Nos. 19-1442, 20-105

In the Supreme Court of the United States

WILLIE EARL CARR AND KIM L. MINOR, PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

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 WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH AND EIGHTH CIRCUITS

BRIEF FOR AMICUS CURIAE THE NATIONAL ASSOCIATION OF DISABILITY REPRESENTATIVES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The National Association of Disability Representatives (NADR) is a nonprofit voluntary membership organization dedicated to advancing the fair and efficient administration of the Nation's disability insurance system.[*]

[*] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

NADR was founded in 2000, and its membership has since grown to more than 600 attorney and non-attorney members across all 50 states. Roughly one-third of NADR's members are former employees of the Social Security Administration (SSA), including administrative law judges (ALJs) and vocational experts. Collectively, NADR's members act as representatives of Social Security disability claimants in over 100,000 cases each year, both at the agency level and on judicial review. Accordingly, NADR has a substantial interest in safeguarding "the orderly and sympathetic administration" of the Nation's disability insurance system. *Heckler* v. *Day*, 467 U.S. 104, 106 (1984).

SUMMARY OF ARGUMENT

A ruling that Social Security disability claimants need not exhaust Appointments Clause challenges before the agency will not lead to a flood of new federal cases raising such challenges under *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), and will not threaten the workability of the Social Security disability system.

A. In the two years since this Court decided *Lucia* and the Acting Commissioner subsequently "ratified" the appointments of all existing ALJs, the overwhelming majority of potential Appointments Clause challenges have either entered the federal judicial system already or are time-barred from doing so. For those cases that are already in the federal courts, only a small minority include *Lucia*-based challenges. The experience of the Third Circuit—which adopted its claimant-friendly rule when the number of potential *Lucia* claims was greater—confirms that allowing those claims to proceed even when unexhausted has posed no threat to the Nation's disability sys-

tem. Indeed, SSA's own data makes plain that the attention devoted to this issue is wildly disproportionate to its actual impact.

B. The missing wave of *Lucia* claims should not come as a surprise. There are pragmatic reasons why Social Security disability claimants may choose to forgo judicial review of an admittedly meritorious Appointments Clause challenge. Claimants hope to secure their insurance benefits as soon as possible, and asking a federal court to grant an administrative rehearing may delay their claim for years. As a result, some claimants may prefer an immediate ruling on the merits in federal court. And among the claimants who do pursue *Lucia* claims, the statutory scheme for attorney's fees—which funds essentially all federal disability litigation—serves to filter out cases that lack underlying substantive merit. The upshot is that far from uncritically pursuing Appointments Clause challenges in every case, disability claimants have advanced this argument in only a small fraction of cases, and almost always—like all petitioners here—as part of substantive arguments on the merits.

ARGUMENT

A DECISION IN PETITIONERS' FAVOR WILL NOT LEAD TO A FLOOD OF NEW CLAIMS OR THREATEN THE WORKABILITY OF THE SOCIAL SECURITY DISABILITY SYSTEM

To resolve these cases, the Court need hold "only that a claimant does not forfeit an Appointments Clause challenge in a Social Security proceeding by failing to raise that claim before the agency." *Ramsey* v. *Commissioner*, 973 F.3d 537, 547 (6th Cir. 2020); *see also Cirko* v. *Commissioner*, 948 F.3d 148, 153 n.3 (3d Cir. 2020). The universe of cases potentially raising Appointments Clause

challenges under *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), is defined and, through the simple passage of time, is quickly dwindling. What is more, for those cases that are already in the judicial system, claimants and their counsel are not incentivized to pursue indiscriminate Appointments Clause challenges, as the experience from the Third Circuit and SSA's own data confirm.

The government has effectively conceded the point through its shifting representations about the consequences of a ruling in petitioners' favor. The government initially characterized the Appointments Clause challenges advanced by disability claimants like petitioners as "just the tip of the iceberg." Gov't C.A. Br. at 27, *Cirko* v. *Commissioner*, No. 19-1772 (3d Cir. July 15, 2019). After the Third Circuit became the first court of appeals to rule against the government in January 2020, the government doubled-down. It argued that the Third Circuit "wrongly assumed that its holding would affect only a narrow universe of cases" when its rule would purportedly "threaten to unsettle a massive volume of adjudications." Gov't C.A. Pet. for Reh'g En Banc at 2, 4, *Cirko*, *supra*, No. 19-1772 (Mar. 9, 2020). Now, confronted with the actual experience of the Third Circuit and circuits across the country, the government is telling a different story. It concedes that the number of active *Lucia* cases is only in the "[h]undreds." *Carr* Resp. Cert. Br. 13; *Davis* Resp. Cert. Br. 14.

