No. 20-105

In the Supreme Court of the United States

JOHN J. DAVIS, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

THOMAS HILLIARD, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE PETITIONERS

MAHESHA P. SUBBARAMAN
SUBBARAMAN PLLC
222 South 9th Street,
Suite 1600
Minneapolis, MN 55402

WES KAPPELMAN
KAPPELMAN LAW FIRM
P.O. Box 1792
Ames, IA 50010

KANNON K. SHANMUGAM
Counsel of Record
WILLIAM T. MARKS
JOEL S. JOHNSON
E. GARRETT WEST
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

SUDHIR V. RAO
ZALMAN ROTHSCHILD
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

QUESTION PRESENTED

Whether a claimant seeking disability benefits or supplemental security income under the Social Security Act must exhaust an Appointments Clause challenge with the administrative law judge whose appointment the claimant is challenging in order to obtain judicial review of that challenge.

PARTIES TO THE PROCEEDING

Petitioners are John J. Davis, Thomas Hilliard, Kimberly L. Iwan, and Destiny M. Thurman.

Respondent is Andrew M. Saul, Commissioner of Social Security.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Page

Regulations—continued:

Page

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No. 20-105

JOHN J. DAVIS, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

THOMAS HILLIARD, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Davis* v. *Saul* (Pet. App. 1a-9a) is reported at 963 F.3d 790. The opinion of the court of appeals in *Hilliard* v. *Saul* (Pet. App. 10a-14a) is reported at 964 F.3d 759. The opinions of the district courts (Pet. App. 15a-18a, 19a-38a, 39a-60a, 61a-82a) are unreported. The reports and recommendations of the magistrate judges (Pet. App. 83a-104a, 105a-131a, 132a-159a) are also unreported.

JURISDICTION

The judgment of the court of appeals in *Davis* was entered on June 26, 2020. The judgment of the court of appeals in *Hilliard* was entered on July 9, 2020. The petition for a writ of certiorari, covering the judgments in both *Davis* and *Hilliard*, was filed on July 29, 2020. The petition was granted on November 9, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 2 of Article II of the United States Constitution provides in relevant part:

> [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

In *Sims* v. *Apfel*, 530 U.S. 103 (2000), this Court held that a claimant seeking disability benefits or supplemental security income under the Social Security Act need not exhaust particular issues before the Appeals Council of the Social Security Administration (SSA) in order to preserve those issues for judicial review. This case presents a similar question involving issue exhaustion in the Social Security context. The question is whether a Social Security claimant must exhaust an Appointments

Clause challenge with the Social Security ALJ whose appointment the claimant is challenging in order to obtain judicial review of that challenge.

Petitioners are Social Security claimants whose applications for benefits were denied before this Court's decision in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), which held that ALJs of the Securities and Exchange Commission are "Officers of the United States" for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, and thus cannot be appointed by agency staff. At the time, Social Security ALJs were appointed by SSA staff without the involvement of the Commissioner of Social Security. While seeking judicial review of the denial of benefits by SSA, petitioners argued that, in light of *Lucia*, they were entitled to new hearings before properly appointed ALJs. The government has not disputed that the ALJs who heard petitioners' claims were improperly appointed, or that the appropriate remedy is to conduct new hearings before properly appointed officers.

The district courts in petitioners' respective cases held that petitioners were barred from asserting their Appointments Clause challenges in federal court because they had not first raised those challenges before their Social Security ALJs. The court of appeals affirmed in two separate decisions. It reasoned that, despite the lack of a statute or a regulation requiring issue exhaustion, imposing such a requirement protected agency authority and promoted judicial efficiency. The court took the view that raising an Appointments Clause challenge before a Social Security ALJ would not have been futile, even though the ALJ lacked the power to remedy the defect. The court also declined to exercise its discretion to consider the unexhausted issue under *Freytag* v. *Commissioner*, 501 U.S. 868 (1991).

The decisions below were incorrect. No statute or regulation requires issue exhaustion in the context of Social Security benefits. And *Sims* makes clear that judge-made rules of issue exhaustion are generally reserved for administrative proceedings that resemble ordinary, adversarial litigation. But Social Security proceedings are claimant-friendly and not adversarial in nature. Indeed, there is no material difference between proceedings before a Social Security ALJ and proceedings before the Social Security Appeals Council—the type of proceeding at issue in *Sims*—that would justify imposing an issue-exhaustion requirement for the former but not the latter.

Even apart from *Sims*, petitioners should prevail for several additional reasons. As an initial matter, no judge-made rule of issue exhaustion in proceedings before a Social Security ALJ is warranted. The judicial practice of imposing such rules without a basis in a statute or a regulation is highly questionable, and the government offers no good reason why the cases permitting that practice should be extended to this context. But even if the Court were to impose such a rule more generally, it should not apply the rule to preclude judicial review of petitioners' Appointments Clause challenges, given the constitutional nature of those challenges and the inability of Social Security ALJs to resolve them.

The court of appeals erred in rejecting petitioners' Appointments Clause challenges for failure to raise them in the SSA review process. The judgments below should therefore be reversed, and the case remanded so that SSA can provide new hearings before officers appointed in a method prescribed by the Appointments Clause.

A. Background

1. In administrative law, the concept of "exhaustion" refers to two related doctrines that, where applicable, require a party challenging an agency action to invoke available administrative processes before seeking judicial review. See *Sims*, 530 U.S. at 106-107. The doctrine of administrative exhaustion of *remedies* requires a party to invoke any available process for directly obtaining relief from the agency "before proceeding to the courts." *Reiter* v. *Cooper*, 507 U.S. 258, 269 (1993); see, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The doctrine of administrative exhaustion of *issues*, by contrast, requires a party to present to the agency particular objections to the challenged agency action in order to preserve those objections for judicial review. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

Rules of administrative issue exhaustion are "largely creatures of statute," and it is also "common" for agencies to impose such rules by regulation. *Sims*, 530 U.S. at 107, 108. On certain occasions, however, the Court has required issue exhaustion in the absence of a statute or regulation. See *id.* at 108-109. The "desirability" of such a judicially created rule, the Court has explained, depends on how closely a particular administrative proceeding resembles "normal adversarial litigation." *Id.* at 109. When an administrative proceeding is inquisitorial rather than "adversarial" in nature, "the reasons for a court to require issue exhaustion are much weaker." *Id.* at 110.

2. The Social Security Act authorizes SSA to provide benefits to eligible individuals under two programs. Title II of the Act "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1772 (2019) (citation omitted); see 42 U.S.C. 401-434. Title XVI of the

Act "provides supplemental security income benefits to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Smith*, 139 S. Ct. at 1772 (internal quotation marks and citation omitted); see 42 U.S.C. 1381-1383f.

The regulations governing the two programs are materially equivalent; they set out a multi-step administrative process through which claimants must generally proceed before they can obtain judicial review of a benefits determination by SSA. See *Smith*, 139 S. Ct. at 1772; 42 U.S.C. 405(g). A claimant must seek an initial determination as to eligibility for benefits; seek reconsideration of that determination; request a hearing conducted by an ALJ; and seek review of the ALJ's decision by the Appeals Council. See 20 C.F.R. 404.900, 416.1400.

The regulations expressly provide that, absent good cause, a claimant who does not timely take each of the steps in the administrative process will "lose" the "right to judicial review." 20 C.F.R. 404.900(b), 416.1400(b). But neither the governing statutes nor the regulations provide that the failure to raise any particular *argument* in the administrative process will preclude a claimant from raising that argument in federal court. See *Sims*, 530 U.S. at 107-108.

The absence of a general issue-exhaustion requirement in Social Security proceedings is consistent with their "informal" and "non-adversarial" nature. See 20 C.F.R. 404.900(b), 416.1400(b); *Sims*, 530 U.S. at 110-111 (plurality opinion). A claimant may request a hearing before an ALJ (or subsequent review by the Appeals Council) by filling out a one-page form that provides only a few lines to set out why the claimant disagrees with the benefits determination. Neither form states that the failure to raise a particular issue could preclude the claimant from raising the issue in subsequent judicial review, and each

form states that it should take "about 10 minutes" for a claimant to complete. See SSA, Form No. HA-501-U5, Request for Hearing by Administrative Law Judge (2015) <tinyurl.com/ssaform501>; SSA, Form No. HA-520-U5, Request for Review of Hearing Decision/Order (2016) <tinyurl.com/ssaform520>. A claimant may also request a hearing through an electronic system administered by SSA or by filing a "written request" in paper form with the agency. See 20 C.F.R. 404.933(a), 416.1433(a); 84 Fed. Reg. 40,468-40,469 (Aug. 14, 2019).

