides on an issue that only this Court can definitively resolve. The battle lines have been drawn in lengthy opinions. The conflict of authority is exceedingly unlikely to disappear given the Third Circuit's denial of en banc review in *Cirko*, the Tenth and Eighth Circuits' express disagreement with the Third Circuit's position, and other circuits' longstanding general issue-exhaustion requirements for SSA ALJs. Dozens of appeals are in the pipeline. Requiring claimants to wait years for a possible favorable ruling is fundamentally un-

fair, especially given the built-in, year-plus delay to receive a hearing and a new ALJ decision. *See Smith*, 139 S. Ct. at 1776 n.16.

This case presents a clean opportunity for the Court to resolve this intractable conflict swiftly. There are no jurisdictional or procedural barriers to this Court's review. And the question presented was outcome-determinative. The Tenth Circuit's decision rested entirely on its conclusion that an exhaustion requirement exists. Further, the court refused to excuse petitioners' failure to raise Appointments Clause challenges before the SSA "for substantially the same reasons [it] found an issue exhaustion requirement." Pet.App.31a n.10. The Tenth Circuit's issue-exhaustion holding, in sum, is all that stands between petitioners and an entitlement to new hearings in front of new, constitutionally appointed adjudicators who would consider petitioners' entitlement to life-changing disability benefits anew.

III. The Decision Below Is Wrong

The Tenth Circuit's decision undermines this Court's decision in *Sims*, which rejected the very sort of judge-made exhaustion requirement that the Tenth Circuit has created. Further, the Tenth Circuit's reasoning makes particularly little sense in the context of Appointments Clause claims, where the case against an issue-exhaustion requirement is especially strong.

1. The Tenth Circuit's justifications for requiring issue exhaustion before SSA ALJs are incompatible with this Court's rationales in *Sims* for refusing to require claimants to exhaust issues before the Appeals Council. In *Sims*, the Court emphasized that most agencies' statutes or regulations expressly require issue exhaustion, but not the SSA. 530 U.S. at 108. When Congress and the

agency fail to require issue exhaustion, *Sims* explained, courts' justification for stepping in rests on an analogy to the rule that litigants forfeit issues on appeal by failing to raise them below. *Id.* at 108-09. Thus, *Sims* held, judicially-crafted issue-exhaustion rules may be appropriate for adversarial administrative proceedings—but when "an administrative proceeding is not adversarial, … the reasons for a court to require issue exhaustion are much weaker." *Id.* at 110.

Applying those principles, both the *Sims* plurality and Justice O'Connor's separate concurrence refused to impose an issue-exhaustion requirement for Appeals Council proceedings. Writing for four justices, Justice Thomas reasoned that the "inquisitorial" nature of Social Security proceedings meant that the Appeals Council "does not depend much, if at all, on claimants to identify issues for review." *Id.* at 110-11, 112 (plurality op.). Thus the plurality declined to fault claimants for failing to do so. *Id.* at 112 (plurality op.). And for Justice O'Connor, "the agency's failure to notify claimants of an issue exhaustion requirement" sufficed to reject it. *Id.* at 113 (O'Connor, J. concurring in part and concurring in the judgment). Citing the SSA's instructions that (1) claimants "could request review" via a one-page form "that should take 10 minutes to complete," (2) "failing to request Appeals Council review would preclude judicial review," and (3) the Appeals Council would issue-spot cases, Justice O'Connor concluded that the claimant "did everything the agency asked of her." *Id.* at 114.

While *Sims* expressly reserved the issue "[w]hether a claimant must exhaust issues before the ALJ," 530 U.S. at 107, ALJ proceedings share all the same dispositive features. ALJs, like Appeals Council judges, have the "duty to investigate the facts and develop the arguments

both for and against granting benefits." *Id.* at 111 (plurality op.). ALJs, like the Appeals Council, use an inquisitorial process to discharge their duty to develop arguments, "look[] fully into the issues," and "decide when the evidence will be presented and when the issues will be discussed." 20 C.F.R. § 404.944. Claimants are not required to present written arguments, *id.* § 404.949, let alone exhaust each of the issues they wish the ALJ to consider. And claimants fill out a materially similar one-page form to request ALJ review; regulations similarly inform claimants that they must exhaust administrative remedies, but not individual issues; and regulations expressly note that ALJs can raise issues *sua sponte*. *Supra* p. 7; 20 C.F.R. §§ 404.900(b), 404.946. These features and others "strongly suggest[] that [ALJs] do[] not depend much, if at all, on claimants to identify issues for review." 530 U.S. at 112 (plurality op.); *see* Dubin, *supra*, at 1303, 1325. So it would be manifestly unreasonable, and contrary to the nature of the proceedings the agency chose to employ, to require claimants to raise issues before ALJs or forfeit them.

Rather than starting from *Sims*' premise that judge-made issue-exhaustion rules depend on context, the Tenth Circuit required "adequate reasons to depart from the general principle" of issue exhaustion, and found none. Pet.App.30a. The Tenth Circuit conceded that "[a]n SSA ALJ typically develops issues regarding benefits," Pet.App.28a, but brushed these similarities aside. Instead, the Tenth Circuit relied heavily on an SSA regulation requiring claimants to notify ALJs in writing if they object to the issues the ALJ identifies to be decided at each hearing. Pet.App.6a, 26a. (citing 20 C.F.R. § 404.939). But the Commissioner rightly has never argued that this regulation (or any other) expressly requires

issue exhaustion. *See* Pet.App.26a-27a n.7. That regulation dates to 1980, *see* 45 Fed. Reg. 52,085 (Aug. 5, 1980), yet *Sims* nonetheless characterized the SSA ALJ process as inquisitorial in 2000.

The Tenth Circuit further concluded that, "even if SSA ALJ review of disability claims is largely non-adversarial, Appointments Clause challenges are 'adversarial'" because regulations purportedly require claimants to "object to an ALJ's authority." Pet.App.28a. But the regulation the Tenth Circuit cited—20 C.F.R. § 404.940—is inapt, and merely requires claimants who believe an ALJ is prejudiced to "notify the [ALJ in question] at [the] earliest opportunity." And again, the Tenth Circuit's interpretation of SSA regulations runs against the government's acknowledgment that those regulations do not expressly require issue exhaustion. Pet.App.20a; *Cirko*, 948 F.3d 155-56 & n.6 (noting "[t]he Commissioner concedes" that "ALJ hearings have no express exhaustion requirement."). From start to finish, the Tenth Circuit thus ignored the features of SSA adjudications material to this Court's reasoning in *Sims*.

2. The Tenth Circuit compounded its error by making a series of incorrect assumptions about Appointments Clause challenges in particular.

a. The court speculated that, had petitioners raised their Appointments Clause claim before the ALJs, "the SSA could have corrected an appointment error." Pet.App.21a. But, under *Lucia*, the Commissioner was the only actor within the SSA capable of constitutionally appointing ALJs. *See* 138 S. Ct. at 2051. Before this Court's decision in *Lucia*, the Acting Commissioner repeatedly instructed the agency's ALJs *not* to "discuss or make any findings related to the Appointments Clause is-

sue," because the "SSA lacks the authority to finally decide constitutional issues such as these." January 2018 Emergency Message; *supra* p. 10-11. And as the government admitted in *Cirko*, individual claimants litigating disability claims before the agency "have 'no access … to the [C]ommissioner directly.'" 948 F.3d at 158.

This Court has long held that litigants are not required to exhaust particular issues where the decision maker who would consider their claim "lack[s] authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148; *see McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675 (1963) (no requirement to file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" beyond asking the Attorney General to bring suit). Here, not only could the individual ALJs not correct the error in their own appointments, Appeals Council judges were also unconstitutionally appointed, making it even more futile to pursue the issue.

The Tenth Circuit suggested that raising Appointments Clause arguments before ALJs would at least put the Commissioner "on notice" and potentially influence the agency. Pet.App.21a. But this Court rejected such speculation in *Mathews v. Eldridge*, stating that "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." 424 U.S. 319, 330 (1976).

b. The Tenth Circuit was equally incorrect that an exhaustion requirement would promote judicial and agency efficiency by permitting the Commissioner an opportunity to appoint the agency's ALJs. It is clear that

the Commissioner would not have promptly addressed petitioners' constitutional concerns even had petitioners raised them before their ALJs. Both before and immediately after *Lucia*, the agency signaled its awareness that its ALJs' appointments might be unconstitutional, but instructed ALJs to simply note any Appointments Clause challenges made. *Supra* p. 10-11. If the Commissioner were concerned about "the possibility of having to conduct two ALJ merits hearings on [petitioners'] disability benefits claims," Pet.App.23a, the Commissioner could have preemptively addressed the issue once it became clear there was a substantial question as to the constitutionality of the ALJs' appointments. And the idea that other claimants suffer delays when claimants in petitioners' shoes receive new hearings before different, constitutionally appointed ALJs, Pet.App.23a, is a problem of the agency's own making.

c. The Tenth Circuit, in a footnote, also cited an interest in avoiding sandbagging. Pet.App.30a n.9. But this Court has held that the interests implicated by an Appointments Clause challenge are so important that they can "be considered on appeal whether or not they were ruled upon below." *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991). And it is hardly likely that Social Security claimants—who are often unrepresented, unsophisticated, and disabled—would strategically proceed through the multi-year administrative process and hold an obscure constitutional challenge in reserve just in case the agency denied benefits. If anything, the agency is sandbagging Social Security claimants, who have no reason to think they must raise every conceivable issue before an ALJ or lose those objections forever. *See Cirko*, 948 F.3d at 156; *supra* p. 7. In sum, the numerous errors in the Tenth Circuit's resolution of an important question of law call out for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIE EARL CARR, Plaintiff – Appellee, v. COMMISSIONER, SSA, Defendant – Appellant.	No. 19-5079
KIM L. Minor, Plaintiff – Appellee, v. COMMISSIONER, SSA, Defendant – Appellant	No. 19-5085

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. Nos. 4:18-CV-00272-FHM, 4:18-CV-00418-FHM)

Amanda L. Mundell, Attorney (Joseph H. Hunt, Assistant Attorney General; Mark B. Stern, Joshua M. Salzman, and Daniel Aguilar, Attorneys, on the briefs)

United States Department of Justice, Washington, D.C. for Defendant - Appellant.