In short, there is no iceberg. At most, *Lucia* cases represent an ice cube in a vast ocean of disability claims. There is accordingly no reason to think that a ruling in petitioners' favor will lead to a flood of new claims or render the Social Security disability system "unworkable." *Carr* Resp. Cert. Br. 8; *Davis* Resp. Cert. Br. 9.

A. There Is A Limited Universe Of Cases With Potential *Lucia* Claims And Only A Relative Handful Are Still In The Judicial System

The question presented affects only a narrow band of cases. It has been roughly two-and-a-half years since this Court's decision in *Lucia* and the SSA Acting Commissioner's subsequent "ratifi[cation]" of all ALJ appointments "as her own" on July 16, 2018. *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 at the Appeals Council*, 84 Fed. Reg. 9,582-83 (Mar. 15, 2019) (*SSR 19-1p*). The Acting Commissioner's action eliminates the *Lucia* issue going forward and thus sets an upper bound on the number of cases with potential *Lucia* challenges. There are no new *Lucia* claims "brewing in SSA cases." *Probst* v. *Saul*, 980 F.3d 1015, 1024 (4th Cir. 2020).

The government's arguments about administrative calamity accordingly stem from the limited set of ALJ decisions made *before* July 16, 2018. But as shown below, the data quite simply "do[es] not bear out," *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1768 (2019), the government's claims of chaos in the event the Court declines to require issue exhaustion in these circumstances.

1. There is little basis to believe that there are a large number of pre-July 16, 2018 cases still pending at SSA such that a ruling in petitioners' favor would give rise to a wave of *new* district court cases. The statutory scheme and SSA's case processing time explains why: A disability claimant has 60 days to appeal an unfavorable ALJ decision to the SSA Appeals Council. *See* 42 U.S.C. § 405(b)(1). For ALJ decisions rendered in July 2018 immediately before the Acting Commissioner's ratification, the statutory deadline to seek Appeals Council review was

therefore September 2018. And because of the parallel time-bar for judicial review of Appeals Council decisions, a case also must have exited the administrative system within the past 60 days if it is still eligible to be heard in federal court today. *See* 42 U.S.C. § 405(g). This means that any yet-to-be-filed cases that could benefit from a ruling in petitioners' favor must have been pending at the Appeals Council *for over two years*—from September 2018 to sometime within the last 60 days.

The overwhelming majority of cases do not spend that much time at the Appeals Council. The average processing time for a case before the Appeals Council in 2016 (the most recent year for which public data exists) was 364 days. *See* SSA, *Annual Data for Appeals Council Requests for Review Average Processing Time* (Oct. 3, 2018), <perma.cc/FZ3W-MPNM>. And that figure has only declined in recent years, because the Appeals Council, like SSA more generally, has shown improvements in its processing times. See SSA, *Annual Performance Report Fiscal Years 2019–2021*, at 7-8 (Feb. 10, 2020) (*SSA Annual Report*), <perma.cc/JL2Q-6BDD>. In any case, the government has presented no data showing that a sizeable number of pre-July 16, 2018 ALJ decisions are still meandering through the bureaucracy. In the experience of amicus's members, it is—fortunately—vanishingly rare for that to be the case.

2. Nor is any basis to conclude that there are a large number of *pending* district court cases where Appointments Clause challenges either have been or could be made.

a. Far from foreboding a *Lucia*-inspired flight to district court, the number of new federal cases filed after *Lucia* was decided in 2018 has been broadly consistent with

the patterns in recent years. That is true both as an absolute number and as a percentage of appealable decisions by the Appeals Council. *See* Fig. 1, *infra*. And these federal cases continue to reflect just a tiny fraction—2 percent in 2019, the first full year after *Lucia*—of the 760,000-plus ALJ hearings conducted each year since 2018. *See SSA Annual Report*, at 46.