Consistent with the informal nature of the proceedings, a Social Security ALJ has a "duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims*, 530 U.S. at 111 (plurality opinion); see 20 C.F.R. 404.944, 416.1444. In particular, the ALJ must "look[] fully into the issues," 20 C.F.R. 404.944, 416.1444, which include all issues resolved against the claimant in the decisions under review, as well as any new issues identified by the claimant or the ALJ "on his or her own initiative." SSA, Hearing, Appeals, and Litigation Law Manual § I-2-2-1 (HALLEX) <tinyurl.com/ssahallex>; see 20 C.F.R. 404.946, 416.1446. The Appeals Council's review is "similarly broad." *Sims*, 530 U.S. at 111 (plurality opinion); see 20 C.F.R. 404.900(b), 416.1400(b). A claimant need not provide briefing or oral argument before the ALJ or Appeals Council. See 20 C.F.R. 404.949, 404.975, 404.976(c), 416.1449, 416.1475, 416.1476(c). A claimant also need not appear before the ALJ unless the ALJ deems it necessary. See 20 C.F.R. 404.950(a)-(b), 416.1450(a)-(b).

The Commissioner of Social Security does not act as an opposing litigant in proceedings before the ALJ or the Appeals Council. See *Sims*, 530 U.S. at 111 (plurality opinion). When a claimant appears in person, the ALJ

"typically conducts questioning of the claimant and all witnesses," regardless of whether the claimant is represented by counsel. Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1303 (1997); see 20 C.F.R. 404.950(e), 416.1450(e). SSA recently reaffirmed that those "informal, non-adversarial proceedings," which are designed especially to administer federal benefits, differ significantly from "formal, adversarial adjudications by regulatory agencies" that do not administer such benefits. 85 Fed. Reg. 73,139-73,140 (Nov. 16, 2020).

B. Facts And Procedural History

1. Petitioners are four individuals—John Davis, Thomas Hilliard, Kimberly Iwan, and Destiny Thurman—who applied for Social Security benefits between 2013 and 2015. Petitioners Davis, Hilliard, and Iwan sought both disability benefits under Title II and supplemental security income under Title XVI; petitioner Thurman sought only supplemental security income under Title XVI. After SSA denied all four applications and then denied reconsideration, each petitioner requested and received an ALJ hearing. An ALJ denied each application. The Appeals Council also denied review of each application between February 2017 and March 2018. Pet. App. 2a, 10a, 15a, 20a, 40a, 62a, 84a, 106a-109a, 133a-135a; *Hilliard* D. Ct. Dkt. 5-2, at 1-3.

2. In January 2018, this Court granted review in *Lucia* to decide whether ALJs of the Securities and Exchange Commission (SEC) are "Officers of the United States" who must be appointed consistent with the requirements of the Appointments Clause. At the time, Social Security ALJs—who constituted the vast majority of all federal ALJs—were selected by agency staff members

with no involvement by the Commissioner. See Resp. Cert. Br. 3; *O'Leary* v. *OPM*, 708 Fed. Appx. 669, 670 (Fed. Cir. 2017), cert. denied, 138 S. Ct. 2616 (2018); Office of Personnel Management, *ALJs by Agency* (2017) <tinyurl.com/aljs-by-agency>. The selection took place through a merit-selection process administered by the Office of Personnel Management (OPM), which classified ALJs as "competitive service" positions—*i.e.*, executive-branch jobs filled through "open, competitive examinations." 5 U.S.C. 1104(a)(2), 2102(a), 3304(a)(1); see 5 C.F.R. 930.201(b). Social Security ALJs were required to be selected either with OPM's prior approval or from a list of eligible candidates prepared by OPM. See 5 C.F.R. 930.204(a).

In light of the grant of review in *Lucia*, SSA's Office of the General Counsel issued an "emergency message" later that month to ALJs, the Appeals Council, and their staff. That message instructed ALJs to note on the record any Appointments Clause challenges made by claimants, but not to "discuss or make any findings related to the Appointments Clause issue," on the ground that SSA "lack[ed] the authority to finally decide constitutional issues such as these." SSA, EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (Jan. 30, 2018) (*Davis* C.A. App. 61-63). The message further stated that the Appeals Council would not "acknowledge, make findings related to, or otherwise discuss" any Appointments Clause challenges. *Ibid.*

In June 2018, this Court issued its decision in *Lucia*, holding that SEC ALJs were "Officers of the United States" who must be appointed by the President, a court of law, or the head of a department. See 138 S. Ct. at 2055. Because the SEC ALJ in *Lucia* had been appointed by SEC staff members, the Court ordered a "new hearing

before a properly appointed official." *Ibid.* (internal quotation marks and citation omitted).

Four days after the decision in *Lucia*, SSA reiterated its instruction that neither ALJs nor the Appeals Council should address any Appointments Clause challenges raised by claimants. See SSA, EM-18003 REV: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process—UPDATE (June 25, 2018) (*Davis* C.A. App. 64-66). The next month, the President issued an executive order that removed all ALJs from the competitive service. See Executive Order 13,843, 83 Fed. Reg. 32,756 (July 10, 2018). The following week, the Acting Commissioner of Social Security "ratified" the appointment of all Social Security ALJs and Appeals Council judges and "approved those appointments as her own." 84 Fed. Reg. 9,583 (Mar. 15, 2019).

In August 2018, SSA updated its earlier instructions to agency staff, directing ALJs not to rule on Appointments Clause challenges to ALJ decisions issued before the ratification date, but to deny relief for challenges to decisions issued after that date. See SSA, 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) (*Davis* C.A. App. 67-70). SSA also advised agency staff that, where a claimant raised a timely pre-ratification Appointments Clause challenge before the Appeals Council, the Council would "grant review" and "issue a decision" or "order remand," "as appropriate." *Ibid.*

In March 2019, SSA published a formal policy for addressing Appointments Clause challenges to decisions that ALJs had issued before the Acting Commissioner's ratification. See 84 Fed. Reg. 9,583. That policy applied only to claimants who timely requested Appeals Council

review of ALJ decisions issued before the date of ratification some eight months earlier. See *ibid.* As to cases pending before the Appeals Council in which the claimant had raised an Appointments Clause challenge before the ALJ, SSA ordered the Appeals Council to vacate the ALJ's decision and order new proceedings before a different, properly appointed ALJ (or to conduct a new rehearing itself), regardless of whether the claimant had renewed the challenge before the Appeals Council. See *ibid.* SSA also ordered new proceedings as to cases in which the claimant had failed to raise an Appointments Clause challenge before the ALJ but did raise the challenge before the Appeals Council. See *ibid.*

3. Before this Court's decision in *Lucia*, each petitioner filed a complaint in federal court, seeking judicial review of SSA's decision to deny benefits under 42 U.S.C. 405(g). Then, following *Lucia*, each petitioner filed a brief to address the intervening change in law, arguing that he or she was entitled to a new hearing before a new, properly appointed ALJ because the presiding ALJ had not been properly appointed. In each case, the government did not dispute that the ALJ was improperly appointed. See *Davis* Resp. C.A. Br. 11 n.2; *Hilliard* Resp. C.A. Br. 31 n.8. Yet in each case, the district court affirmed the ALJ's denial of benefits, expressly rejecting the Appointments Clause challenge on the ground that it had been forfeited because it had not been raised before either the ALJ or the Appeals Council. See Pet. App. 4a, 17a, 37a-38a, 58a-60a, 79a-81a; *Hilliard* D. Ct. Dkt. 7, at 16.

4. The court of appeals affirmed in two separate judgments, holding that Social Security claimants must exhaust Appointments Clause challenges before their ALJs. Pet. App. 1a-9a, 10a-14a.

a. In *Davis*, which involved petitioners Davis, Iwan, and Thurman, the court of appeals acknowledged this Court's holding in *Sims* that Social Security claimants need not raise issues before the Appeals Council in order to preserve them for judicial review. See Pet. App. 5a. But the court of appeals distinguished *Sims* on the ground that it applied only to proceedings before the Appeals Council, not before ALJs. See *id.* at 6a.

The court of appeals noted that the deciding vote in *Sims* "turned on" the fact that, when SSA had instructed the claimant on how to seek Appeals Council review, it had told her that she could request review by filling out a one-page form that should take about 10 minutes to complete; that "only failing to request Appeals Council review would preclude judicial review"; and that the Appeals Council "would review her entire case for issues." Pet. App. 5a. Having distinguished *Sims* in that fashion, the court of appeals concluded that issue exhaustion was required in proceedings before a Social Security ALJ, reasoning that such a requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Id.* at 6a (citation omitted).