Paul F. McTighe, Jr., Tulsa, Oklahoma for the Plaintiffs – Appellees.

Before **HARTZ, MATHESON**, and **CARSON**, Circuit Judges.

MATHESON, Circuit Judge.

This appeal asks whether Social Security disability claimants waive Appointments Clause challenges that they failed to raise in their administrative proceedings.

In separate claims, Willie Earl Carr and Kim L. Minor ("Appellees") sought disability benefits from the Social Security Administration ("SSA"). In each case, the administrative law judge ("ALJ") denied the claim, and the agency's Appeals Council declined to review.

In district court, Mr. Carr challenged the SSA's denial of his claim for disability benefits. While his case

was pending, the Supreme Court held that Securities and Exchange Commission ("SEC") ALJs are "inferior officers" under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and therefore must be appointed by the President, a court, or the head of the agency, *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2049 (2018). Shortly after, Ms. Minor also sued in district court challenging the denial of benefits in her case.

In response to *Lucia*, the SSA Commissioner ("Commissioner") appointed the SSA's ALJs.[1] The Commissioner did so "[t]o address any Appointments Clause questions" *Lucia* posed. Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) On Cases Pending at the Appeals Council ("Effect of Lucia"), 84 Fed. Reg. 9582, 9583 (Mar. 15, 2019). After

[1] The SEC had only five ALJs when *Lucia* was decided. *See Lucia*, 138 S. Ct. at 2049. The SSA has approximately 1,600. *See* SSA, *FY 2021 Congressional Justification*, 187-89 (2020), https://perma.cc/M3EJ-ZE23.

the Commissioner's action, Mr. Carr and Ms. Minor each filed a supplemental brief, asserting for the first time that the ALJs who had rejected their claims had not been properly appointed under the Appointments Clause.

The district court upheld the ALJs' denials of the claims, but it agreed with the Appointments Clause challenges. The court vacated the SSA decisions and remanded for new hearings before constitutionally appointed ALJs. It held that Mr. Carr and Ms. Minor did not waive their Appointments Clause challenges by failing to raise them in their SSA proceedings.

On appeal, the Commissioner argues that Appellees waived their Appointments Clause challenges by failing to exhaust them before the SSA. Exercising jurisdiction under 28 U.S.C. § 1291, we agree and reverse.

I. BACKGROUND

The following presents an overview of (A) SSA

disability proceedings, (B) the Appointments Clause, and (C) the factual and procedural background in these cases.

A. *Social Security Administrative Procedure*

When a Social Security claimant seeks disability benefits, the SSA makes an "[i]nitial determination" regarding entitlement. 20 C.F.R. § 404.900(a)(1). Dissatisfied claimants may seek agency reconsideration. *Id.* § 404.900(a)(2).

A claimant who disagrees with the reconsidered determination may request a hearing before an SSA ALJ. *Id.* § 404.900(a)(3). An ALJ may (1) dismiss the request for a hearing, *id.* § 404.957, (2) remand for a revised determination, *id.* § 404.948(c), (3) issue a decision, *id.* § 404.948(a), or (4) hold a hearing and then issue a decision, *id.* § 404.953. "The issues before the [ALJ] include all the issues brought out in the initial, reconsidered or revised determination that were not

decided entirely in [the claimant's] favor," *id.* § 404.946(a), as well as new issues the ALJ raises, *id.* § 404.946(b). Claimants must "notify the [ALJ] in writing at the earliest possible opportunity" if they "object to the issues to be decided at the hearing." *Id.* § 404.939.

A claimant may appeal an ALJ's decision to the SSA Appeals Council ("Appeals Council"). *Id.* § 404.900(a)(4). If the Appeals Council affirms or declines to review, the claimant may sue in district court within 60 days. *Id.* § 404.900(a)(5); 42 U.S.C. § 405(g).

B. ***Appointments Clause***

The Appointments Clause provides:

> The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the

> Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. "The Supreme Court has defined an officer generally as 'any appointee exercising significant authority pursuant to the laws of the United States.'" *Bandimere v. S.E.C.*, 844 F.3d 1168, 1173 (10th Cir. 2016) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). "The term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Id.* (quotations omitted). Employees—or "lesser functionaries"—need not be appointed under the Appointments Clause. *Id.* at 1170, 1173 (quotations omitted). The Appointments Clause prevents the "diffusion of the appointment power," *Ryder v. United*

States, 515 U.S. 177, 182 (1995), and "promotes public accountability by identifying the public officials who appoint officers," *Bandimere*, 844 F.3d at 1172.

In *Lucia*, the Supreme Court held that the SEC's ALJs are inferior officers and must be appointed by the President, a court, or a head of agency department. 138 S. Ct. at 2049. Because the ALJ in *Lucia* had not been appointed in one of those ways, the Court vacated the agency's decision that Mr. Lucia had violated the Investment Advisers Act, 15 U.S.C. § 80b–1 *et seq.*, and remanded for a new hearing before a properly appointed ALJ. *Id.* at 2055-56. The Court did not address whether SSA ALJs are also inferior officers subject to Appointments Clause appointment.

C. ***Factual and Procedural Background***

Mr. Carr and Ms. Minor separately sought disability benefits in 2014. ALJs heard and denied their claims in

2017. The Appeals Council declined to review both claims, and they each sued in the Northern District of Oklahoma, contesting the ALJ's decisions on the merits.

After Mr. Carr's suit was filed but before Ms. Minor's, the Supreme Court decided *Lucia*. Several weeks later, the SSA Commissioner appointed the agency's ALJs. *See* Effect of Lucia, 84 Fed. Reg. at 9583. The SSA explained that although

> [t]he Supreme Court's decision in Lucia did not specifically address the constitutional status of ALJs who work in other Federal agencies, including the [SSA,] [t]o address any Appointments Clause questions involving Social Security claims, and consistent with guidance from the Department of Justice, on July 16, 2018[,] the Acting Commissioner of Social Security ratified the appointments of our ALJs and approved those appointments as her own.

Id.

Mr. Carr and Ms. Minor each filed briefs in district court raising, for the first time, Appointments Clause

challenges to the ALJs who denied their claims. The court upheld the ALJs' decisions on the merits but remanded for new hearings before ALJs properly appointed under the Appointments Clause. Relying on *Sims v. Apfel*, 530 U.S. 103 (2000), it concluded that the claimants did not waive their Appointments Clause claims by failing to raise them in their SSA proceedings. *See Willie Earl C. v. Saul*, No. 18-CV-272-FHM, 2019 WL 2613819, at *5 (N.D. Okla. June 26, 2019); *Kim L. M. v. Saul*, No. 18-CV-418-FHM, 2019 WL 3318112, at *6 (N.D. Okla. July 24, 2019).

The Commissioner appealed as to both Mr. Carr and Ms. Minor. The appeals have been consolidated and were argued together to this panel.

II. **DISCUSSION**

On appeal, the Commissioner "[does] not contest that [SSA] ALJs are inferior officers and that the ALJs had not been properly appointed" when they denied

Appellees' benefits claims. Aplt. Br. at 8. He argues only that the district court erred by holding that Appellees were not required to exhaust their Appointments Clause challenges in the administrative proceedings. The Commissioner does not argue that a statute or regulation requires issue exhaustion in the SSA context. He contends we should find such a requirement "even without relying on a specific statute or regulation." *Id.* at 21.

A. ***Standard of Review***

"We review a district court's ruling reversing the Commissioner's final decision de novo, applying the same standards as the district court." *Vallejo v. Berryhill*, 849 F.3d 951, 954 (10th Cir. 2017).[2]

[2] When a district court excuses (or declines to excuse) a plaintiff's failure to exhaust, we review that decision for abuse of discretion. *See, e.g., McGraw v. Prudential Ins. Co. of Am.*, 137 F.3d 1253, 1263 (10th Cir. 1998) ("We may disturb [a district court's refusal to excuse failure to exhaust] only if it represents a clear abuse of discretion."); *Koch v. White*, 744 F.3d 162, 164 (D.C. Cir.