Fig. 1: New Federal Court Cases 2016-2020[2]

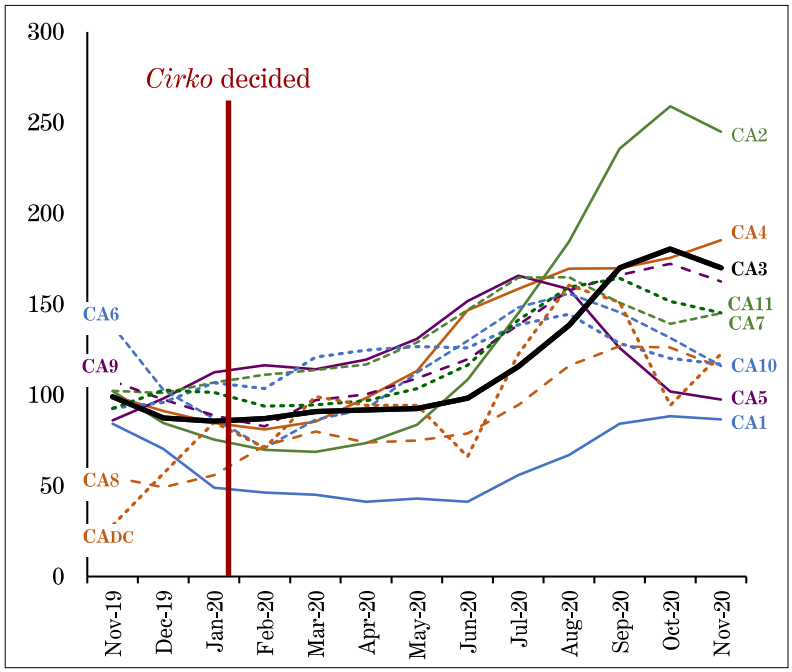
Fiscal Year	New Cases Filed in District Court	Percentage of Appealable Appeals Council Dispositions
2020	19,454	12.36%
2019	17,192	14.82%
2018	18,252	14.00%
2017	18,445	13.41%
2016	17,864	13.82%

Notably, the absence of new *Lucia*-inspired case filings has continued even after the Third Circuit's decision in *Cirko*. *Cirko* was decided in January 2020, when it is at least plausible that there were a non-trivial number of pre-July 16, 2018 ALJ decisions either still working their way through the Appeals Council or recently decided by the Appeals Council. But even after *Cirko*, there was no tsunami. *See* Fig. 2, *infra*. Far from evincing a wave of new cases, the number of new actions filed in the Third Circuit followed the broader trend of increased filings across all circuits, presumably as a result of the Appeals

[2] *See* SSA, *Appeals to Court as a Percentage of Appealable AC Dispositions* (2020), <perma.cc/K2PB-AEMG>.

Council nearly doubling the number of its own dispositions.[3] In fact, many circuits showed *larger* increases in the volume of new case filings in the six months immediately after *Cirko* was decided than did the Third Circuit.

Fig. 2: Ratio Of New District Court Cases From Nov. 2019 To Nov. 2020 To Typical Monthly New Cases[4]



[3] The Appeals Council decided 75,175 cases in the first half of Fiscal Year 2020, but a higher-than-normal 116,559 cases in the second half. *See* SSA, *Appeals Council Requests for Review FY 2020* (2020), <perma.cc/2GMM-B6SN>. It is thus unsurprising that more new cases were filed across the country in the latter half of the year.

[4] In order to provide an apples-to-apples comparison between circuits, the absolute number of new cases in each month was converted to a ratio of the number of new cases in that month to the historical average of new cases per month over the preceding five years (*i.e.*, a

b. Among the cases already pending in federal courts, there is no evidence that claimants have asserted Appointments Clause challenges in significant numbers. Had the number of *Lucia* claims been substantial, one would expect the proof to show up somewhere in the SSA's public data in the form of an unusually high number of remands. But the overall number of remands by federal courts to SSA has held steady since *Lucia* was decided. *See* Fig. 3, *infra*. And that is true despite *Cirko*, which theoretically would have allowed thousands of claimants in cases pending in the Third Circuit to amend their pleadings to incorporate an Appointments Clause claim.

Fig. 3: Federal Court Remands 2016-2020[5]

Fiscal Year	Remands
2020	9,655
2019	9,956
2018	9,245
2017	8,974
2016	9,489

c. Even among the set of cases remanded to SSA since this Court's decision in *Lucia*, evidence of Appoint-

value of 100 indicates the number of new cases was equal to the historical monthly average, while a value of 150 indicates it was 50 percent higher than the historical monthly average). In addition, the ratios provided reflect a three-month rolling average (*i.e.*, the data for November 2019 reflects the average for September, October, and November 2019). For the raw data, *see* <perma.cc/LNZ9-AANS>.