The fact that an Appointments Clause challenge presented a constitutional question did not alter the analysis, in the court's view, because even "important" and "fundamental" constitutional challenges "can be forfeited." Pet. App. 7a (citation omitted). The court of appeals acknowledged that "a claimant need not litigate certain constitutional questions in order to satisfy the *jurisdictional* requirement of the judicial review statute" and that it was "unrealistic to expect" that the Commissioner would have "consider[ed] substantial changes in the current administrative review system at the behest of the single aid recipient raising a constitutional challenge in an adjudicatory context." *Id.* at 7a-8a (citation omitted).

The court of appeals nevertheless concluded that it did not follow that raising the challenge before an ALJ "would have been futile." Pet. App. 8a. According to the court, if the "hundreds of claimants" who could have raised Appointments Clause challenges before their ALJs had done so, SSA would have been "alerted to the issue" and could have "taken steps through ratification or new appointments to address [it]." *Ibid.*

The court of appeals also rejected petitioners' argument that it should at a minimum exercise its discretion to consider the unexhausted Appointments Clause challenges because they implicated the "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." Pet. App. 9a (citation omitted). The court cited the "practicalities of potentially upsetting numerous administrative decisions because of an alleged appointment flaw to which the agency was not timely alerted." *Ibid.*

b. In *Hilliard*, the court of appeals summarily refused to consider petitioner Hilliard's Appointments Clause challenge, citing its decision in *Davis*. Pet. App. 14a.

SUMMARY OF ARGUMENT

I. A Social Security claimant need not exhaust an Appointments Clause challenge before the ALJ whose appointment the claimant is challenging in order to obtain judicial review of that challenge.

A. Under the reasoning in *Sims* v. *Apfel*, 530 U.S. 103 (2000), a Social Security claimant is not required to raise a particular objection to a benefits determination before an ALJ in order to preserve the objection for judicial review. In *Sims*, this Court declined to require issue exhaustion in proceedings before the Social Security Ap-

peals Council. In the majority portion of the Court's opinion, the Court explained that issue-exhaustion requirements primarily arise by statute or regulation. The Court recognized that it had, at times, imposed judicially crafted issue-exhaustion requirements. But the Court explained that it had generally done so only when agency proceedings resemble normal adversarial litigation, given that issue-exhaustion rules are based on an analogy to the rules applicable in the litigation system.

While a majority of the Court in *Sims* agreed with those principles, the Court fractured with respect to the appropriate resolution of the particular question at issue. Writing for a four-justice plurality, Justice Thomas concluded that it would be inappropriate to require issue exhaustion before the Appeals Council because Social Security proceedings were non-adversarial. Justice O'Connor concurred in part and concurred in the judgment, writing separately to explain that she would resolve the case on the ground that SSA had failed to provide notice that Social Security claimants would forfeit issues not raised before the Appeals Council.

The logic of *Sims* dictates that Social Security claimants need not exhaust an issue before an ALJ in order to preserve that issue for judicial review. As in *Sims*, no statute or regulation requires issue exhaustion before an ALJ; if anything, the Social Security Act and SSA regulations affirmatively demonstrate that issue exhaustion is not required.

Issue exhaustion would thus be required only if this Court judicially imposed such a rule. But as the plurality in *Sims* recognized, no such rule is warranted in the Social Security context because of the non-adversarial nature of the proceedings. And there are no material differences between ALJ proceedings and Appeals Council proceed-

ings which would counsel in favor of requiring issue exhaustion in the former context but not the latter. The same result would follow under Justice O'Connor's approach, because SSA has not notified claimants that they must exhaust issues before an ALJ in order to preserve them for judicial review.

B. Even apart from *Sims*, the Court should decline to require the exhaustion of issues before a Social Security ALJ in order to preserve those issues for judicial review.

In *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), the Court stated that its prior cases established a "general rule" of issue exhaustion in administrative proceedings. But the Court has not imposed a judicially created issue-exhaustion requirement in the nearly 70 years since it decided *L.A. Tucker*, and the legal basis for any such general rule is dubious. Neither *L.A. Tucker* nor the cases it cited explain the source of judicial authority to create issue-exhaustion requirements not imposed by statute or regulation. Those cases also involved unique factual circumstances that cannot be generalized to all agency proceedings.

Subsequent doctrinal developments have further eroded the foundations for any general rule of issue exhaustion. *Sims* suggests that any such rule is limited to agency proceedings that resemble normal adversarial litigation, and this Court's more recent decisions call into question the judicial practice of creating prudential rules with no basis in statutory or regulatory text.

For all of those reasons, the Court should be wary about relying on any general, prudential rule of issue exhaustion. But without any such rule, the policy rationales offered by the government for requiring the exhaustion of issues before a Social Security ALJ are far too weak to carry the day. The government argues that the lack of such an issue-exhaustion requirement would render

SSA's administrative-review process "unworkable," but its concerns are overblown. Social Security claimants have little incentive to conceal meritorious objections to benefits determinations during an administrative process that can take years to complete. In any event, it is the duty of Congress or SSA in the first instance to address any workability concerns that might arise.

C. Even if an issue-exhaustion requirement were generally applicable to SSA ALJ proceedings, any such requirement would not apply to petitioners' Appointments Clause challenges. In a number of cases, the Court has held that parties need not exhaust constitutional claims before administrative agencies, in part because administrative proceedings are not designed to resolve such claims. The Court has also held that exhaustion is not required where it would be futile to raise an issue before an agency, such as where the agency lacks the ability to provide redress.

Both of those principles apply here. The Court has previously applied them to excuse exhaustion in a number of cases involving Social Security proceedings. In those cases, the Court has made clear that SSA lacks both the competence and the ability to adjudicate constitutional claims. That is unquestionably true with respect to petitioners' Appointments Clause claims, as demonstrated by SSA's guidance to ALJs that they should state on the record that they lack the power to resolve such claims.

Nor does the government's interest in requiring issue exhaustion outweigh the harm to claimants from such a requirement. Refusing to require issue exhaustion where SSA has not itself imposed such a requirement does not interfere with the agency's autonomy, and it makes particularly little sense to give SSA an opportunity to correct an Appointments Clause violation that it cannot remedy.

An issue-exhaustion requirement would also burden often-destitute claimants by inducing them to hire counsel in SSA proceedings—which would be especially odd because it is primarily SSA's own responsibility to raise salient issues in Social Security proceedings. For those reasons, even if the Court were to impose a general issue-exhaustion requirement for proceedings before a Social Security ALJ, petitioners should not be subject to that requirement.

II. If the Court concludes that petitioners have forfeited their Appointments Clause challenges, it should exercise its discretion to excuse the forfeiture in light of the judiciary's interest in enforcing the separation of powers and the government's decision not to dispute that petitioners' ALJs were unconstitutionally appointed. Whether as a matter of law or as a matter of discretion, the judgment of the court of appeals should be reversed and the case remanded so that SSA can provide new hearings before constitutionally appointed ALJs.

ARGUMENT

I. A SOCIAL SECURITY CLAIMANT NEED NOT EXHAUST AN APPOINTMENTS CLAUSE CHALLENGE BEFORE THE ADMINISTRATIVE LAW JUDGE WHOSE APPOINTMENT IS BEING CHALLENGED

When a Social Security claimant believes that the ALJ assigned to review the claim has not been appointed by a method prescribed by the Appointments Clause, the claimant need not raise that objection with the ALJ in order to preserve it for subsequent judicial review. That conclusion follows ineluctably from this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000), which declined, in the absence of a contrary statute or regulation, to require exhaustion of issues before the Social Security Appeals Council.

There is no valid basis for treating proceedings before a Social Security ALJ differently. But even if the Court were to impose a judge-made issue-exhaustion requirement for proceedings before a Social Security ALJ more generally, such a rule would not apply because the claims at issue are constitutional in nature and because it would have been futile for petitioners to raise those claims before the ALJ. The court of appeals erred in reaching a contrary conclusion, and its judgments should now be reversed.

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

Requiring the exhaustion of issues in proceedings before a Social Security ALJ cannot be squared with this Court's decision in *Sims*.