B. *Additional Legal Background*

1. Issue Exhaustion

The Supreme Court "long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts." *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992). Moreover, "[i]n most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court." *Sims*, 530 U.S. at 112 (O'Connor, J., concurring); see also *N.M. Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1165 n.25 (10th Cir. 2019) ("In general, an issue must have been raised before an agency for a party to seek judicial review of agency action on that issue.");

2014) ("[T]he decision whether to excuse a *failure* to exhaust is reviewed for an abuse of discretion."). The district court here did not excuse Appellees' failure to exhaust. It held there is no exhaustion requirement for SSA Appointments Clause challenges, and it reversed the ALJs' decisions. *See Willie Earl C.*, 2019 WL 2613819, at *5; *Kim L. M.*, 2019 WL 3318112, at *6.

Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency, 373 F.3d 1251, 1297 (D.C. Cir. 2004) ("It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review.").

When a statute or regulation requires issue exhaustion, claimants waive issues they fail to raise in their administrative proceedings. *See Malouf v. S.E.C.*, 933 F.3d 1248, 1255 (10th Cir. 2019) (holding that an SEC claimant waived an Appointments Clause challenge he did not raise before the agency); *Energy W. Mining Co. v. Lyle ex rel. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (ruling that a claimant waived an Appointments Clause challenge he failed to raise in his administrative hearing for Department of Labor benefits). The Supreme Court has recognized that it has "imposed an issue-exhaustion requirement even in the absence of a

statute or regulation." *Sims*, 530 U.S. at 108; *see also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

The exhaustion requirement, whether it concerns a remedy or an issue, furthers two main institutional interests. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006). First, it allows agencies "to correct [their] own mistakes." *Id.* (quotations omitted); see also *L. A. Tucker*, 344 U.S. at 37 ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."). Second, it "promotes efficiency" by expediting claims, limiting the number of cases that reach federal courts, and conserving resources. *See Woodford*, 548 U.S. at 89; *see also In re DBC*, 545 F.3d 1373, 1379 (Fed. Cir. 2008) (requiring

issue exhaustion because it served efficiency and agency autonomy). Courts thus have declined to require issue exhaustion only in rare circumstances, such as in Sims. Because the district court here relied on *Sims* for its decision, we provide an overview of that case.

2. ***Sims v. Apfel***

In *Sims*, the Supreme Court held that an SSA claimant did not waive issues she wished to raise in district court and that she had failed to specify in her request for Appeals Council review. 530 U.S. at 112. The SSA ALJ had denied the claimant's request for benefits. The claimant sought Appeals Council reconsideration but did not identify the issues she wished to have reviewed. *Id.* at 105. The Appeals Council denied review. *Id.* She sued in district court, this time listing her challenges to the ALJ's decision. *Id.* at 105-06. Because she raised issues in district court that

she had not identified in her appeal to the Council, the court held that it lacked jurisdiction. The Fifth Circuit affirmed. *Id.* at 106 (citing *Sims v. Apfel*, 200 F.3d 229, 230 (5th Cir. 1998) (per curiam)).

The Supreme Court reversed in a fractured decision. Five Justices joined the first section of Justice Thomas's analysis, but only four joined the second section. Justice O'Connor, who joined the first section but not the second, wrote a concurrence. Because she relied on narrower grounds than the plurality, her analysis governs. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotations omitted)); *Cirko ex rel. Cirko v. Comm'r of Soc. Sec.*, 948

F.3d 148, 155 n.4 (3d Cir. 2020) ("Under the rule of [Marks], Justice O'Connor's analysis . . . controls."). We summarize below the various opinions.

a. *Majority*

In the first section of his analysis, joined by the majority, Justice Thomas observed that issue exhaustion, even without a statute or regulation requiring it, is "a general rule because it is usually appropriate under an agency's practice for contestants in an adversary proceeding before it to develop fully all issues there." 530 U.S. at 109 (quotations and brackets omitted). But when "an administrative proceeding is not adversarial, . . . the reasons for a court to require issue exhaustion are much weaker" and do not apply to SSA Appeals Council proceedings. *Id.* at 110.

b. *Plurality*

Justice Thomas's second analysis section received

only four votes. There, the plurality said that issue exhaustion should not be required because "Social Security proceedings are inquisitorial rather than adversarial." *Id.* at 110-11. It reasoned that "[i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits, and the Council's review is similarly broad." *Id.* at 111 (citation omitted).

The plurality said that "the Council's review is plenary unless it states otherwise" and that Appeals Council petition forms "provide[] only three lines for the request for review." *Id.* at 111-12. It concluded that the SSA process "therefore strongly suggests that the Council does not depend much, if at all, on claimants to identify issues for review." *Id.* at 112.

c. *Justice O'Connor's concurrence*

Justice O'Connor concurred in the judgment and

joined only the first section of Justice Thomas's analysis. She observed that, "[i]n most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court[,]" but that, "[i]n the absence of a specific statute or regulation requiring issue exhaustion, . . . such a rule is not always appropriate." *Id.* at 112-13 (O'Connor, J., concurring). In her view, "the agency's failure to notify claimants of an issue exhaustion requirement in his context is a sufficient basis for our decision[,]" and "[r]equiring issue exhaustion is particularly inappropriate here, where the regulation and procedures of the [SSA] affirmatively suggest that specific issues need not be raised before the Appeals Council." *Id.* at 113. Because Appeals Council review is plenary and Appeals Council petition forms contain only three lines, the claimant "did everything that the agency asked of her" even though she did not

specify issues in the form. *Id.*

C. ***Analysis***

Because the Commissioner does not argue that a statute or regulation requires issue exhaustion, we consider whether the institutional interests supporting issue exhaustion apply here. We then address whether the district court appropriately departed from the exhaustion rule. We conclude exhaustion should apply here and that the district court erroneously relied on *Sims*. We therefore reverse.

1. **Purposes of Issue Exhaustion**

We address whether the purposes for the exhaustion rule apply to the Appellees' Appointments Clause challenges.[3]

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[3] Although we have not addressed whether exhaustion is necessary in the SSA ALJ context, other circuits have imposed an exhaustion requirement. *See, e.g.*, *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017); *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003); *Mills v. Apfel*, 244 F.3d 1, 4-5 (1st Cir. 2001). The Third Circuit is the only federal appellate court that has addressed

First, had Appellees exhausted their Appointments Clause claims, the SSA could have corrected an appointment error. *See Woodford*, 548 U.S. at 89. The SSA "might have changed its position on the Appointments Clause issue; and 'if it did not, [it] would at least [have been] put on notice of the accumulating risk of wholesale reversals being incurred by its persistence." *Malouf*, 933 F.3d at 1257 (quoting *L. A. Tucker*, 344 U.S. at 37). Even if corrective action was unlikely "at the behest of a single [benefits claimant]," *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976), Appellees' failure to exhaust their Appointments Clause challenges deprived the SSA of its interest in internal error-correction, *see Woodford*, 548 U.S. at 89.[4]

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exhaustion of an Appointments Clause challenge in the SSA ALJ context. It held that claimants do not waive such challenges by failing to raise them before their ALJs. *See Cirko*, 948 F.3d at 159.

[4] Even though the Supreme Court did not decide *Lucia* until after the ALJ decisions here, this court had decided *Bandimere*,

Second, an exhaustion requirement here would have promoted both judicial and agency efficiency. *See id.* Judicial efficiency would have been served if the SSA Commissioner had appointed its ALJs in response to Appellees' raising their Appointments Clause challenges before the agency. Their doing so could have saved the judiciary the time and expense of this litigation and the scores of similar cases currently on appeal around the country. *See* Aplt. Br. at viii-xi (listing 49 related appeals in United States circuit courts); *McKart v. United States*, 395 U.S. 185, 195 (1969) ("A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene.").

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holding, as in *Lucia*, that the SEC's ALJs had not been properly appointed.

As to agency efficiency, the SSA could have addressed the Appointments Clause issue in the first instance if Appellees had raised it in their administrative proceedings and avoided the possibility of having to conduct two ALJ merits hearings on their disability benefits claims and those of many others. This prospect would undermine administrative efficiency and delay pending cases. *In re DBC*, 545 F.3d at 1379 ("If [the plaintiff] had objected to the [agency], instead of to this court in the first instance, it could have obtained relief immediately, and thus avoided the unnecessary expenditure of the administrative resources of the [agency] . . . ."). As the Commissioner notes, SSA proceedings are time-consuming and the agency is flooded with claimants. *See* Aplt. Br. at 27; *see also* SSA, *Annual Performance Report, Fiscal Years 2019–2021*, 3 (2020), https://perma.cc/5GFC-2HKM (noting that "the

average wait time for a hearing decision [is] 470 days").[5]

2. No Exception to Issue Exhaustion Should Apply

In finding an exception to the issue exhaustion requirement, the district court mistakenly relied on *Sims*, which held that exhaustion before the SSA Appeals Council is not required.