[5] This data has been collected from SSA's National New Court Cases and Remand Activity reports. *See* SSA, *Archived Public Data Files* (2020), <perma.cc/ZKK5-ZSSB>.

ments Clause-based remands is hard to see. Such remands do not even crack the agency's "Top Ten" list of reasons cited by district courts for sending cases back to SSA. *See* SSA, *Top 10 Remand Reasons Cited by the Court on Remands to SSA* (2020) (reproduced as Fig. 4, *infra*), <perma.cc/D428-9ARX>. The list for the last fiscal year—which incorporates at least eight months of the post-*Cirko* world—looks much like it did over the last decade, with the following top three reasons: "Treating Source—Opinion Rejected Without Adequate Articulation" (13.2 percent or roughly 1,275 cases), "Inadequate Rationale for Symptom Evaluation Finding" (10.3 percent or roughly 1,000 cases), and "Consultative Examiner—Inadequate Support/Rationale for Weight Given Opinion" (6.7 percent or roughly 650 cases). *See ibid.* Indeed, *Lucia*-based remands appear to be so inconsequential that they do not exceed even 2.4 percent of all remands or roughly 230 cases nationwide—the number associated with the tenth of the "Top Ten" reasons for district court remands. *See ibid.*[6]

Fig. 4: Top 10 Remand Reasons Cited By Federal Courts In Fiscal Year 2020

Percentage Cited	Remand Reason
13.2	Treating Source—Opinion Rejected Without Adequate Articulation

[6] Social Security cases in the Third Circuit have made up slightly more than 6 percent of all Social Security cases nationwide, according to data from the Administrative Office of the U.S. Courts. *See* <perma.cc/LNZ9-AANS>. It thus stands to reason that a wave of across-the-board *Lucia* remands in the Third Circuit—if such a wave ever existed—would have appeared in the agency's "Top Ten" list.

Percentage Cited	Remand Reason
10.3	Inadequate Rationale for Symptom Evaluation Finding
6.7	Consultative Examiner—Inadequate Support/Rationale for Weight Given Opinion
6.4	Residual Functional Capacity—Mental Limitations Inadequately Evaluated
3.6	Incomplete / Inaccurate Record—Record Inadequately Developed
3.4	Non-Examining Source—Inadequate Support/Rationale for Weight Given Opinion
3.2	VE and DOT Not Reconciled (*e.g.*, sit/stand limitations, time off task, etc.)
3.0	Residual Functional Capacity—Exertional Limitations Inadequately Evaluated
2.4	Residual Functional Capacity—Other
2.4	Non-Examining Source—Opinion Accepted Without Adequate Articulation

3. In the wake of *Cirko*, other courts of appeals have repeatedly pressed the government to back up its floodgates argument, and the government has repeatedly come up empty. *See, e.g.*, Oral Arg. at 7:13, *Hekter* v. *Commissioner*, No. 20-1855 (7th Cir. Nov. 12, 2020) (government counsel stating "I don't have direct data" but "I agree over the passage of time this [number of *Lucia* claims] has gone down considerably . . . the cases have definitely winnowed"), <perma.cc/2XUX-CAAZ>; Oral Arg. at 32:57, *Lopez* v. *Commissioner*, No. 19-11747 (11th Cir. Oct. 27,

2020) (counsel stating "I'm not going to tell you the sky's going to fall today"), <perma.cc/AE9P-4M2C>. And before this Court, the government concedes that the number of active *Lucia* cases is limited to the "[h]undreds." *Carr* Resp. Cert. Br. 13; *Davis* Resp. Cert. Br. 14.

Regardless how one looks at the data, the number of Appointments Clause challenges the government faced amounted to "a drop in the bucket," *Cirko*, 948 F.3d at 159, for what is "probably the largest adjudicative agency in the western world," *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omitted). SSA plainly "has capacity to handle [the] volume of these cases." Oral Arg. at 11:11, *Probst*, *supra*, No. 19-1529 (4th Cir. Sept. 10, 2020) (government counsel responding to question about whether claimant-friendly rulings in Third and Sixth Circuit "wreaked havoc and they're just not able to function at all"), <perma.cc/FP3K-WH46>. In such circumstances, "it is unclear why pessimism should rule the day." *McGirt* v. *Oklahoma*, 140 S. Ct. 2452, 2481 (2020).

B. Pragmatic Considerations Explain Why Appointments Clause Challenges Did Not Materialize In Significant Numbers

The missing deluge of *Lucia*-claims is readily explained.