1. The question presented in *Sims* was whether a Social Security claimant must raise a particular ground for challenging an ALJ's benefits determination before the Social Security Appeals Council in order to preserve that issue for judicial review. While no single opinion commanded a majority in its entirety, the Court held that issue exhaustion was not required.

a. Justice Thomas delivered the Court's judgment and wrote for a majority in the portion of his opinion setting forth the basic framework governing administrative issue exhaustion. See 530 U.S. at 106-110. In that portion of the opinion, the Court first rejected the proposition that "an issue-exhaustion requirement" is a "corollary" of any requirement of exhaustion of *remedies*. *Id.* at 107. Instead, the Court viewed the two requirements as not "necessarily" connected, and it reasoned that any such "corollary" was "particularly unwarranted" in the context of proceedings before the Social Security Appeals Council. *Ibid.*

"Requirements of administrative issue exhaustion," the Court explained, are "largely creatures of statute"—a fact "reflect[ed]" in the Court's case law. 530 U.S. at 107-108. The Court cited as an example its decision in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), which applied a statute providing that "[n]o objection that has not been urged" before the National Labor Relations Board "shall be considered by the court." *Id.* at 665 (quoting 29 U.S.C. 160(e) (1982)). But in the case before it, the Court noted, no statute "require[d] issue exhaustion in the request for review" filed by a claimant with the Social Security Appeals Council. *Sims*, 530 U.S. at 108.

The Court also recognized that it is "common" for an agency to require issue exhaustion by regulation. 530 U.S. at 108. When such a regulation is valid, the Court continued, "courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Ibid.* But the Court noted that SSA's regulations did not require issue exhaustion (even though it was "likely" that the Commissioner of Social Security could promulgate such a requirement if he so chose). See *ibid.*

The Court acknowledged that it had sometimes "imposed" an issue-exhaustion requirement in the absence of a statute or regulation. See 530 U.S. at 108. But "[t]he basis for a judicially imposed issue-exhaustion requirement," the Court explained, was "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Id.* at 108-109. Accordingly, the "desirability" of imposing a judicially created issue-exhaustion requirement "depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. Such a rule can be appropriate in "adversarial administrative

proceeding[s]" in which the "parties are expected to develop the issues." *Id.* at 110. But when proceedings are not adversarial, the Court observed, "the reasons for a court to require issue exhaustion are much weaker." *Ibid.*

b. While a majority of the Court agreed on the foregoing principles, the Court fractured on the precise analysis necessary to resolve the case. See *Sims*, 530 U.S. at 110-111 (plurality opinion); *id.* at 113 (O'Connor, J., concurring in part and concurring in the judgment).

i. Writing for a four-justice plurality, Justice Thomas concluded that it would be inappropriate to require issue exhaustion before the Appeals Council because "Social Security proceedings are inquisitorial rather than adversarial." 530 U.S. at 110-111. For example, the plurality noted, it is "the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits," and the Commissioner does not "oppose[] claimants" during the review process. *Id.* at 111 (citing Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1301-1305, 1325-1329 (1997) (Dubin)).

The plurality found support for its view in SSA's regulations. Those regulations provide that SSA "conduct[s] the administrative review process in an informal, nonadversarial manner" and that the Appeals Council will "evaluate the entire record" on its own, including parts of the ALJ's decision with which the claimant may agree. 530 U.S. at 111 (citation omitted). The plurality noted that a claimant was not even required to file a brief with the Appeals Council; instead, the claimant needed only to fill out SSA Form HA-520, which "provides only three lines for the request for review" and states that it "will take only 10 minutes" to complete. *Id.* at 111, 112. Accordingly, the plurality explained, the Appeals Council "does not depend

much, if at all, on claimants to identify issues for review"—a fact the plurality found "entirely understandable" given that a "large portion" of claimants "either have no representation at all or are represented by non-attorneys." *Ibid.* (citing Dubin 1294 n.29).

For those reasons, the plurality determined that the analogy to adversarial proceedings is "weakest" in the context of Social Security proceedings. 530 U.S. at 112. The plurality thus concluded that "a judicially created issue-exhaustion requirement is inappropriate." *Ibid.*

ii. Justice O'Connor concurred in part and concurred in the judgment. She agreed with the plurality that the question whether to require issue exhaustion in the absence of a statute or regulation "requires careful examination of the characteristics of the particular administrative procedure provided." 530 U.S. at 113 (internal quotation marks and citation omitted). She further explained that "[t]he Court's opinion provides such an examination, and reaches the correct result." *Ibid.*

According to Justice O'Connor, however, SSA's "failure to notify claimants of an issue exhaustion requirement" before the Appeals Council provided a "sufficient basis" for the Court's judgment. 530 U.S. at 113. Justice O'Connor noted that SSA regulations did not state that a claimant must "raise specific issues before the Appeals Council to preserve them for review in federal court"; to the contrary, the limited nature of Form HA-520 suggested that issue exhaustion was not required. *Ibid.* She also observed that SSA's regulations conveyed that the Appeals Council would review the ALJ's decision in full. *Id.* at 114.

In Justice O'Connor's view, the agency had thus told claimants "(1) that [they] could request review by sending a letter or filling out a 1-page form that should take 10

minutes to complete, (2) only that failing to request Appeals Council review would preclude judicial review, and (3) that the Appeals Council would review [the] entire case for issues." 530 U.S. at 114. Because the claimant before the Court had done "everything that the agency asked of her," Justice O'Connor refused to "impose any additional requirements." *Ibid.*

2. The reasoning endorsed by a majority of the Court in *Sims* compels the conclusion that Social Security claimants are not required to exhaust issues before Social Security ALJs in order to preserve them for judicial review.

a. To begin with, as in *Sims*, no statutory provision requires the exhaustion of an objection to an SSA benefits determination before an ALJ. See *Davis* Resp. C.A. Br. 11-22. And the language and context of the judicial-review provision of the Social Security Act, 42 U.S.C. 405(g), affirmatively indicates that Congress did not intend to impose such a requirement.

Section 405(g) provides that "any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, * * * may obtain a review of such decision." Nothing in that language suggests an intent to require administrative issue exhaustion. And while exhaustion of administrative *remedies* is required in Social Security proceedings, that obligation is grounded in the requirement in Section 405(g) that a decision be "final" before judicial review is authorized. See *Sims*, 530 U.S. at 107-108; *Bowen* v. *City of New York*, 476 U.S. 467, 482 (1986).

Congress's omission of any express issue-exhaustion requirement in Section 405(g) is telling, because Congress has often included issue-exhaustion provisions in corresponding statutes permitting judicial review of agency action. See, *e.g.*, 5 U.S.C. 7123(c) (Federal Labor Relations Authority); 15 U.S.C. 77i(a) (Securities and Exchange

Commission); 15 U.S.C. 687a(e) (Small Business Administration); 15 U.S.C. 717r(b) (Federal Energy Regulatory Commission); 29 U.S.C. 210(a) (Department of Labor); 29 U.S.C. 160(e) (National Labor Relations Authority); 30 U.S.C. 816(a)(1) (Federal Mine Safety and Health Review Commission); 43 U.S.C. 1349(c)(5) (Department of the Interior); 47 U.S.C. 405(a) (Federal Communications Commission); 49 U.S.C. 1153(b)(4) (National Transportation Safety Board).

In addition, Congress has expressly required issue exhaustion in a separate statute administered by SSA. The Commissioner of Social Security may administratively impose civil penalties on any person who engages in certain wrongful conduct involving Social Security benefits. See 42 U.S.C. 1320a-8(a), (c). A party "adversely affected" by the Commissioner's imposition of civil penalties may seek judicial review, but "[n]o objection" that the party did not "urge[] before the Commissioner of Social Security" may be "considered by the court" absent "extraordinary circumstances." 42 U.S.C. 1320a-8(d)(1). Notably, those civil-penalties proceedings are adversarial in nature, with the charged party having the right to written notice of the charge and an opportunity for a hearing on the record, at which the party may be represented by counsel and may present and cross-examine witnesses. See 42 U.S.C. 1320a-8(b)(2); see also 20 C.F.R. 498.215-498.217.

Section 405 not only lacks that sort of express issue-exhaustion language; it includes other rules limiting judicial review of benefits determinations, suggesting that the omission of an issue-exhaustion requirement was not accidental. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). For example, the statute authorizes the Commissioner to promulgate rules regulating the "method of tak-

ing and furnishing" the "proofs and evidence" in administrative proceedings. 42 U.S.C. 405(a). And when SSA denies a claim because of a claimant's failure to "submit proof in conformity with" such regulations, the statute provides that a court "shall review only the question of conformity with such regulations and the validity of such regulations." 42 U.S.C. 405(g). The critical point is that, while Section 405(g) includes some limits on judicial review of an SSA determination, it does not preclude review of an unexhausted issue.

b. Also as in *Sims*, no regulation requires exhaustion of a particular objection to an Social Security ALJ's benefits determination before a claimant may seek judicial review of that objection. Instead, the relevant regulations again merely require exhaustion of *remedies*, stating that a claimant will "lose [the] right to judicial review" of a benefits determination if the claimant does not "take the next step" in the administrative process "within the stated time period." 20 C.F.R. 404.900(b). By contrast, SSA regulations governing proceedings to impose civil penalties provide that a party will forfeit an argument in an administrative appeal of an ALJ's decision by failing to raise the argument before the ALJ. See 20 C.F.R. 498.221(f).

c. Because no statute or regulation requires the exhaustion of particular objections to an SSA benefits determination before an ALJ, the only remaining question is whether the Court should impose such a requirement on its own. But the analysis approved by a majority of the Court in *Sims* compels the conclusion that issue exhaustion is not required in Social Security proceedings, whether before the Appeals Council or before an ALJ.