First, the Supreme Court in *Sims* cautioned that its holding did not apply to the issue before us. It held only that, when the claimant failed to raise issues in her petition for Appeals Council review, she did not waive her ability to raise those issues in district court. The Court emphasized that "[w]hether a claimant must

[5] Even if Appellees were to prevail on their Appointments Clause challenges here, they do not contest on appeal the district court's affirmance of the agency's denial of benefits. Oral Arg. at 25:07-25:30. In *Bandimere* and *Lucia*, by contrast, the claimants appealed the ALJs' merits decisions as well as the ALJs' appointments. *See* Opening Brief of Petitioner at 18, *Bandimere v. S.E.C.*, 844 F.3d 1168 (10th Cir. 2016) (No. 15-9586); Opening Brief for Petitioners at 46, *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018) (No. 15-1345).

exhaust issues before the ALJ is not before us." *Sims*, 530 U.S. at 107. And the four-Justice dissent predicted that "the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ." *Id.* at 117 (Breyer, J., dissenting).[6] Appellees here did not present their Appointments Clause challenges to the ALJs or the Appeals Council.

Second, the reasons the *Sims* Court did not require issue exhaustion in petitions to the Appeals Council do not apply to SSA ALJ hearings. Justice O'Connor, providing the deciding vote, observed that SSA Appeals Council petition forms provide only three lines for

[6] Since *Sims*, other circuits have imposed an issue exhaustion requirement in the SSA ALJ context. *See, e.g., Shaibi*, 883 F.3d at 1109 (holding that "*Sims* concerned only whether a claimant must present all relevant issues to the *Appeals Council*," and that claimants "must raise all issues and evidence at their administrative hearings in order to preserve them on appeal" (quotations omitted)); *Mills*, 244 F.3d at 4 (observing that the failure to specify issues for Appeals Council review is "entirely different from failing to offer evidence in the first instance to the ALJ, which is far more disruptive of the review function").

claimants to specify the bases for appeal, and that appellate review is plenary by default. *Id.* at 113-14 (O'Connor, J., concurring). The Sims claimant, therefore, "did everything that the agency asked of her" by filling out the form, even though she did not specify the contested issues on appeal. *Id.* at 114.

By contrast, SSA ALJs must notify claimants of the "specific issues to be decided" at each hearing, 20 C.F.R. § 404.938(b)(1), and claimants must "notify the [ALJs] in writing at the earliest possible opportunity" if they "object to the issues to be decided at the hearing," *id.* § 404.939. If Appellees' ALJs did not list the Appointments Clause as an issue "to be decided," Appellees needed to object and raise it. The claimant in Sims did not have a similar obligation with respect to Appeals Council review.[7]

[7] The Commissioner does not argue that § 404.939 requires

Third, the district court placed undue weight on the "non-adversarial" nature of SSA ALJ proceedings. Although the *Sims* majority said the basis for issue exhaustion is weakest when agency determination of benefits is inquisitorial, only the plurality relied on this rationale to hold exhaustion was not required. The district court failed to recognize that Justice O'Connor's controlling concurrence relied on a narrower ground. That is, the SSA does not notify claimants they must raise issues to the Appeals Council, the Appeals Council review is plenary, and the claimant "did everything that the agency asked of her" even though she identified no issues for review. *Sims*, 530 U.S. at 114 (O'Connor, J., concurring). Justice O'Connor's reasoning does not apply to SSA ALJ proceedings, where, as noted above,

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issue exhaustion before SSA ALJs. We need not decide that question, because we hold exhaustion of Appointments Clause challenges is necessary even without a statutory or regulatory requirement.

SSA regulations require claimants to object if they dispute the issues to be decided at their ALJ hearings.

Fourth, even if SSA ALJ review of disability claims is largely non-adversarial, Appointments Clause challenges are "adversarial" as described in *Sims*. The *Sims* majority recognized that a proceeding is inquisitorial when the agency develops the issues on its own and adversarial when the "parties are expected to develop the issues." *Id.* at 110.

An SSA ALJ typically develops issues regarding benefits, but a claimant must object to an ALJ's authority. *See, e.g.*, 20 C.F.R. § 404.940 (explaining that a claimant who believes an ALJ is prejudiced "must notify the [ALJ of the objection] at [the] earliest opportunity"); *Muhammad v. Berryhill*, 381 F. Supp. 3d 462, 467 (E.D. Pa. 2019) ("[An Appointments Clause] attack on the structural integrity of the process itself[] is

as adversarial as it gets and under . . . *Sims* presents the strongest case for requiring issue exhaustion." (citation and quotations omitted)).

Fifth and finally, the Third Circuit's decision in *Cirko* is unpersuasive and counter to our precedent.[8] There, the court held that claimants need not exhaust Appointments Clause challenges before the SSA ALJ. It reasoned that, given their constitutional nature, such challenges are "beyond the power of the agency to remedy." *Cirko*, 948 F.3d at 157.

We rejected this view in *Malouf* and *Energy West*. *See Malouf*, 933 F.3d at 1257 (explaining that an administrative Appointments Clause challenge would have notified the agency of the need to appoint its ALJs, a remedy within the SSA's authority); *Energy W.*, 929

[8] *Cirko* was decided after the parties filed their opening briefs. In its reply brief, filed after *Cirko*, the Commissioner argues we should not follow the Third Circuit. Aplt. Reply Br. at 11.

F.3d at 1206 (observing that an Appointments Clause challenge would not have been futile because the agency's appellate tribunal could vacate a judgment by an unappointed ALJ). And to the extent *Cirko* relied on Sims, we decline to follow it for the reasons discussed.[9]

* * * *

The district court failed to provide adequate reasons to depart from the general principle that "an issue must have been raised before an agency for a party to seek judicial review of agency action on that issue." *N.M.*

[9] We also have recognized that an issue exhaustion requirement discourages the strategic practice of "sandbagging." *Freytag v. Comm'r*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring). That is, without an exhaustion requirement, a claimant might proceed through the administrative process without raising an issue and then, if the SSA denies benefits, raise the issue in court and seek a new ALJ hearing. *See Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 431 n.6 (10th Cir. 2011) ("In practice, the requirement that plaintiffs exhaust their administrative remedies greatly minimizes the threat of sandbagging—i.e., the concern that plaintiffs will shirk their duty to raise claims before the agency, only to present new evidence at trial that undermines the agency's decision." (quotations omitted and alterations incorporated)).

Health Connections, 946 F.3d at 1165 n.25.[10]

III. CONCLUSION

We reverse the district court's judgment.

[10] Assuming, as we have found, issue exhaustion is required, Appellees urge us to excuse their failure to raise their Appointments Clause challenge before the agency. The district court did not address this issue. We decline to excuse Appellees' failure to exhaust for substantially the same reasons we have found an issue exhaustion requirement.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIE EARL C.,	)	
PLAINTIFF	)	Case No. 18-CV-272
vs.	)	FHM
Andrew M. Saul,[1] Commissioner of Social Security,	)	
Defendant.	)	

OPINION AND ORDER

Plaintiff, WILLIE EARL C., seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security Disability benefits.[2] In accordance with 28 U.S.C. § 636(c)(1) & (3),

[1] Effective June 17, 2019, Andrew M. Saul is the Commissioner of the Social Security Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Commissioner Saul should be substituted as the defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of the Social Security Act, 42 U.S.C. § 405(g).

[2] Plaintiff Willie Earl C.'s application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge

the parties have consented to proceed before a United States Magistrate Judge.

Standard of Review

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to a determination of whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *See Briggs ex rel. Briggs v. Massanari*, 248 F.3d 1235, 1237 (10th Cir. 2001); *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is

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(ALJ) Deirdre O. Dexter was held April 10, 2017. By decision dated June 15, 2017, the ALJ entered the findings which are the subject of this appeal. The Appeals Council denied Plaintiff's request for review on March 16, 2018. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 993 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Background

Plaintiff was 43 years old on the alleged date of onset of disability and 47 years old on the date of the denial decision. He has a high school education and past relevant work includes an electrician. [R. 21]. Plaintiff claims to

have been unable to work since December 20, 2013 due to nerve damage in each arm; big knot on left wrist; screws, steel, and metal in neck and back; high blood pressure, high cholesterol; severe pain; six spurs in back; back fusion six times; degenerative disc disease; and unable to turn neck from side to side. [R. 178].

The ALJ's Decision

The ALJ determined that Plaintiff has the following severe impairments: cervical and lumbar degenerative disc disease; obesity, carpal tunnel syndrome, and paroxysmal supraventricular tachycardia. [R. 19]. The ALJ determined that the Plaintiff has the residual functional capacity to perform sedentary work in that Plaintiff is able to lift, carry, push or pull up to 5 pounds frequently and 10 pounds occasionally. He is able to sit for up to 6 hours in an 8-hour workday; able to stand and/or walk up to 2 hours in an 8-hour workday. Plaintiff

should have the option to stand for 10 minutes after 30 minutes of sitting without leaving the workstation. The job should not require standing or walking for more than 20 minutes consecutively. Plaintiff should have the option to use a cane to ambulate. Plaintiff is able to occasionally climb ramps or stairs, and occasionally stoop. Plaintiff should never climb ladders, ropes, or scaffolds, and he should not kneel, crouch, or crawl. Plaintiff is able to frequently reach, handle, or finger. The job should provide regular breaks every 2 hours. [R. 20]. The ALJ determined that Plaintiff was unable to perform his past relevant work, however, based on the testimony of the vocational expert, there are a significant number of jobs in the national economy that Plaintiff could perform. [R. 26-27]. Accordingly, the ALJ found Plaintiff was not disabled. The case was thus decided at step five of the five-step evaluative sequence for determining whether a

claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff's Allegations

Plaintiff asserts that the ALJ: 1) failed to properly develop the record; 2) the RFC assessment is erroneous; 3) credibility findings are not supported by substantial evidence; 4) erred in failing to develop vocational expert witness testimony; and 5) the decision in this case was rendered by an Administrative Law Judge whose appointment was invalid at the time she rendered her decision. [Dkt. 12, p. 3].