1. As a practical matter, disability claimants hope to secure their insurance benefits as soon as possible. "For many beneficiaries, their monthly disability payment represents most of their income"—even though the average monthly benefit was just $1,234 in 2019, barely enough to keep one above the poverty line. *See* SSA, *The Faces and Facts of Disability: Facts* (2020), <perma.cc/8W22-TTQL>. "Even these modest payments can make a huge difference in the lives of people who can no longer work."

Ibid.

Yet insisting on a rehearing means returning to an administrative process that "can drag on for years," *Smith*, 139 S. Ct. at 1776, and thus further delaying the prospect of securing benefits. As a result, some claimants may conclude that seeking a new hearing before a constitutionally appointed ALJ is a luxury that they cannot afford.

Experience confirms this behavior. Many claimants have elected to forgo a *Lucia* claim entirely. Such claimants likely understood that including an Appointments Clause challenge among other substantive arguments runs the risk that busy district court judges will be happy to decide their cases based on *Lucia*, thus providing them a rehearing, but also setting back the date when they may ultimately receive benefits. *See, e.g.*, *Marzella* v. *Commissioner*, Civ. No. 2:18-1666, Dkt. No. 18, at 2 n.3 (E.D. Pa. Jan. 30, 2020) (magistrate judge R&R recommending *Lucia*-based remand despite substantive arguments); *Marzella*, *id.*, Dkt. No. 26, at 1 n.1 (E.D. Pa. Mar. 27, 2020) (adopting R&R and remanding based on *Lucia*). Some disability claimants have even withdrawn *Lucia* claims they initially advanced, hoping that they would be able to secure a remand on the merits. *See, e.g.*, Mot. to Withdraw Issue, *Van Nguyen* v. *Saul*, Civ. No. 2:18-3802, Dkt. No. 22 (E.D. Pa. July 3, 2019) (requesting to withdraw *Lucia* claim); Mem., *Van Nguyen*, *id.*, Dkt. No. 23 (July 31, 2019) (granting remand on merits because ALJ's findings were not supported by substantial evidence).

Of course, some claimants—like petitioners here—will assert their right to a hearing before a constitutionally appointed ALJ. Almost always, these *Lucia* claims are asserted in addition to, or as an alternative to, substantive arguments on the merits. *See, e.g.*, *Carr* Pet. App. 37a (noting substantive arguments that ALJ failed to

properly develop the record, incorrectly determined claimant's residual functional capacity, made improper credibility findings, and erred in developing vocational expert testimony); *Davis* Pet. App. 16a-17a (noting substantive arguments that ALJ failed to properly analyze medical opinion and claimant's intellectual limitations, and improperly relied on vocational expert's testimony).

In short, there is no one-size-fits all approach. The actual litigation history of *Lucia* claims shows that claimants have been guided by pragmatic considerations relevant to their individual situations in deciding whether to pursue an Appointments Clause challenge.

2. The system for funding Social Security disability litigation also filters the number of Appointments Clause challenges that can be pursued. To state the obvious, "[m]any claimants are indigent or are on low or fixed incomes and cannot afford to retain counsel at fixed hourly rates." *Wells* v. *Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990). Yet for most claimants, the "[a]vailability of lawyers . . . is of the highest importance." *McKittrick* v. *Gardner*, 378 F.2d 872, 875 (4th Cir. 1967). In order to address this challenge, Congress enacted legislation "to encourage effective legal representation of claimants" on a contingency-fee basis. *Jackson* v. *Astrue*, 705 F.3d 527, 530 (5th Cir. 2013) (citation omitted). These laws, while essential to the availability of judicial review of adverse administrative determinations, also serve as sea walls against waves of *Lucia* claims.

First, counsel may be entitled to a portion of "the total of the past-due benefits" ultimately awarded to the claimant, providing an incentive to pursue only meritorious substantive claims. 42 U.S.C. § 406(b)(1)(A); *see also Culbertson* v. *Berryhill*, 139 S. Ct. 517, 520-21 (2019). Because contingent compensation is available only if the

claimant actually receives benefits, a claimant raising a *Lucia* claim must prevail in both the district court *and* on the subsequent remand to SSA. *See Gisbrecht* v. *Barnhart*, 535 U.S. 789, 795 (2002). And even where the claimant does ultimately prevail on remand, it can be years before the attorney who represented them in district court will be able to receive compensation. *See, e.g.*, *Ashing* v. *Astrue*, 798 F. Supp. 2d 1143, 1146-47 (C.D. Cal. 2011) (four years); *Pearce* v. *Astrue*, 532 F. Supp. 2d 1367, 1368 (M.D. Fla. 2008) (six years); *Ryan* v. *Barnhart*, 431 F. Supp. 2d 326, 327 (W.D.N.Y. 2006) (19 years).