As already noted, see pp. 18-20, the majority in *Sims* explained that "[t]he basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that ap-

pellate courts will not consider arguments not raised before trial courts." 530 U.S. at 108-109. The "desirability" of imposing an issue-exhaustion requirement thus "depends on the degree to which the analogy * * * applies in a particular administrative proceeding." *Id.* at 109.

"The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Sims*, 530 U.S. at 110 (plurality opinion). In ordinary litigation, the parties "frame the issues for decision" and "advance[e] the facts and argument[s] entitling them to relief," and the courts perform the "role of neutral arbiter[s]." *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citations omitted). But unlike judicial proceedings, Social Security proceedings are "inquisitorial," *Sims*, 530 U.S. at 110-111 (plurality opinion)—indeed, by regulation, they are "informal" and "non-adversarial." 20 C.F.R. 404.900(b); see *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1152 (2019). And SSA itself recognizes that its proceedings have "significant differences" from the "formal, adversarial adjudications" administered by other "regulatory agencies." 85 Fed. Reg. 73,139 (Nov. 16, 2020); see *id.* at 73,140, 73,141, 73,142 (similar).

d. To be sure, the Court in *Sims* noted that the question "[w]hether a claimant must exhaust issues before [an] ALJ" is "not before us." 530 U.S. at 107. But the ALJ process is the same as the Appeals Council process in every relevant respect. In fact, the plurality in *Sims* relied on the nature of proceedings before ALJs in order to demonstrate the non-adversarial nature of Social Security proceedings more generally. See *id.* at 111.

A Social Security ALJ wears "three hats": the ALJ "help[s] the claimant develop facts and evidence; help[s] the government investigate the claim; and issue[s] an independent decision." 85 Fed. Reg. 73,140; see Dubin 1303-1304. The ALJ thus has the initial "duty" to "ensure

that the administrative record is fully and fairly developed." SSA, Hearings, Appeals, and Litigation Law Manual § I-2-6-56 (HALLEX) <tinyurl.com/ssahallex>; see 20 C.F.R. 404.1512(b), 416.912(b). And as with the Appeals Council, the ALJ also "has primary responsibility for identifying and developing the issues" to be decided at the hearing. *Sims*, 530 U.S. at 112 (plurality opinion); see 20 C.F.R. 404.938(b)(1), 404.946, 416.1438(b)(1), 416.1446.

While the issues before the ALJ generally include all issues "brought out" in the prior determinations that were resolved against the claimant, the ALJ may also raise issues that have not "previously been adjudicated" on "his or her own initiative." HALLEX § I-2-2-1; see 20 C.F.R. 404.946(a), 416.1446(a). The ALJ must notify the claimant of the issues to be decided at the hearing; a claimant who "objects to an issue[] the ALJ will decide" should notify the ALJ in writing. HALLEX § I-2-2-20; see 20 C.F.R. 404.939, 416.1439.

After identifying the relevant issues, the ALJ must "look[] fully" into them, 20 C.F.R. 404.944, 416.1444, "investigat[ing] the facts and develop[ing] the arguments both for and against granting benefits," *Sims*, 530 U.S. at 111 (plurality opinion). And at the hearing, "[t]he Commissioner has no representative before the ALJ to oppose the claim for benefits." *Ibid.*

Proceedings before a Social Security ALJ share the same features of Appeals Council proceedings that the plurality in *Sims* found salient. See 530 U.S. at 111. In both contexts, the claimant need not submit briefs or oral argument. See 20 C.F.R. 404.949, 416.1449. Indeed, a claimant pursuing either proceeding need only fill out a one-page form that states that it should take 10 minutes to complete. See 20 C.F.R. 422.203(b); SSA, Form No. HA-501, *supra*. The plurality in *Sims* found the similar version of the form for Appeals Council review to be

"strong[]" evidence that "the [Appeals] Council does not depend much, if at all, on claimants to identify issues for review." 530 U.S. at 112. The same inference follows with regard to ALJs—especially because a claimant can also request ALJ review through an even more informal electronic or written submission. See 20 C.F.R. 404.933(a); 84 Fed. Reg. 40,468-40,469 (Aug. 14, 2019).

All told, application of the legal framework for the judicial creation of issue-exhaustion rules adopted by the majority in *Sims* makes easy work of this case. Under that framework, proceedings before a Social Security ALJ are non-adversarial, and so "the reasons for a court to require issue exhaustion" are "weak[]." *Sims*, 530 U.S. at 110. The Court should thus decline to impose such a requirement here.

3. Although the framework adopted by the majority in *Sims* is more than sufficient to resolve this case in petitioners' favor, the outcome would remain the same under the approach taken by Justice O'Connor in her separate opinion. As was the case in the context of Appeals Council proceedings, SSA has also "fail[ed] to notify claimants of an issue exhaustion requirement" in proceedings before ALJs. *Sims*, 530 U.S. at 113 (opinion concurring in part and concurring in the judgment).

a. In Justice O'Connor's view, SSA had failed to provide the requisite notice of an issue-exhaustion requirement before the Appeals Council because it had told claimants "(1) that [they] could request review by sending a letter or filling out a 1-page form that should take 10 minutes to complete, (2) only that failing to request Appeals Council review would preclude judicial review, and (3) that the Appeals Council would review [the] entire case for issues." *Sims*, 530 U.S. at 114. Once again, the same is true with respect to proceedings before a Social Secu-

rity ALJ. As already explained, the agency has told claimants that they need only fill out a similar form to request review; SSA regulations state only that failing *entirely* to seek ALJ review would preclude judicial review; and the regulations make the ALJ responsible for reviewing the case for issues to be resolved at the hearing. See pp. 6-8, 25-27, *supra*. Even under Justice O'Connor's approach, therefore, the exhaustion of issues before a Social Security ALJ is not required.

That is particularly true of the Appointments Clause challenges at issue here. After the grant of review in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), SSA directed ALJs not to decide *Lucia*-based Appointments Clause challenges on the ground that the agency "lack[ed] the authority" to decide those issues, and it instructed the Appeals Council to ignore such challenges entirely. SSA, EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (Jan. 30, 2018) (*Davis* C.A. App. 61-63). Only in March 2019 did the agency explain to claimants that it would provide new hearings to parties that had raised the challenges before either the ALJ or the Appeals Council. See 84 Fed. Reg. 9,583; pp. 10-11, *supra*. But at that point, it was far too late for petitioners to raise the issue, since SSA had finally denied their claims a year or more earlier.

b. In its brief at the certiorari stage, the government argued that Justice O'Connor's approach would not preclude the judicial creation of an issue-exhaustion requirement at the ALJ stage, because "the regulations governing ALJ proceedings do not 'affirmatively suggest that specific issues need not be raised.'" Resp. Cert. Br. 11 (quoting *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment)). In particular, the government cited 20 C.F.R. 404.939, which states that,

if a claimant "object[s] to the issues to be decided at the hearing," the claimant "must notify the administrative law judge in writing at the earliest possible opportunity." That regulation was on the books in substantially the same form when the Court decided *Sims*, see 20 C.F.R. 404.939 (2000), yet the Court concluded that "nothing" in the regulations imposed an issue-exhaustion requirement. 530 U.S. at 107. And ironically, the government did not invoke that regulation below as a basis for imposing an issue-exhaustion requirement. See *Davis* Resp. C.A. Br. 11-22; *Hilliard* Resp. C.A. Br. 30-41; see also *Carr* v. *Commissioner*, 961 F.3d 1267, 1270 (10th Cir. 2020) (same).

In any event, the government gets it the wrong way around. The determining factor in Justice O'Connor's analysis was that SSA "fail[ed] to notify claimants of an issue exhaustion requirement"; it was not that the agency had affirmatively notified claimants that there was *no such requirement*. *Sims*, 530 U.S. at 113 (opinion concurring in part and concurring in the judgment). And nothing in the regulation the government cites gives affirmative notice that, by failing to object to the list of issues identified by the ALJ, a claimant will forfeit the right to judicial review of that issue. Indeed, a claimant need only object to "an issue[] the ALJ *will decide*"—that is, an issue expressly listed in the "advance notice" sent to the claimant of the issues the ALJ will decide at the hearing. HALLEX § I-2-2-20 (emphasis added). Because no statute or regulation (or other agency document) notifies claimants that they are required to preserve issues by raising them before their ALJs, Justice O'Connor's approach in *Sims* would not permit the judicial creation of an issue-exhaustion requirement for ALJ proceedings.