Analysis

Development of the Record

Plaintiff contends that the ALJ erred in failing to incorporate and consider the extensive evidence from the Plaintiff's first two Applications. [Dkt. 12, p. 4]. The ALJ

specifically addressed the evidence in the case at the hearing:

> ALJ: Do you have any objection to any of the documents marked as exhibits in this case?
> ATTY: I have no objection.
> ALJ: Do you have any additional evidence to submit either at this time or post-hearing?
> ATTY: No.

Plaintiff's allegations that the ALJ failed to properly develop the record is denied.

Residual Functional Capacity

Plaintiff argues that the ALJ's RFC assessment is erroneous because it was based on a record that was not fully and fairly developed, thus not based on substantial evidence. Further, the RFC assessment appears to be "boilerplate" statements. [Dkt. 12, p. 6]. Plaintiff contends that the ALJ's finding that he can frequently reach, handle, or finger is in error because objective medical tests show he has carpal tunnel syndrome and

radiculopathy. [Dkt. 12, p. 7; R. 283-285]. The determination of RFC is an administrative assessment, based upon all of the evidence of how the claimant's impairments and related symptoms affect his ability to perform work related activities. See Social Security Ruling *(SSR)* 96-5p, 1996 WL 374183, at *2, *5. The final responsibility for determining RFC rests with the Commissioner, and because the assessment is made based upon all of the evidence in the record, not only the relevant medical evidence, it is well within the province of the ALJ. See 20 C.F.R. §§ 404.1527(e)(2); 404.1546; 404.1545; 416.946.

Contrary to Plaintiff's argument, the court has denied Plaintiff's allegation that the ALJ failed to properly develop the record. Further, the ALJ accurately discussed the medical record noting the EMG testing showed only mild carpal tunnel syndrome in right arm and

mild radiculopathy in his left arm, both without motor axonal loss. [R. 25, 283]. Examinations revealed Plaintiff had full 5/5 muscle strength, including full strength in hand and arms. [R. 25-26, 273, 177-79, 331]. Plaintiff testified he could lift 5 pounds but indicated in his Functional Report that he was restricted to 25 pounds. [R. 21, 26; 198]. The ALJ determined Plaintiff was capable of performing reduced sedentary work. The RFC limitation to frequent reaching, handling, or fingering reasonably addressed Plaintiff's alleged limitations in the use of his hands and arms. [R. 20, 25, 273, 277-79, 283, 331].

The ALJ properly focused on the functional consequences of Plaintiff's condition and accurately described the doctors' findings. See e.g. *Coleman v. Chater*, 58 F.3d 577, 579 (10th Cir. 1995)(the mere presence of alcoholism is not necessarily disabling, the

impairment must render the claimant unable to engage in any substantial gainful employment), *Higgs v. Bowen*, 880 F.2d 860, 863 (6th Cir. 1988)(the mere diagnosis of arthritis says nothing about the severity of the condition), *Madrid v. Astrue*, 243 Fed.Appx. 387, 392 (10th Cir. 2007)(diagnosis of a condition does not establish disability, the question s whether an impairment significantly limits the ability to work), *Scull v. Apfel*, 221 F.3d 1352 (10th Cir. 2000)(unpublished), 2000 WL 1028250* (disability determinations turn on the functional consequences, not the causes of a claimant's condition). Moreover, DDS physicians, David Coffman, M.D. and David McCarty, M.D., both opined Plaintiff could perform light work. [R. 26, 65-66, 75-76]. Thus, the ALJ gave Plaintiff the benefit of the doubt by issuing a more favorable RFC assessment than was suggested by these physicians.

Further, the court disagrees with Plaintiff that the

ALJ's findings were 'boilerplate'. The ALJ noted Plaintiff's testimony, accurately discussed the medical and other evidence, and explained her finding that Plaintiff was not as limited as he claimed. The ALJ gave valid reasons for her findings and they were adequately linked to substantial evidence contained within the record. [R. 21-26]. Accordingly, the court sees no error in the ALJ's residual functional capacity determination.

Credibility

Plaintiff argues the ALJ's decision does not contain a sufficient credibility analysis because the ALJ failed to consider all the factors that the regulations require her to consider. Plaintiff contends the ALJ did not properly link her credibility findings to the evidence of the case and failed to consider the following pain credibility requirements: location, duration, frequency, and intensity of Plaintiff's pain or other symptoms; factors that

precipitate and aggravate the symptoms; the type, dosage, effectiveness, and side effects of any medication Plaintiff takes or has taken to alleviate pain or other symptoms; treatment, other than medication, Plaintiff receives or has received for relief of pain or other symptoms (sleeping in recliner) and any other factors concerning Plaintiff's functional limitations and restrictions due to pain or other symptoms. The ALJ also failed to consider Plaintiff's strong work history. [Dkt. 12, p. 7-11].

Although the Social Security Administration has eliminated the use of the term "credibility" from the agency's sub-regulatory policy, the agency continues to evaluate a disability claimant's symptoms using a two-step process: First, we must consider whether there is an underlying medically determinable physical or mental impairment(s) that could reasonably be expected to

produce an individual's symptoms, such as pain. Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce an individual's symptoms is established, we evaluate the intensity and persistence of those symptoms to determine the extent to which the symptoms limit an individual's ability to perform work-related activities . . . . Soc. Sec. Ruling *(SSR)* 16-3p; Titles II & XVI: Evaluation of Symptoms in Disability Claims, 2016 WL 1119029 at 2 (Mar. 16, 2016) (superseding SSR 96-7p; Policy Interpretation Ruling Titles II and XVI: Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements, 1996 WL 374186 (July 2, 1996)). The two-step process substantially restates the prior two-step process set forth in SSR 96-7, which was characterized by the Tenth Circuit as a three-step process set forth in *Luna v. Bowen*, 834 F.2d 161, 163-64 (10th Cir. 1987), the seminal

case regarding credibility followed in the Tenth Circuit. See, e.g., *Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1166–67 (10th Cir. 2012).

At step one of the process, "[a]n individual's symptoms, . . . will not be found to affect the ability to perform work-related activities for an adult . . . unless medical signs or laboratory findings show a medically determinable impairment is present." *Id.* at 3. At step two, the ALJ may consider, among other things, a number of factors in assessing a claimant's credibility, including the levels of medication and their effectiveness, the extensiveness of the attempts . . . to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, . . . and the consistency or compatibility of nonmedical testimony with objective medical evidence. *Kepler v. Chater*, 68 F.3d 387,

391 (10th Cir. 1995) (internal quotation marks and citations omitted); see 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3). The court is not to disturb an ALJ's credibility findings if they are supported by substantial evidence because "[c]redibility determinations are peculiarly the province of the finder of fact." *Cowan v. Astrue*, 552 F.3d 1182, 1190 (10th Cir. 2008) (quoting *Kepler*, 68 F.3d at 391). However, credibility findings "should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings." *Id.* (citations omitted).

The ALJ cited numerous grounds, tied to the evidence, for the credibility finding including Plaintiff reported concentration problems due to pain. However, prior to Plaintiff's date last insured, he rated his pain as 2/10 and well controlled. Treatment records reflect Plaintiff was alert and demonstrated appropriate

judgment, insight, train of thought, and memory for the situation at all of his appointments, even when he rated his pain as 7/10. Plaintiff consistently was alert, oriented times three, and followed three-step commands. [R. 26]. Plaintiff alleged he was unable to drive because he could not turn his head, however, his Spurling test was negative, and the EMG showed only mild carpal tunnel syndrome in right arm and mild radiculopathy in his left arm, both without motor axonal loss. [R. 25, 283]. Further, Plaintiff's activities of daily living included performing chores, reading, driving, shopping, and handling his own finances. [R. 25-26- 200-02]. The ALJ found Plaintiff's subjective statements about intensity, persistence, and limiting effects of his symptoms were not entirely consistent with medical and other evidence. [R. 26]. The ALJ thus properly linked her credibility finding to the record. Therefore, the court finds no reason to deviate

from the general rule to accord deference to the ALJ's credibility determination.

Hypothetical Question to the Vocational Expert

Plaintiff argues that the ALJ's hypothetical question presented to the vocational expert did not reflect Plaintiff's "true physical residual functional capacity," particularly his widespread pain, fatigue, and the carpal tunnel syndrome that impairs his ability to finger, feel, and handle. [Dkt. 12, 11-12]. Hypothetical questions should be crafted carefully to reflect a claimant's RFC, as "[t]estimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir.1991) (quotation omitted); see also *Evans v. Chater*, 55 F.3d 530, 532 (10th Cir.1995) (noting "the established rule that such inquiries must include all

(and only) those impairments borne out by the evidentiary record").