As a practical matter, these contingencies serve to filter out petitions for judicial review that plainly lack merit. Securing a *Lucia*-based remand alone does nothing to assure the claimant of victory in the second round before a new constitutionally appointed ALJ, because an Appointments Clause challenge is "independent of the merits of the individual claim for benefits." *SSR 19-1p*, 84 Fed. Reg. at 9,583. Thus, counsel considering whether to represent a client with a potential *Lucia* claim are unlikely to do so without an eye to the ultimate likelihood of success on the underlying disability claim.

Second, counsel may be entitled to attorney's fees independent of a claim on any past-due benefits ultimately awarded, but subject to restrictions that create similar incentives against pursuing standalone *Lucia* claims. Under the Equal Access to Justice Act (EAJA), a court will award fees to the claimant's attorney if the claimant is a "prevailing party," 28 U.S.C. § 2412(a)(1), and if the government's position was not "substantially justified," § 2412(d)(1)(A). As the statutory language makes plain, Congress did not enact EAJA to subsidize litigation against all governmental action, but only against "unjustified governmental action." *Scarborough* v. *Principi*, 541

U.S. 401, 407 (2004) (quoting H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 4 (1985)). This Court has determined that the government's action is "substantially justified" for EAJA purposes if it "could satisfy a reasonable person." *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988).

The "substantial justification" threshold has acted as a practical barrier to advancing Appointments Clause challenges in cases that lack underlying merit. Some courts have concluded that the government's position in opposing *Lucia*-based remands has not been "substantially justified." These courts have cited the "entirely predictable" rejection of the government's position on issue exhaustion in light of *Sims* v. *Apfel*, 530 U.S. 103 (2000), the lack of any applicable statute or regulation, and the lack of any good reason for judicially imposing issue exhaustion. *See, e.g.*, *Byrd* v. *Saul*, 469 F. Supp. 3d 351, 355 (E.D. Pa. 2020); *Armstrong* v. *Saul*, 465 F. Supp. 3d 486, 489-90 (E.D. Pa. 2020). But other courts have seen the matter differently in light of the split of authority on the issue-exhaustion question. *See, e.g.*, *Hines* v. *Commissioner*, Civ. No. 18-16037, 2020 WL 3396801, at *3 (D.N.J. June 18, 2020); *Holmes* v. *Berryhill*, Civ. No. 19-784, 2020 WL 2126787, at *3 (E.D. Pa. May 4, 2020), *appeal pending*, No. 20-2812 (3d Cir.). As a result, from the disability lawyer's perspective, the availability of EAJA fees for securing *Lucia*-based remands is uncertain. That uncertainty makes it impractical to accept clients whose only chance of success lies with *Lucia*.

3. These pragmatic considerations demonstrate why the courts of appeals' concerns about "sandbagging" and "perverse incentives" are ultimately misplaced. *See Carr* Pet. App. 30a n.9; *Davis* Pet. App. 9a. Such concerns assume the existence of a "wiley [*sic*] lawyer" who lets the

case proceed through the SSA system while holding a *Lucia* argument in his back pocket so his client can get "two bites at the apple." *Ramsey*, 973 F.3d at 548 (Siler, J., dissenting). Whatever the appeal of that argument as a theoretical matter, in the real world, that second bite does not come free. Rather, disability claimants and their counsel must pragmatically weigh the costs and benefits of asserting the right to a hearing before a constitutionally appointed ALJ, including the added delay and whether rehearing will ultimately advance their claim for benefits. And counsel evaluating which cases to accept will look skeptically on files where the ultimate disability claim lacks merit. The upshot is that far from indiscriminately seeking remands based on *Lucia*, disability claimants and their representatives, like all litigants, must consider whether the game is worth the candle.

* * * * *

All agree that the Social Security disability system "must be fair—and it must work." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971) (citation omitted). The government has tried to frame these cases as involving a contest between these two aspirations. But that is a false choice. Here, considerations of fairness demand that petitioners be afforded the chance to make their claim. *See Carr* Pet. Br. 27-28, 29-33; *Davis* Pet. Br. 27-28. And considerations of efficiency do not point the other way. The Court should accordingly hold that a Social Security disability claimant does not forfeit an Appointments Clause challenge by failing to raise that claim before the ALJ.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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