* * * * *

A straightforward application of *Sims* resolves this case. No statute or regulation requires issue exhaustion in proceedings before a Social Security ALJ, and Social Security proceedings are non-adversarial in nature. In fact, proceedings before a Social Security ALJ are materially indistinguishable from those before the Appeals Council—the precise context in which the Court refused to require issue exhaustion in *Sims*. Applying the reasoning of *Sims* here, the Court should hold that a party need not exhaust a particular objection to a benefits determination before a Social Security ALJ in order to preserve that objection for judicial review.

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

If the Court were to conclude that *Sims* alone does not resolve this case, it still should decline to require the exhaustion of issues before a Social Security ALJ. The basis for the judicial creation of such requirements is questionable, and the arguments for doing so in proceedings before a Social Security ALJ are invalid.

1. In *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), the Court divined from its prior cases a "general rule" that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* at 37. Yet the Court has not recognized a judicially created issue-exhaustion rule in the nearly 70 years since *L.A. Tucker*.[1]

[1] While the Court did favorably cite the relevant portion of *L.A. Tucker* in *Woodford* v. *Ngo*, 548 U.S. 81 (2006), that case involved an express statutory requirement to exhaust administrative *remedies*. See *id.* at 87-88, 90.

Because the legal basis for that long-dormant practice is dubious, the Court should not revive it here.

a. In *L.A. Tucker*, the Court cited four cases to support its statement that exhaustion of issues before administrative agencies was generally required: *Spiller* v. *Atchison, Topeka & Santa Fe Railway Co.*, 253 U.S. 117 (1920); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103 (1927); *United States* v. *Northern Pacific Railway Co.*, 288 U.S. 490 (1933); and *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143 (1946). See 433 U.S. at 36 n.5. But those cases do not support the existence of a general issue-exhaustion requirement for several reasons.

First, none of those cases explained the source of a court's power to create an issue-exhaustion requirement in the absence of a statute or regulation imposing such a requirement. See *Spiller*, 253 U.S. at 130; *Vajtauer*, 273 U.S. at 113; *Northern Pacific*, 288 U.S. at 494; *Aragon*, 329 U.S. at 155. Indeed, this Court "has yet to identify the source of the judiciary's authority to impose" a judge-made issue-exhaustion requirement "on top of a statutory scheme that does not expressly contain one." *Island Creek Coal Co.* v. *Bryan*, 937 F.3d 738, 747 (6th Cir. 2019).

Second, those cases involved unique facts that are not generalizable to all issues and all agency proceedings. Each of the administrative proceedings in those cases was adversarial in nature. See *Spiller*, 253 U.S. at 122-123; *Vajtauer*, 273 U.S. at 106-111; *Northern Pacific*, 288 U.S. at 492; *Aragon* v. *Unemployment Compensation Commission*, 149 F.2d 447, 450-452 (9th Cir. 1945). And three of the cases involved "evidentiary or testimonial objections" that a party did not raise during the "evidentiary development stages" of the proceedings. Dubin 1342; see *Spiller*, 253 U.S. at 130; *Vajtauer*, 273 U.S. at 113; *North-*

ern Pacific, 288 U.S. at 494. The final case, *Aragon*, involved the unusual circumstance of a court of appeals "inject[ing]" an issue into the case that the parties had not raised before either the relevant administrative agency or the district court. See 329 U.S. at 155.

Third, the holdings in those cases are best understood not to rest on any general rule of issue exhaustion at all. The decisions in *Spiller* and *Northern Pacific* are explained by the applicable standard of review: an agency does not act "arbitrarily" by basing its order in part on unobjected-to hearsay evidence that was "substantially corroborated" by other "clearly admissible" evidence, *Spiller*, 253 U.S. at 131, nor does an agency commit an "abuse of discretion" by denying a motion for rehearing that sought to introduce evidence available "months" before the agency acted, *Northern Pacific*, 288 U.S. at 494.[2] The decision in *Vajtauer* rested on the longstanding principle that a witness who "desires the protection" of the Fifth Amendment privilege against self-incrimination "must claim it" at the "time he relies on it." *Salinas* v. *Texas*, 570 U.S. 178, 183 (2013) (citing, *inter alia*, *Vajtauer*, 273 U.S. at 113). And in *Aragon*, as just explained, the error lay with the court of appeals, which decided an issue never raised by the parties. See 329 U.S. at 155; see also *Sims*, 530 U.S. at 109 (noting that the "waived issue" in *Aragon* had not been "raised before the [d]istrict [c]ourt").

Fourth, to the extent any general rule of issue exhaustion did exist before *L.A. Tucker*, the Court applied it in-

---

[2] Cf. *Department of Transportation* v. *Public Citizen*, 541 U.S. 752, 764-765 (2004) (holding that an agency's "fail[ure] adequately to discuss potential alternatives" to a final rule was neither arbitrary nor capricious when those alternatives were not presented to the agency in the rulemaking process).

consistently. In *Aragon*, the Court invoked issue exhaustion but then proceeded to reject the unpreserved argument on the merits. See 329 U.S. at 155. And in *Hormel* v. *Helvering*, 312 U.S. 552 (1941), the Court chose to consider the applicability to a taxpayer of a particular statute that the Commissioner of Internal Revenue had not raised before the Board of Tax Appeals. See *id.* at 554-557. The Court noted that its tax cases requiring issue exhaustion had been "careful to point out the circumstances justifying application" of an issue-exhaustion requirement "in the particular case," and that requiring issue exhaustion in that case would provide the taxpayer with a windfall. *Id.* at 557, 559-560.

b. Whatever the original basis for the "general rule" of issue exhaustion divined in *L.A. Tucker*, its foundations have eroded over time.

As an initial matter, the majority in *Sims* declined to apply any "general rule" of issue exhaustion, explaining that issue exhaustion was least appropriate when the particular administrative proceedings were "inquisitorial" in nature and were most appropriate when the proceedings resembled "normal adversarial litigation." 530 U.S. at 109-110. *L.A. Tucker* itself fits comfortably within that framework: the administrative proceeding at issue there was adversarial in nature, as were the proceedings in the cases on which *L.A. Tucker* relied. See *id.* at 110; *L.A. Tucker*, 344 U.S. at 36; pp. 31-32, *supra*. For the reasons discussed above, no issue-exhaustion requirement should apply in Social Security proceedings because, unlike the proceedings in those cases, they are non-adversarial. See pp. 24-27, *supra*.

The imposition of judicially created issue-exhaustion requirements, moreover, is in tension with modern principles of statutory interpretation. As a general matter,

courts no longer allow "policy-laden arguments" to overcome "the text of [a] statute." *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2066 (2019) (Kavanaugh, J., concurring); see *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020). A court will therefore not apply its "independent policy judgment to recognize a cause of action that Congress has denied," nor will it "limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). In related fashion, a court will not craft a "judge-made procedural right" that Congress did not establish in the Administrative Procedure Act, because "imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts." *Perez* v. *Mortgage Bankers Association*, 135 S. Ct. 1199, 1207 (2015).

To be sure, the foregoing principles did not arise in the specific context of issue-exhaustion requirements. But they do suggest that care is warranted when the government seeks to impose a prudential issue-exhaustion requirement not rooted in the text of the relevant statute or the regulations implementing it. That is especially true here: as the Court recently recognized, the unique facets of the Social Security regime suggest that Congress "wanted more oversight by the courts in this context rather than less," given that it "designed" that regime to be "unusually protective" of claimants. *Smith*, 139 S. Ct. at 1776 (citation omitted).

2. In light of the lack of support for any purported "general rule" of administrative issue exhaustion, the Court should be wary of relying on any such rule in deciding whether issue exhaustion is required in proceedings before a Social Security ALJ. Aside from that purported general rule, however, the government has offered only

weak policy arguments in support of an issue-exhaustion requirement.

The government contends (Resp. Cert. Br. 9) that SSA's administrative-review process would be "unworkable" without an issue-exhaustion requirement. That contention is unfounded. As an initial matter, Social Security claimants have little reason to "sandbag[]" the agency by withholding a potentially dispositive issue until the claimant's case reaches federal court. See *ibid.* After all, SSA's regulations ordinarily require a Social Security claimant to proceed through a multi-step administrative process before seeking judicial review. See *Smith*, 139 S. Ct. at 1772; p. 6, *supra*.