The hypothetical question posed to the vocational expert was not deficient. As this court has decided, the ALJ's RFC assessment was based on the substantial evidence of record. The hypothetical question posed by the ALJ to the vocational expert was appropriately based on the RFC assessment. Thus, this court finds that the ALJ's reliance on the vocational expert's testimony was proper.

Appointments Clause Claim

Plaintiff argues that the ALJ who decided his case was not appointed in compliance with the Appointments Clause of the Constitution.[3] The Commissioner does not

[3] The Appointments Clause of the Constitution requires the President "to appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States." U.S. Const. art. II, §2, cl. 2. It further provides that "Congress may by Laws vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of

dispute that the ALJ was not constitutionally appointed[4] but argues that the court should not consider the argument because Plaintiff did not raise the issue during the administrative proceedings on his claim for benefits. To be clear, the Commissioner does not contend that Plaintiff failed to complete any of the steps in the administrative process. Rather, the Commissioner argues that Plaintiff failed to raise the particular issue during the administrative process.

The Appointments Clause issue has been raised in a number of recent cases in response to *Lucia v. S.E.C.*, – U.S. –, 138 S.Ct. 2044, 2055, 201 L.Ed.2d 464 (2018) which held that the ALJs in the Securities and Exchange Commission (SEC) were not constitutionally appointed. The courts reviewing Social Security decisions where the

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Law, or in the heads of Departments." *Id.*

[4] For purposes of this brief, Defendant does not argue that SSA ALJs are employees rather than inferior officers. [Dkt. 14, p.7].

Appointments Clause issue has been raised mostly find that the issue was forfeited because it was not raised before the Social Security Administration.[5] These cases rely on the general rule that before an issue can be raised on appeal to the courts, it must have first been raised before the administrative agency. They distinguish the result in *Lucia* based on language in that case that one who makes a "timely" challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief. 138 S.Ct. at 2055. These cases

[5] *Fortin v. Comn'r Soc. Sec.*, 2019 WL 1417161 (E.D. NC March 29, 2019)(rejecting magistrate judge's recommendation that court find no forfeiture occurred, finding that *Sims* left open the question of whether judicially created issue exhaustion at the ALJ level makes good sense; noting that Plaintiff in *Fortin* only brought up Appointments Clause issue in supplemental briefing after summary judgment), *Pearson v. Berryhill*, 2018 WL 6436092 (D. Kan. Dec. 7, 2018)(finding 42 U.S.C. § 406(g) contains nonwaivable and nonexcusable requirement that an individual must present a claim to the agency before raising it to the court and finding Plaintiff failed to raise Appointments Clause issue before agency rendered the challenge untimely), *Faulkner v. Commn'r Soc. Sec.*, 2018 WL 6059403 (W.D. Tenn. Nov. 19, 2018)(challenge under Appointments Clause is nonjurisdictional and may be forfeited; challenge forfeited where Plaintiff did nothing to identify challenge before agency and good cause was not shown for failure).

find that the Social Security claimant, having not presented the issue to the administrative agency, has failed to make a timely Appointments Clause challenge. The Commissioner's brief relies on similar arguments.[6]

A small number of cases rely on the Court's analysis in *Sims v. Apfel*, 550 U.S. 103, 105, 120 S.Ct. 2080, 147 L. Ed.2d 80 (2000) and conclude that the Appointments Clause issue was not forfeited.[7] In *Sims* the Supreme

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[6] The Commissioner also cites five regulations it contends supports requiring issue exhaustion. None of the regulations by their terms require issue exhaustion or notify claimants of an issue exhaustion requirement.

[7] *Kellett v. Berryhill*, 2019 WL 2339968 (E.D. Penn. June 3, 2019)(finding the Appointments Clause issue is an important issue that goes to the validity of SSA proceedings which should be heard even if not properly preserved before the ALJ; discussing *Sims* rationale applied to Appointments Clause issues and finding no forfeiture, and digesting cases), Ready *v. Berryhill*, 2019 WL 1934874 (E.D. .Penn. April 30, 2019)(finding no forfeiture and that it would have been futile for Plaintiff to raise the challenge at the agency level), *Probst v. Berryhill*, –F.Supp.3d – (E.D. NC 2019)(noting majority of courts have determined challenge is forfeited by failure to raise issue before agency, digesting cases; relying on *Sims* and nonadversarial nature of Social Security hearings, finding it would be manifestly unfair to find waiver), *Bizzare v. Berryhill*, 364 F.Supp.3d 418 (M.D. Penn. 2019)(acknowledging result breaks from emerging consensus, noting no statute, regulation or judicial decision indicates that Social Security claimants forfeit judicial review of constitutional claims not

Court concluded that Social Security claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues. In reaching this conclusion, the Court considered the following factors.[8] First, requirements to exhaust issues are largely creatures of statute and no statute requires issue exhaustion before the Social Security Administration. Second, while it is common for agency regulations to require issue exhaustion, Social Security regulations do not require issue exhaustion. Third, the reasons why courts generally impose issue exhaustion requirements do not apply to the non-adversarial process

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raised at the administrative level, finding no authority suggesting that ALJs could resolve constitutional challenges to their own appointment, and finding no forfeiture occurred).

[8] The court also considered the limited space on the form used to request Appeals Council review and an estimate that it would only take ten minutes to complete the form.

of the Social Security Administration. Fourth, the Social Security Administration does not notify claimants of an issue exhaustion requirement. *Sims*, 120 S.Ct. at 2084-86.

While *Sims* does not address issue exhaustion before the ALJ, the reasons cited by the Supreme Court to reject an issue exhaustion requirement before the Appeals Council also apply to the other steps in the Social Security Administration process. The statute still does not require issue exhaustion. In the 19 years since the *Sims* decision, the Social Security Administration has not enacted any regulation requiring issue exhaustion. The Social Security Administrative process remains non-adversarial and claimants, many of whom are unrepresented, are still not notified of any issue exhaustion requirement. Finally, the undersigned notes that a ruling that *Sims* does not apply to the other steps in the administrative process would result in an issue exhaustion requirement at some

steps of the process and not at subsequent steps.

The court is persuaded that the cases finding that no forfeiture occurs when the claimant fails to raise the Appointments Clause issue before the Social Security Administration are better reasoned in light of the Supreme Court's analysis in *Sims*.

The court finds that at the time the decision in this case was entered, June 15, 2017, the ALJ who issued the decision under review was not appropriately appointed under the Appointments Clause of the Constitution. The court further finds that Plaintiff did not forfeit the Appointments Clause claim by failing to raise that issue before the Social Security Administration. As a result, the ALJ's decision is REVERSED and the case is REMANDED to the Commissioner for further proceedings before a different constitutionally appointed ALJ.

SO ORDERED this 26th day of June, 2019.

/s/ Frank H. McCarthy
FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KIM L. M.,	)	
PLAINTIFF	)	Case No. 18-CV-418
vs.	)	FHM
Andrew M. Saul,[1] Commissioner of Social Security,	)	
Defendant.	)	

OPINION AND ORDER

Plaintiff, KIM L. M., seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security Disability benefits.[2] In accordance with 28 U.S.C. § 636(c)(1) & (3),

[1] Effective June 17, 2019, Andrew M. Saul is the Commissioner of the Social Security Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Commissioner Saul should be substituted as the defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of the Social Security Act, 42 U.S.C. § 405(g).

[2] Plaintiff Kim L. M.'s application was denied initially and upon

the parties have consented to proceed before a United States Magistrate Judge.

Standard of Review

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to a determination of whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *See Briggs ex rel. Briggs v. Massanari*, 248 F.3d 1235, 1237 (10th Cir. 2001); *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is

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reconsideration. A hearing before an Administrative Law Judge (ALJ) John W. Belcher was held March 29, 2017. By decision dated June 7, 2017, the ALJ entered the findings which are the subject of this appeal. The Appeals Council denied Plaintiff's request for review on June 10, 2018. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 993 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Background

Plaintiff was 53 years old on the alleged date of onset of disability and 60 years old on the date of the denial decision. She has a two year college degree in secretarial

science and past relevant work includes a bus driver. [R. 40, 217]. Plaintiff claims to have been unable to work since January 12, 2010 due to pain in back, neck, and shoulders, three knee surgeries, severe anxiety, high blood pressure, irregular heartbeat, and Rheumatoid arthritis. [R. 194].

The ALJ's Decision

The ALJ determined that Plaintiff has the following severe impairments: degenerative disc disease of lumbar spine, derangement of the bilateral knees, obesity, depression disorder, and anxiety disorder. [R. 12]. The ALJ determined that the Plaintiff has the residual functional capacity to perform light work except Plaintiff can stand or walk for 4 out of 8 hours, sit for 6 hours. She can occasionally climb, bend, stoop, kneel, crouch, crawl, and can frequently balance and kneel. Plaintiff is limited to simple, routine, and multi-step tasks and can perform some complex tasks. [R. 14]. The ALJ determined at step

four that Plaintiff could perform her past relevant work as a bus driver as she actually performed it. [R. 17]. The ALJ made alternative findings for step five of the sequential evaluation process that based on the testimony of the vocational expert, there are a significant number of jobs in the national economy that Plaintiff could perform. [R. 17-18]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled with an alternative step five finding. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff's Allegations

Plaintiff asserts that the ALJ: 1) failed to follow the law at Step Four of the sequential evaluation test; 2) the RFC assessment is not supported by substantial evidence; 3) credibility findings are not supported by substantial evidence; 4) failed to develop and follow

vocational expert witness testimony; and 5) the decision in this case was rendered by an Administrative Law Judge whose appointment was invalid at the time he rendered his decision. [Dkt. 13, p. 4].