Because that process can take years to complete, a claimant dissatisfied with an initial benefits determination has every incentive to raise any potentially dispositive issue at the earliest possible juncture. See SSA, *Annual Performance Report, Fiscal Years 2019-2021*, at 45-47 (2020) <tinyurl.com/ssaperformancereport> (SSA Performance Report); SSA, *Annual Data for Appeals Council Requests for Review: Average Processing Time* (2018) <tinyurl.com/appealscouncilprocessingtime>. In addition, both the ALJ and the Appeals Council have the responsibility to raise any salient issues during the review process, see pp. 25-27, *supra*, making it unlikely that unexhausted but meritorious issues will reach federal court in significant numbers.

Indeed, in many Social Security cases, the absence of an issue-exhaustion requirement may not affect the agency at all. When a claim for benefits turns on fact-intensive questions regarding the claimant's disability, the primary issue will often be whether SSA's decision is supported by substantial evidence. See 42 U.S.C. 405(g). An issue-exhaustion requirement would have little effect in those cases, as the claimant is ordinarily precluded from

submitting "new evidence" to the court which was not previously submitted in accordance with SSA's rules. *Ibid.*; see, *e.g.*, 20 C.F.R. 404.1512(a)(1), 416.912(a)(1).

The government notes that SSA "completes over 760,000 ALJ hearings" each year. Resp. Cert. Br. 9 (citing SSA Performance Report 4, 44, 46). But only a tiny fraction of those cases ever reach federal court. United States Courts, *Judicial Facts and Figures,* tbl 4.4, at 3 (2019) <tinyurl.com/ssalawsuits> (noting that fewer than 18,000 Social Security cases were filed in the preceding year). It is hard to believe that, of that small fraction, the even smaller fraction of claimants with meritorious arguments not raised until federal court will swamp the system.

In any event, even if the lack of an issue-exhaustion requirement in proceedings before a Social Security ALJ were to present a genuine workability concern, the responsibility for addressing that problem would lie in the first instance with Congress and SSA. Congress has shown that it knows how to require issue exhaustion by statute, see pp. 22-23, *supra*, and SSA has declined to require issue exhaustion in the 20 years since the Court noted in *Sims* that SSA could do just that. See 530 U.S. at 108.

While the government argues that an issue-exhaustion requirement would "protect[] the authority of the administrative agency," Resp. Cert. Br. 9, that has it exactly backwards: to impose a judicially created exhaustion rule would override both Congress's and SSA's decisions not to impose such a requirement in the aftermath of *Sims*. To the extent the Court concludes that *Sims* does not already foreclose such a requirement, it should therefore decline to impose an issue-exhaustion requirement on proceedings before a Social Security ALJ.

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

Even if an issue-exhaustion requirement were generally applicable to Social Security ALJ proceedings, any such requirement would not apply to petitioners' Appointments Clause challenges. The ALJ lacked the power to decide constitutional issues of that sort, and petitioners' interest in having their claims decided plainly outweighs the government's interest in requiring exhaustion.

1. Appointments Clause challenges to the appointment of Social Security ALJs are not subject to administrative exhaustion requirements.

a. In a "long line of cases," this Court has held that a party generally need not ask an administrative agency to resolve a constitutional challenge to the agency's "decisionmaking process" in order to preserve such a challenge for judicial review. 2 Richard J. Pierce, Jr. & Kristin E. Hickman, *Administrative Law Treatise* § 17.5, at 1519 (6th ed. 2018); see *Sims*, 530 U.S. at 115 (Breyer, J., dissenting). Accordingly, where a party has "exhausted the full set of available administrative review procedures," the "failure to have raised his constitutional claim" with the agency "would not bar him from asserting it later in a district court." *Mathews* v. *Eldridge*, 424 U.S. 319, 329 n.10 (1976); see, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 76 (1976); *Gibson* v. *Berryhill*, 411 U.S. 564, 574-575 (1973). As the Court has explained, "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures," and "access to the courts" is "essential" to their resolution. *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); see *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 491 (2010).

In a related and equally long line of cases, the Court has held that litigants need not exhaust administrative remedies where doing so would be "futile." See *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). For example, exhaustion will be excused where an agency is "unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute." *McCarthy* v. *Madigan*, 503 U.S. 140, 147-148 (1992); see, *e.g.*, *Diaz*, 426 U.S. at 76. Exhaustion is also excused where the agency "lack[s] authority to grant the type of relief requested." *Madigan*, 503 U.S. at 148; see, *e.g.*, *Bethesda Hospital Association* v. *Bowen*, 485 U.S. 399, 404 & n.2 (1988); *Montana National Bank of Billings* v. *Yellowstone County*, 276 U.S. 499, 505 (1928). The futility principle comports with the commonsense notion that it would be pointless to require "claims to be filed initially" with an agency that "can do nothing but pass them along unaddressed." *Elgin* v. *Department of Treasury*, 567 U.S. 1, 24 (2012) (Alito, J., dissenting).

b. The Court has applied the foregoing principles to hold that claimants who have applied for Social Security benefits need not exhaust constitutional challenges to SSA's administrative procedures by first presenting those challenges to SSA, explaining that SSA lacks both the "jurisdiction" and the "competence" to decide such claims. See *Diaz*, 426 U.S. at 76 (citation omitted); *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Eldridge*, 424 U.S. at 329 n.10; see also *Smith*, 139 S. Ct. at 1774 n.7.

The Court should reach the same conclusion as to petitioners' claims that the ALJs who presided over their Social Security hearings were not properly appointed. An Appointments Clause challenge is a "structural constitutional objection[]," and the judiciary has a particularly "strong interest" in "maintaining the constitutional plan

of separation of powers." *Freytag* v. *Commissioner*, 501 U.S. 868, 878-879 (1991) (citation omitted). After all, it is the "duty of the judicial department"—and not of administrative agencies—to resolve disputes implicating the structural protections of the Constitution. *NLRB* v. *Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see, *e.g.*, *Zivotofsky* v. *Clinton*, 566 U.S. 189, 196-197 (2012).

It would be especially bizarre to require a claimant to raise an Appointments Clause challenge before the improperly appointed official. Such a challenge attacks the ALJ's authority to decide the matter at all, see *Lucia*, 138 S. Ct. at 2055-2056, and the challenge would thus make the ALJ "a judge in his own cause," *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 428 (1995) (citation omitted). An Appointments Clause challenge thus differs even from a challenge to the constitutionality of the agency's *procedures*; in the latter case, the ALJ might not only have some relevant expertise about the agency's own procedures but might also be capable of resolving the claimant's concern by resting the decision on another ground or by conducting the hearing differently. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 402 (1971).

Raising an Appointments Clause challenge before a Social Security ALJ would also be futile: a Social Security ALJ is authorized to determine only whether a claimant is entitled to benefits under the Social Security Act "on the basis of evidence adduced at [a] hearing." 42 U.S.C. 405(b)(1); see 42 U.S.C. 405(*l*); 20 C.F.R. 404.900(a)(6), 416.1400(a)(6). To its credit, SSA has recognized as much, instructing ALJs not to "discuss or make any findings related to the Appointments Clause issue" precisely because "SSA lacks the authority to finally decide constitutional issues such as these." SSA, EM-18003: Important Infor-

mation Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (Jan. 30, 2018) (*Davis* C.A. App. 62). Even if issue exhaustion were generally required in proceedings before a Social Security ALJ, therefore, no exhaustion requirement would apply to petitioners' Appointments Clause challenges.[3]

2. In addition, the purposes for an exhaustion requirement would not be served by requiring claimants to raise their Appointments Clause challenges before Social Security ALJs. When determining whether to require exhaustion, the Court has balanced "the interest of the individual in retaining prompt access to a federal judicial forum" against "countervailing institutional interests favoring exhaustion." *Madigan*, 503 U.S. at 146. In this case, petitioners' interests are weighty, and the government's countervailing interests are not.

On the one hand, imposing an issue-exhaustion requirement on Social Security claimants such as petitioners would cause "undue prejudice." *Madigan*, 503 U.S. at 146. Because Social Security claimants are subject to an inquisitorial review process, it is "[t]he [agency], not the claimant, [that] has primary responsibility for identifying and developing the issues." *Sims*, 530 U.S. at 112 (plurality opinion); see pp. 25-26, *supra*. The ALJ takes an "active investigatory role" and "shoulders a statutory obligation" to obtain evidence. Dubin 1303; see 42 U.S.C.

---

[3] Nor is a hearing before an ALJ an "ironclad prerequisite" for judicial review of a Social Security benefits determinations. *Smith*, 139 S. Ct. at 1774. The Court has exercised jurisdiction over both constitutional and non-constitutional claims asserted by Social Security claimants despite the lack of a prior hearing before SSA. See *id.* at 1774 n.7; *City of New York*, 476 U.S. at 482-484; *Sanders*, 430 U.S. at 109.

423(d)(5)(B). The ALJ must sometimes also order medical testing and request witnesses. See Dubin 1303. Requiring issue exhaustion would compel claimants, who are otherwise not required to develop facts or make legal arguments, see *id.* at 1302-1304, to identify constitutional claims or else risk forfeiting them.

Such a requirement would be especially burdensome for claimants who lack legal representation at their administrative hearings. In 2015 (the most recent year for which data are available), about 30% of claimants lacked attorney representation in SSA hearings. See SSA, *Annual Data for Representation at Social Security Hearings* (2018) <tinyurl.com/ssarepresentation>. And that year alone, more than 2.7 million individuals applied for disability benefits. See SSA Performance Report 44. In light of claimants' limited resources and the issues at stake, Congress designed the SSA administrative process to be "unusually protective" of claimants. *Smith*, 139 S. Ct. at 1776 (citation omitted). It does not make sense to require often-destitute claimants to retain counsel to write briefs advancing constitutional arguments that SSA lacks the power to resolve.

On the other hand, the government's interests are much less compelling. Exhaustion ordinarily serves two primary governmental purposes. First, exhaustion protects "administrative agency authority" by giving an agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court," thereby also discouraging "disregard of the agency's procedures." *Woodford* v. *Ngo*, 548 U.S. 81, 89 (2006) (internal quotation marks, alteration, and citation omitted). Second, exhaustion promotes efficiency because claims "can be resolved much more quickly and economically in proceedings before an agency than in liti-

gation in federal court." *Ibid.* Likewise, "where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *Madigan*, 503 U.S. at 145.

Neither of those interests is implicated here. As to administrative autonomy: petitioners do not allege a "mistake" that the agency could "correct," but rather a constitutional defect that the adjudicator lacked the power to remedy. See pp. 38-40, *supra*. And petitioners are not "disregard[ing]" an agency procedure, because there is no regulation requiring them to raise their constitutional arguments before an ALJ. See p. 24, *supra*. To the contrary, petitioners dutifully exhausted their administrative *remedies*—just as SSA's regulations require. The real threat to SSA's autonomy is a judicially created rule of issue exhaustion that neither Congress nor SSA has seen fit to impose. See p. 36, *supra*.

As to administrative efficiency: it would be inefficient to ensure that SSA has an opportunity to correct an error it lacks the power to address. Indeed, requiring issue exhaustion would force claimants to expend resources on futile briefing. Nor would requiring exhaustion help create a "useful record for subsequent judicial consideration." *Ngo*, 548 U.S. at 89 (citation omitted). The facts relevant to the ALJ's determination—namely, those relating to the claimant's disability—are entirely irrelevant to the constitutionality of the ALJ's appointment.

3. The court of appeals erred by failing to recognize that petitioners' Appointments Clause challenges were exempt from any issue-exhaustion requirement that may attach to proceedings before a Social Security ALJ.

The court of appeals acknowledged that it was "unrealistic to expect" the Commissioner of Social Security to

have "consider[ed] substantial changes" in the "administrative review system" if petitioners had raised their Appointments Clause challenges before their ALJs. Pet. App. 7a-8a (quoting *Eldridge*, 424 U.S. at 330). The court nevertheless reasoned that, if "hundreds of claimants" had raised such challenges, SSA would have been "alerted to the issue" and "could have taken steps through ratification or new appointments to address [it]." Pet. App. 8a. Yet SSA was "alerted to the issue" by no later than January 2018, when it instructed its ALJs to state on the record that they lacked the power to resolve any Appointments Clause challenges. See pp. 9-11, *supra*. And it was not until over a year later that the agency announced a formal policy to provide new hearings to claimants who raised Appointments Clause challenges. See *ibid.* It is hard to believe that SSA would have cured the constitutional violations if claimants had only flagged the issue before their ALJs.

The court of appeals also overstated the government's interest in issue exhaustion. The court reasoned that, under petitioners' theory, "hundreds if not thousands of social security claimants" could require SSA to rehear their cases, Pet. App. 8a; the government, for its part, has indicated that the figure is only in the "hundreds," see Resp. Cert. Br. 12. Either way, an agency that conducts over 760,000 ALJ hearings in a year is unlikely to be seriously burdened by the limited set of claimants in the pipeline with valid yet unexhausted *Lucia*-based Appointments Clause challenges. Indeed, in light of the modest additional burden here, one might well wonder why the government is litigating this issue rather than simply giving new hearings to petitioners and other similarly situated claimants.

II. THE COURT SHOULD EXCUSE PETITIONERS' FAILURE TO RAISE THEIR APPOINTMENTS CLAUSE CHALLENGES BEFORE THEIR ADMINISTRATIVE LAW JUDGES

After all of that, if the Court nevertheless were to conclude that petitioners were required to exhaust their Appointments Clause claims by raising them before their Social Security ALJs, it should "exercise [its] discretion" to excuse petitioners' failure to do so. *Freytag*, 501 U.S. at 879.

As a general matter, an appellate court has discretion to "resolv[e] an issue not passed on below," including where "the proper resolution is beyond any doubt" or where "injustice might otherwise result." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976) (citations omitted). In *Freytag*, the Court permitted a party to raise an Appointments Clause challenge before a special trial judge of the Tax Court even though the party had consented to proceedings before that very judge. See 501 U.S. at 877-879 (citation omitted). The Court reasoned that the Appointments Clause argument was neither "frivolous" nor "disingenuous"; that the argument went to the "validity" of the underlying proceeding that was the "basis for th[e] litigation"; and that the judiciary had a "strong interest" in "maintaining the constitutional plan of separation of powers." *Id.* at 879 (citation omitted).

Those principles counsel in favor of excusing petitioners' failure to raise their Appointments Clause challenges before the Social Security ALJs whose appointments they were challenging. *Freytag* involved the same type of constitutional challenge, and this case thus implicates the same "strong interest of the federal judiciary" in enforcing the separation of powers. 501 U.S. at 879. And as in *Freytag*, the "alleged defect" in the appointment of the

Social Security ALJs goes to the "validity of the [administrative] proceeding that is the basis for th[e] litigation"—namely, the ALJs' decision to deny petitioners' claims for Social Security benefits. *Ibid.*

The "proper resolution" of the Appointments Clause challenge here is also "beyond any doubt." *Singleton*, 428 U.S. at 121. The government has not disputed that Social Security ALJs are "Officers of the United States" for constitutional purposes, U.S. Const. Art. II, § 2, cl. 2, and the government has conceded that petitioners' ALJs were not appointed in a method prescribed by the Appointments Clause. See Resp. Cert. Br. 3; *Davis* Resp. C.A. Br. 11 n.2; *Hilliard* Resp. C.A. Br. 31 n.8. In fact, SSA has already decided to afford new hearings to claimants with pending cases as a remedy for the Appointments Clause violations in their cases. See 84 Fed. Reg. 9,583; pp. 10-11, *supra*.

It would be inequitable for the Court to decline to excuse petitioners' failure to raise their Appointments Clause challenges before their Social Security ALJs. Petitioners were deprived of their entitlement to an ALJ appointed according to the requirements of the Appointments Clause. And if the Court refused to consider the petitioners' challenge here, then petitioners would be treated differently from those claimants who, by happenstance, still had claims pending before SSA when *Lucia* was decided. Under SSA's policy, claimants who failed to raise their Appointments Clause challenges *before their ALJs*, but whose cases were still pending before the Appeals Council at the time of the policy, were entitled to new proceedings upon request. See 84 Fed. Reg. 9,583.

It would be profoundly unjust to impose an ALJ exhaustion requirement on petitioners when SSA did not even see fit to enforce that requirement against other claimants in cases still pending before it when *Lucia* was

decided. If the Court were to conclude that issue exhaustion is required at all in this context, therefore, it should at a minimum exercise its discretion to allow petitioners to obtain relief on their plainly meritorious Appointments Clause claims.

CONCLUSION

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

Respectfully submitted.

MAHESHA P. SUBBARAMAN
SUBBARAMAN PLLC
222 South 9th Street,
Suite 1600
Minneapolis, MN 55402

WES KAPPELMAN
KAPPELMAN LAW FIRM
P.O. Box 1792
Ames, IA 50010

KANNON K. SHANMUGAM
WILLIAM T. MARKS
JOEL S. JOHNSON
E. GARRETT WEST
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

SUDHIR V. RAO
ZALMAN ROTHSCHILD
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

DECEMBER 2020