Analysis

Step Four Evaluation

Plaintiff argues that the ALJ failed to address the mental and physical demands of her past relevant work as required by *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996).[Dkt. 13, p. 4-6]. Plaintiff contends that the ALJ made no attempt to perform any of the requirements at phases two and three of the step four analysis. [Dkt. 13, p. 6]. Specifically, Plaintiff claims that the ALJ erred by finding her capable of performing her past relevant work as a bus driver even though that job is listed as medium work in the *Dictionary of Occupational Titles* (DOT 913.463-010). [Dkt. 13, p. 4]. Further, Plaintiff worked as

a bus driver prior to her four back and knee surgeries which should bring into question her ability to safely transport the children with her pain and limited mobility. [Dkt. 13, p. 5].

The Tenth Circuit has developed a three-phase test for assessing a claimant's ability to perform past relevant work. See *Winfrey*, 92 F.3d at 1023-25. First, the ALJ must make findings regarding the claimant's residual functional capacity. See *id.* at 1023. Second, the ALJ must assess the mental and physical demands of the claimant's past relevant work. See *id.* at 1024. Third, the ALJ must make specific findings regarding the plaintiff's ability to perform his past relevant work based on the findings from phases one and two. See *id.* at 1025.

In compliance with *Winfrey*, the ALJ completed phase one when he determined Plaintiff's RFC was limited light work. [R. 14]. Phase two requires the ALJ to obtain

"adequate 'factual information about those work demands which have a bearing on the medically established limitations.'" *Id.* at 1024 (quoting *SSR* 82-62). With respect to physical limitations, a determination of the Plaintiff's ability to do past relevant work requires a careful appraisal of (1) the individual's statements as to which past work requirements can no longer be met and the reason(s) for his or her inability to meet those requirements; (2) medical evidence establishing how the impairment limits ability to meet the physical and mental requirements of the work; and (3) in some cases, supplementary or corroborative information from other sources such as employers, the *Dictionary of Occupational Titles*, etc., on the requirements of the work as generally performed in the economy. *SSR* 82-62. The regulations provide that the ALJ can obtain this information from a number of sources, including the

plaintiff, the testimony of a vocational expert, or the *Dictionary of Occupational Titles*. *See* 20 C.F.R. § 404.1560(b)(2).

In this case, at the hearing, the ALJ and vocational expert asked Plaintiff specific questions about the physical and mental demands of her past relevant work as a daycare operator and bus driver, including how much weight she lifted, what her duties entailed, and whether she used office equipment such as a computer. [R. 59-66]. The vocational expert testified that Plaintiff could perform her past relevant work as a bus driver as she actually performed it but not as generally performed. [R. 65]. In his decision, the ALJ made specific findings relying on this testimony. [R. 17]. Under *Winfrey*, then, the ALJ met his obligation to assess the demands of Plaintiff's past relevant work and determined that Plaintiff retained the residual functional capacity to

perform that work.

Residual Functional Capacity

Plaintiff argues that the ALJ's RFC determination is not based on substantial evidence. Plaintiff contends that she is not able to perform the duties of substantial gainful activity in that she is unable to perform work on a sustained basis for 8 hours in an eight-hour workday. [Dkt. 13, p. 7-8]. Further, Plaintiff is limited due to the restrictions from pain and limited mobility after her several knee and back surgeries. That is the extent of Plaintiff's claim.

Plaintiff's hint of an argument fails to develop a sufficient legal or factual basis for reversal, and the court will not speculate or develop appellate arguments on her behalf. See *Threet v. Barnhart*, 353 F.3d 1185, 1190 (10th Cir. 2003). Plaintiff fails to cite or point to any evidence that shows a compounding effect on any of her conditions

or supports her conclusion that she is unable to engage in substantial gainful activity for an 8-hour workday. Finally, Plaintiff fails to explain why reversal is warranted. Since Plaintiff has not explained why she thinks there was an error, she has waived appellate consideration of this issue. *See Keyes-Zachary v Astrue*, 695 F.3d 1156, 1161 (10th Cir. 2012) ("We will consider and discuss only those . . .contentions that have been adequately briefed for our review.") *citing Chambers v. Barnhart*, 389 F.3d 1139, 1142 (10th Cir. 2004)("The scope of our review . . . is limited to the issues the claimant . . . adequately presents on appeal."(internal quotation marks omitted)). In the face of such waiver, the court declines to address this issue.

Credibility

Plaintiff argues that the ALJ did not prepare in-depth credibility findings that comply with the requirements of

Social Security Rulings and the case law of the Tenth Circuit. Plaintiff contends that the ALJ's analysis of her testimony was inaccurate and focused only on her activities of daily living. The court does not agree.

Although the Social Security Administration has eliminated the use of the term "credibility" from the agency's sub-regulatory policy, the agency continues to evaluate a disability claimant's symptoms using a two-step process: First, we must consider whether there is an underlying medically determinable physical or mental impairment(s) that could reasonably be expected to produce an individual's symptoms, such as pain. Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce an individual's symptoms is established, we evaluate the intensity and persistence of those symptoms to determine the extent to which the symptoms limit an individual's ability to

perform work-related activities for an adult. . . . Soc. Sec. Ruling *(SSR)* 16-3p; Titles II & XVI: Evaluation of Symptoms in Disability Claims, 2016 WL 1119029 at 2 (Mar. 16, 2016) (superseding SSR 96-7p; Policy Interpretation Ruling Titles II and XVI: Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements, 1996 WL 374186 (July 2, 1996)). The two-step process substantially restates the prior two-step process set forth in SSR 96-7, which was characterized by the Tenth Circuit as a three-step process set forth in *Luna v. Bowen*, 834 F.2d 161, 163-64 (10th Cir. 1987), the seminal case regarding credibility followed in the Tenth Circuit. See, e.g., *Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1166–67 (10th Cir. 2012).

At step one of the process, "[a]n individual's symptoms, . . . will not be found to affect the ability to perform work-related activities for an adult . . . unless

medical signs or laboratory findings show a medically determinable impairment is present." *Id.* at 3. At step two, the ALJ may consider, among other things, a number of factors in assessing a claimant's credibility, including the levels of medication and their effectiveness, the extensiveness of the attempts . . . to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, . . . and the consistency or compatibility of nonmedical testimony with objective medical evidence. *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995) (internal quotation marks and citations omitted); see 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3). The court is not to disturb an ALJ's credibility findings if they are supported by substantial evidence because "[c]redibility determinations are peculiarly the province of the finder of fact." *Cowan v.*

Astrue, 552 F.3d 1182, 1190 (10th Cir. 2008) (quoting *Kepler*, 68 F.3d at 391). However, credibility findings "should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings." *Id.* (citations omitted).

The ALJ cited numerous grounds, tied to the evidence, for the credibility finding. The ALJ noted Plaintiff walked to her doctor's appointments.[3] [R. 15]. The ALJ also noted that it was reported Plaintiff walks with a normal gait, her grip and great toe strength was equal bilaterally and rated 5/5. [R. 435]. Medical imaging showed only mild degenerative changes in her knees and her back pain improved with surgery, weight loss, and increased activity. [R. 15, 286-89; 401,431, 532-33]. Further, Plaintiff's allegations of depression disorder and

[3] The court is cognizant that the ALJ mistakenly noted that Plaintiff walks to the grocery store in addition to her doctor's appointments. [R. 59].

anxiety disorder were inconsistent with the medical evidence. Treatment notes reflected Plaintiff's mood, affect, attention, and concentration were normal; symptoms were controlled by medication and stable; and she was capable of multi-step commands. [R. 15, 401, 408, 444, 450, 478, 496, 504, 556]. The ALJ found Plaintiff's subjective statements about intensity, persistence, and limiting effects of her symptoms were not entirely consistent with medical and other evidence. [R. 15]. The ALJ thus properly linked her credibility finding to the record. Therefore, the court finds no reason to deviate from the general rule to accord deference to the ALJ's credibility determination.

Testimony of the Vocational Expert

Plaintiff argues that at step four the ALJ failed to question the vocational expert regarding a function-by-function comparison of the RFC and Plaintiff's past

relevant work as a bus driver. [Dkt. 13, p. 12].

According to Plaintiff's description of her past relevant work as a bus driver, the heaviest weight she lifted was less than 10 pounds. [R. 217, 220]. At the hearing, the vocational expert questioned Plaintiff as to the heaviest weight she lifted and Plaintiff testified she had to raise the hood that was on spring. [R. 63]. In response to the hypothetical question posed by the ALJ, the vocational expert testified that Plaintiff would be able to return to the job of bus driver as she performed it. [R. 65].

Based on the record as a whole, the court is satisfied that the information about Plaintiff's past relevant work provided enough detail for the ALJ to compare the requirements of the work with the RFC. Accordingly, the ALJ appropriately determined that Plaintiff could do her past relevant work and is therefore not disabled.

Plaintiff also argues that the ALJ erred in finding that she was capable of other jobs in significant numbers in the national economy. [Dkt. 13, p. 12-13]. Plaintiff contends she does not have transferrable skills to the jobs of general clerk and administrative clerk because the vocational expert testified the adjustment would be great because of a change of industry tools. [Dkt. 13, p. 13]. Plaintiff relies upon 20 C.F.R. § 404.1568(d) which states:

> (4)Transferability of skills for persons of advanced age. If you are of advanced age (age 55 or older), and you have a severe impairment(s) that limits you to sedentary or light work, we will find that you cannot make an adjustment to other work unless you have skills that you can transfer to other skilled or semiskilled work (or you have recently completed education which provides for direct entry into skilled work) that you can do despite your impairment(s). We will decide if you have transferable skills as follows. If you are of advanced age and you have a severe impairment(s) that limits you to no more than sedentary work, we will find that you have skills that are transferable to skilled or semiskilled sedentary work only if the sedentary work

> is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry.(See § 404.1567(a) and § 201.00(f) of appendix 2.) If you are of advanced age but have not attained age 60, and you have a severe impairment(s) that limits you to no more than light work, we will apply the rules in paragraphs (d)(1) through (d)(3) of this section to decide if you have skills that are transferable to skilled or semiskilled light work (see § 404.1567(b)). If you are closely approaching retirement age (age 60 or older) and you have a severe impairment(s) that limits you to no more than light work, we will find that you have skills that are transferable to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry.

Plaintiff, who was 60 years old on the date of the denial decision, testified that she previously worked as a daycare owner where she was required to prepare reports. Plaintiff testified that she did not use a computer as a daycare owner, but had learned to use one while attaining

her two year secretarial college degree. [R. 40-41, 66]. In response to hypothetical questions posed by the ALJ, the vocational expert identified the light job of general clerk and sedentary job of administrative clerk. [R. 67]. The vocational expert indicated that both of those jobs required the use of a computer, but the general clerk's use of a computer would be more limited. The vocational expert determined that Plaintiff retained skills from her job as a daycare owner that would transfer to other jobs in the national economy which included time management, monitoring and assessment, and reading and writing reports. [R. 17]. Relying on this evidence, the ALJ concluded that Plaintiff was not disabled. An alternative finding to his step four decision, the ALJ found at step five that Plaintiff had acquired work skills from past relevant work that were transferable to other occupations with jobs existing in significant numbers in

the national economy. [R. 17]. Thus, this court finds that the ALJ's reliance on the vocational expert's testimony was proper.

Appointments Clause Claim

Plaintiff argues that the ALJ who decided her case was not appointed in compliance with the Appointments Clause of the Constitution.[4] The Commissioner does not dispute that the ALJ was not constitutionally appointed[5] but argues that the court should not consider the argument because Plaintiff did not raise the issue during the administrative proceedings on her claim for benefits. To be clear, the Commissioner does not contend that

[4] The Appointments Clause of the Constitution requires the President "to appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States." U.S. Const. art. II ,§2, cl. 2. It further provides that "Congress may by Laws vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the heads of Departments." *Id.*

[5] For purposes of this brief, Defendant does not argue that SSA ALJs are employees rather than inferior officers. [Dkt. 15, p. 8].

Plaintiff failed to complete any of the steps in the administrative process. Rather, the Commissioner argues that Plaintiff failed to raise the particular issue during the administrative process.

The Appointments Clause issue has been raised in a number of recent cases in response to *Lucia v. S.E.C.*, – U.S. –, 138 S.Ct. 2044, 2055, 201 L.Ed.2d 464 (2018) which held that the ALJs in the Securities and Exchange Commission (SEC) were not constitutionally appointed. The courts reviewing Social Security decisions where the Appointments Clause issue has been raised mostly find that the issue was forfeited because it was not raised before the Social Security Administration.[6] These cases

[6] *Fortin v. Comn'r Soc. Sec.*, 2019 WL 1417161 (E.D. NC March 29, 2019)(rejecting magistrate judge's recommendation that court find no forfeiture occurred, finding that *Sims* left open the question of whether judicially created issue exhaustion at the ALJ level makes good sense; noting that Plaintiff in *Fortin* only brought up Appointments Clause issue in supplemental briefing after summary judgment), *Pearson v. Berryhill*, 2018 WL 6436092 (D. Kan. Dec. 7, 2018)(finding 42 U.S.C. § 406(g) contains nonwaivable and nonexcusable requirement that an individual must present a claim to

rely on the general rule that before an issue can be raised on appeal to the courts, it must have first been raised before the administrative agency. They distinguish the result in *Lucia* based on language in that case that one who makes a "timely" challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief. 138 S.Ct. at 2055. These cases find that the Social Security claimant, having not presented the issue to the administrative agency, has failed to make a timely Appointments Clause challenge. The Commissioner's brief relies on similar arguments.[7]

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the agency before raising it to the court and finding Plaintiff failed to raise Appointments Clause issue before agency rendered the challenge untimely), *Faulkner v. Commn'r Soc. Sec.*, 2018 WL 6059403 (W.D. Tenn. Nov. 19, 2018)(challenge under Appointments Clause is nonjurisdictional and may be forfeited; challenge forfeited where Plaintiff did nothing to identify challenge before agency and good cause was not shown for failure).

[7] The Commissioner also cites five regulations it contends supports requiring issue exhaustion. None of the regulations by their terms require issue exhaustion or notify claimants of an issue exhaustion requirement.

A small number of cases rely on the Court's analysis in *Sims v. Apfel*, 550 U.S. 103, 105, 120 S.Ct. 2080, 147 L. Ed.2d 80 (2000) and conclude that the Appointments Clause issue was not forfeited.[8] In *Sims* the Supreme Court concluded that Social Security claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues. In

[8] *Kellett v. Berryhill*, 2019 WL 2339968 (E.D. Penn. June 3, 2019)(finding the Appointments Clause issue is an important issue that goes to the validity of SSA proceedings which should be heard even if not properly preserved before the ALJ; discussing *Sims* rationale applied to Appointments Clause issues and finding no forfeiture, and digesting cases), *Ready v. Berryhill*, 2019 WL 1934874 (E.D. .Penn. April 30, 2019)(finding no forfeiture and that it would have been futile for Plaintiff to raise the challenge at the agency level), *Probst v. Berryhill*, –F.Supp.3d – (E.D. NC 2019)(noting majority of courts have determined challenge is forfeited by failure to raise issue before agency, digesting cases; relying on *Sims* and nonadversarial nature of Social Security hearings, finding it would be manifestly unfair to find waiver), *Bizzare v. Berryhill*, 364 F.Supp.3d 418 (M.D. Penn. 2019)(acknowledging result breaks from emerging consensus, noting no statute, regulation or judicial decision indicates that Social Security claimants forfeit judicial review of constitutional claims not raised at the administrative level, finding no authority suggesting that ALJs could resolve constitutional challenges to their own appointment, and finding no forfeiture occurred).

reaching this conclusion, the Court considered the following factors.[9] First, requirements to exhaust issues are largely creatures of statute and no statute requires issue exhaustion before the Social Security Administration. Second, while it is common for agency regulations to require issue exhaustion, Social Security regulations do not require issue exhaustion. Third, the reasons why courts generally impose issue exhaustion requirements do not apply to the non-adversarial process of the Social Security Administration. Fourth, the Social Security Administration does not notify claimants of an issue exhaustion requirement. *Sims*, 120 S.Ct. at 2084-86.

While *Sims* does not address issue exhaustion before the ALJ, the reasons cited by the Supreme Court to reject an issue exhaustion requirement before the Appeals

[9] The court also considered the limited space on the form used to request Appeals Council review and an estimate that it would take only ten minutes to complete the form.

Council also apply to the other steps in the Social Security Administration process. The statute still does not require issue exhaustion. In the 19 years since the *Sims* decision, the Social Security Administration has not enacted any regulation requiring issue exhaustion. The Social Security Administrative process remains non-adversarial and claimants, many of whom are unrepresented, are still not notified of any issue exhaustion requirement. Finally, the undersigned notes that a ruling that *Sims* does not apply to the other steps in the administrative process would result in an issue exhaustion requirement at some steps of the process and not at subsequent steps.

The court is persuaded that the cases finding that no forfeiture occurs when the claimant fails to raise the Appointments Clause issue before the Social Security Administration are better reasoned in light of the Supreme Court's analysis in *Sims*.

The court finds that at the time the decision in this case was entered, June 7, 2017, the ALJ who issued the decision under review was not appropriately appointed under the Appointments Clause of the Constitution. The court further finds that Plaintiff did not forfeit the Appointments Clause claim by failing to raise that issue before the Social Security Administration. As a result, the ALJ's decision is REVERSED and the case is REMANDED to the Commissioner for further proceedings before a different constitutionally appointed ALJ.

SO ORDERED this 24th day of July, 2019.

/s/ Frank H. McCarthy
FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE