Nos. 19-1442 and 20-105

In the Supreme Court of the United States

WILLIE EARL CARR, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

JOHN J. DAVIS, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a claimant seeking disability benefits under the Social Security Act, 42 U.S.C. 301 *et seq.*, forfeits an Appointments Clause challenge to the appointment of an administrative law judge by failing to present that challenge during administrative proceedings.

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OPINIONS BELOW

The opinion of the court of appeals in *Carr* v. *Saul* (19-1442 Pet. App. 1a-31a) is reported at 961 F.3d 1267. The order of the district court in *Carr* (19-1442 Pet. App. 32a-56a) is not published in the Federal Supplement but is available at 2019 WL 2613819. The order of the district court in *Minor* v. *Social Security Administration* (19-1442 Pet. App. 57a-83a) is not published in

the Federal Supplement but is available at 2019 WL 3318112.

The opinions of the court of appeals in *Davis* v. *Saul* (20-105 Pet. App. 1a-9a) and *Hilliard* v. *Saul* (20-105 Pet. App. 10a-14a) are reported at 963 F.3d 790 and 964 F.3d 759. The decision of the district court in *Hilliard* (20-105 Pet. App. 15a-18a) is unreported. The orders of the district court in *Davis* (20-105 Pet. App. 19a-38a), *Iwan* v. *Commissioner of Social Security* (20-105 Pet. App. 39a-60a), and *Thurman* v. *Commissioner of Social Security* (20-105 Pet. App. 61a-82a) are not published in the Federal Supplement but are available at 2018 WL 4300505, 2018 WL 4295202, and 2018 WL 4300504. The reports and recommendations of the magistrate judges in *Davis* (20-105 Pet. App. 83a-104a), *Iwan* (20-105 Pet. App. 105a-131a), and *Thurman* (20-105 Pet. App. 132a-159a) are not published in the Federal Supplement but are available at 2018 WL 3600056, 2018 WL 4868983, and 2018 WL 4516002.

JURISDICTION

The judgments of the court of appeals were entered on June 15, 2020 in *Carr*; June 26, 2020 in *Davis*; and July 9, 2020 in *Hilliard*. The petitions for writs of certiorari were filed on June 29, 2020 in *Carr* and July 29, 2020 in *Davis* and *Hilliard*. The petitions for writs of certiorari were granted on November 9, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. Legal Framework

The Social Security Act, 42 U.S.C. 301 *et seq.*, directs the Social Security Administration (SSA) to administer, among other things, two federal programs that provide benefits to disabled individuals. See *Smith* v. *Berryhill*,

139 S. Ct. 1765, 1772 (2019). The first program, Title II, provides old-age, survivor, and disability benefits to insured individuals regardless of financial need. See 42 U.S.C. 401 *et seq.* The second program, Title XVI, provides supplemental security income to financially needy individuals who are aged, blind, or disabled, regardless of their insured status. See 42 U.S.C. 1381 *et seq.* The statutory and regulatory provisions governing the two programs are, as relevant to these cases, materially identical. See 42 U.S.C. 405 (Title II); 42 U.S.C. 1383 (Title XVI); 20 C.F.R. 404.900 *et seq.* (Title II); 20 C.F.R. 416.1400 *et seq.* (Title XVI). For ease of reference, we cite the Title II provisions in this brief.

Congress authorized SSA to establish procedures to adjudicate applications for benefits. 42 U.S.C. 405(a). SSA, in turn, has set up a four-step review process; if the claimant prevails at any step, the process generally proceeds no further. 20 C.F.R. 404.900(a). First, the agency makes an initial determination. 20 C.F.R. 404.902. Second, the claimant may seek reconsideration of the initial determination. 20 C.F.R. 404.908(a). Third, the claimant may request a hearing before an administrative law judge (ALJ), subject to certain procedural requirements. 20 C.F.R. 404.929; see 20 C.F.R. 404.957. Finally, the claimant may seek review of the ALJ's decision by the Appeals Council. 20 C.F.R. 404.967. The agency's regulations explain: "[W]e conduct the administrative review process in an informal, non-adversarial manner. * * * [W]e will consider at each step of the review process any information you present as well as all the information in our records." 20 C.F.R. 404.900(b).

These cases concern the third step in the review process, the ALJ hearing. SSA's regulations explain that,

once a claimant seeks an ALJ hearing, the agency will send a notice of hearing that will tell the claimant, among other things, "[t]he specific issues to be decided" in that case. 20 C.F.R. 404.938(b)(1). The regulations warn the claimant: "If you object to the issues to be decided at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity" and "must state the reason(s) for your objection(s)." 20 C.F.R. 404.939.

Once the administrative process ends and the agency makes a final decision, the claimant may obtain judicial review by filing a civil action in district court. 42 U.S.C. 405(g). This Court has explained that a claimant must satisfy two requirements before seeking judicial review: (1) a jurisdictional requirement to present his claim to the agency, and (2) a non-jurisdictional requirement to exhaust his claim at each of the four steps of the administrative process. *Smith*, 139 S. Ct. at 1773-1774.

B. Appointment Of Social Security ALJs

The Appointments Clause of the Constitution governs the appointment of "Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. The Clause allows only one method of appointment for principal officers: by the President with the advice and consent of the Senate. *Ibid.* The Clause allows Congress to choose among four methods of appointment for inferior officers: by the President with the advice and consent of the Senate, by the President alone, by the Head of a Department, and by a court of law. *Ibid.* If a person performing governmental functions qualifies as an employee rather than an officer, however, the Clause does not constrain the manner of his selection. *United States* v. *Germaine*, 99 U.S. 508, 510 (1879).

Before 2018, SSA treated its ALJs as employees rather than officers. *Bandimere* v. *SEC*, 844 F.3d 1168, 1199 (10th Cir. 2016) (McKay, J., dissenting), cert. denied, 138 S. Ct. 2706 (2018). Lower-level staff chose the agency's ALJs through a merit-selection process administered by the Office of Personnel Management, and the ALJs chosen through that process were not appointed by the Commissioner. See *O'Leary* v. *OPM*, 708 Fed. Appx. 669, 670 (Fed. Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 2616 (2018).

In *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), this Court held that ALJs appointed by the Securities and Exchange Commission (SEC) are officers rather than employees, and that the Appointments Clause accordingly governs their appointment. *Id.* at 2049. The Court also held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to a new hearing before a different, constitutionally appointed officer. *Id.* at 2055 (citation omitted).

SSA took a series of steps in response to *Lucia*. In January 2018, when this Court granted review in *Lucia*, SSA issued an emergency message informing ALJs that they might receive constitutional challenges to their appointments, and directing them to acknowledge but not decide those challenges. SSA, *EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process* (Jan. 30, 2018) (Jan. 30 Notice). Soon after this Court decided *Lucia* in June 2018, the agency issued a revised emergency message repeating those instructions. 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).

The next month, in July 2018, the Acting Commissioner of Social Security—the Head of a Department for purposes of the Appointments Clause—ratified the appointments of the agency's ALJs. 19-1442 Pet. App. 9a. That action ensured that hearings conducted by the ALJs would comply with the Appointments Clause going forward, but it did not address claims that had already been adjudicated by ALJs before the ratification date. In a third emergency message issued in August 2018, the agency addressed that latter issue by stating that, in cases where a claimant made a timely challenge to the appointment of the ALJ who had issued a decision before the ratification date, the Appeals Council would grant review and provide relief. 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).

The agency confirmed that approach in a ruling issued in March 2019. 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. 9582 (Mar. 15, 2019) (*Ruling 19-1p*). The ruling explained that the agency receives "millions of claims" and that its ALJs issue "hundreds of thousands of decisions" each year. *Id.* at 9583. Endeavoring to strike a balance between the "two overriding concerns" of "fairness and efficiency," the ruling provided that, if a claimant challenged the pre-ratification appointment of an ALJ at the agency—at either the ALJ level or the Appeals

Council level—he would receive a new decision from a properly appointed officer. *Ibid.* But if the claimant failed to raise such a challenge before the agency, he would not be entitled to such relief. *Ibid.*

C. Proceedings Below

Petitioners are six individuals who applied for Social Security benefits under Title II, Title XVI, or both. 19-1442 Pet. App. 8a; 20-105 Pet. App. 2a, 10a. They were all represented before the agency by lawyers or non-attorney representatives.[1] Each case followed the same path at the agency: (1) the agency made an initial determination denying benefits, (2) the agency denied reconsideration, (3) an ALJ denied benefits after a hearing, and (4) the Appeals Council denied review. 19-1442 Gov't Cert. Br. 4-5; 20-105 Gov't Cert. Br. 5.

In each case, the ALJ had been chosen under the pre-*Lucia* regime. 19-1442 Pet. App. 9a-10a; 20-105 Pet. App. 2a, 17a. Each petitioner failed to challenge the appointment at the ALJ level, and again failed to do so at the Appeals Council level. *Ibid.* Petitioners' ALJ hearings and requests for review by the Appeals Council all occurred before 2018—that is, before this Court granted review in *Lucia*. 19-1442 Gov't Cert. Br. 5; 20-105 Gov't Cert. Br. 15-16.

Each petitioner then filed suit in district court, seeking review of the denial of benefits. 19-1442 Pet. App. 9a; 20-105 Pet. App. 15a, 19a, 39a, 61a. In briefs filed in district court, petitioners argued for the first time that

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[1] See Opening Br. Addendum 3, *Hilliard*, No. 19-1169 (8th Cir. Mar. 18, 2019); Opening Br. Addendum 19, 56, *Carr*, No. 19-5079 (10th Cir. Dec. 16, 2019); D. Ct. Doc. 8, at 11, *Thurman*, No. 17-35 (N.D. Iowa June 23, 2017); D. Ct. Doc. 9, at 105, *Davis*, No. 17-80 (N.D. Iowa Oct. 11, 2017); D. Ct. Doc. 9, at 83, *Iwan*, No. 17-97 (N.D. Iowa Nov. 22, 2017).

the ALJs who had denied their claims had not been appointed in conformity with the Appointments Clause. 19-1442 Pet. App. 9a-10a; 20-105 Pet. App. 4a, 17a.

The district courts reached different decisions. In *Carr* and *Minor*, the Northern District of Oklahoma reversed the ALJ's decision and remanded the matter to the agency, holding that the claimants could raise their Appointments Clause challenges in court despite their failure to do so before the agency. 19-1442 Pet. App. 32a-56a, 57a-83a. In *Davis*, *Iwan*, *Thurman*, and *Hilliard*, by contrast, the Northern and Southern Districts of Iowa affirmed the ALJ's decisions, holding that the claimants had forfeited their Appointments Clause challenges by failing to raise them before the agency. 20-105 Pet. App. 15a-18a, 19a-38a, 39a-60a, 61a-82a.

On appeal, the Eighth and Tenth Circuits held that the claimants had forfeited their Appointments Clause challenges. 19-1442 Pet. App. 1a-31a; 20-105 Pet. App. 1a-9a, 10a-14a. Both courts explained that, in general, a litigant who has failed to present an issue to an agency may not raise that issue for the first time in court. 19-1442 Pet. App. 12a; 20-105 Pet. App. 6a. The courts declined to exempt SSA ALJ hearings from that general rule, 19-1442 Pet. App. 21a-25a; 20-105 Pet. App. 5a-6a, or to carve out an exception for Appointments Clause challenges, 19-1442 Pet. App. 29a-30a; 20-105 Pet. App. 7a-8a.

SUMMARY OF ARGUMENT

I. For a century, this Court has consistently held that a party forfeits claims not raised before the administrative agency charged with adjudication in the first instance. See *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). That rule precludes parties from sleeping on their rights and ensures that the

administrative review process remains both meaningful and efficient. A related line of decisions of this Court is best read as requiring a timely challenge before granting relief under the Appointments Clause. See *Ryder* v. *United States*, 515 U.S. 177, 182 (1995); *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018). That timely-objection rule limits the disruption that might otherwise result from calling into question every past action of an improperly appointed adjudicatory officer.

Each of these rules independently precludes the claims here, which petitioners failed to raise before the agency in any form, despite multiple opportunities to do so. Petitioners offer no excuse for waiting until district court proceedings to raise those challenges. And given the scope of the Social Security adjudicatory system—which receives millions of claims and whose ALJs adjudicate over 750,000 claims each year—petitioners' underlying theory that background forfeiture rules should not apply in Social Security cases would wreak havoc on the orderly and efficient disposition of claims.

II. Petitioners raise four contrary arguments, each of which lacks merit.

A. Petitioners first argue that courts should abandon the common-law forfeiture rule altogether. But this Court's cases have consistently recognized and applied such a rule up through the present. Petitioners' suggestion that the rule lacks legitimacy also is misplaced. Courts have authority to develop common-law and equitable principles governing the arguments the courts themselves will consider, taking into account the need to respect the authority and requirements of orderly processing of the agency.

B. Petitioners next contend that the Court should adopt an exception to general forfeiture principles for

Social Security cases. A uniform background rule, however, both comports with the constitutional role of courts and promotes clarity. The proposed exception would also presumably encompass the application of agency regulations and policies or fact-bound issues, forcing courts to address complex, technical disputes in the first instance.

For their contrary argument, petitioners rely exclusively on *Sims* v. *Apfel*, 530 U.S. 103 (2000), which held that a claimant need not exhaust issues at the Appeals Council stage. In that case, the plurality and concurrence focused on the fact that (in their view) SSA procedures suggested the agency did not depend on claimants to raise arguments affirmatively. But *Sims* expressly declined to address exhaustion before the ALJ, and the logic of the decision does not extend to that stage of the process, where the governing regulations indicate that the ALJ *does* depend on the active participation of claimants. In any event, *Sims* did not purport to adopt an exception to the timely-objection rule for Appointments Clause claims.

C. Petitioners further urge the Court to gerrymander an exception from normal forfeiture rules for Appointments Clause challenges to Social Security ALJs. Although petitioners point to a handful of precedents considering unexhausted constitutional claims where the agency conceded the objection was futile, those cases are inapt: here, the Commissioner *could* have remedied petitioners' claims by ratifying or appointing ALJs herself (as she eventually did). Had a wave of claimants raised Appointments Clause challenges before the agency, the Commissioner may well have been prompted to take that step earlier.

D. Finally, petitioners contend that, in any event, this Court should exercise its discretion to excuse their forfeiture. But the Court has stated that discretion is appropriate only in exceptional circumstances, and petitioners identify no such circumstances here.

ARGUMENT

I. PETITIONERS FORFEITED THEIR APPOINTMENTS CLAUSE CLAIMS

"For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). These cases concern the application of two such rules. This Court has held that, as a general rule of administrative law, a party who fails to raise an objection in administrative proceedings may not raise it for the first time in court. The Court also has held that a party may claim a new hearing on account of a violation of the Appointments Clause so long as the party made a timely challenge to the improper appointee. Both principles lead to the same result here: petitioners forfeited their Appointments Clause objections by failing to raise them before the agency.

A. Under A General Rule Of Administrative Law, Parties Forfeit Objections They Never Raise Before The Agency

1. Rules about the preservation of issues in agency proceedings fall into three broad categories. *Island Creek Coal Co.* v. *Bryan*, 937 F.3d 738, 746-748 (6th Cir. 2019). First, Congress sometimes provides by statute that a court may consider an objection only if the party raised it before the agency. See, *e.g.*, 30 U.S.C. 816(a)(1). Second, the agency sometimes provides by regulation that a party must take specified procedural

steps in order to preserve an argument. See, *e.g.*, 20 C.F.R. 802.211(a). Third, where both Congress and the agency have remained silent, this Court has applied a background rule that courts should not consider issues that were neither pressed nor passed upon in agency proceedings. These cases fall into the third category.

The rule underlying that third category has deep roots. In the courts, "[t]he rule against considering new issues on appeal is as old as appellate review." Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023, 1026 (1987). The counterpart of that rule in administrative law "is as old as federal administrative law." *Island Creek*, 937 F.3d at 743 (citation omitted). This Court developed the principle in a long line of cases in the early 20th century, refusing again and again to consider objections that had never been raised before the administrative agency. See *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 155 (1946); *Helvering* v. *Pfeiffer*, 302 U.S. 247, 249 (1937); *Helvering* v. *Salvage*, 297 U.S. 106, 109 (1936); *General Utilities & Operating Co.* v. *Helvering*, 296 U.S. 200, 206 (1935); *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, 494 (1933); *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, 418 (1932); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927); *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U.S. 117, 131 (1920).

The Court summed up those earlier decisions in two cases in the mid-20th century. In *Hormel* v. *Helvering*, 312 U.S. 552 (1941), the Court explained that, as a general principle, courts should not decide "questions of law which were neither pressed nor passed upon" by the agency. *Id.* at 557. Then, in *United States* v. *L. A.*

Tucker Truck Lines, Inc., 344 U.S. 33 (1952), in the context of a challenge to the appointment of a hearing examiner, the Court observed that it "ha[d] recognized in more than a few decisions * * * that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *Id.* at 36-37. The Court added: "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as 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." *Ibid.*

This Court has continued to apply that doctrine in the decades since. The Court reaffirmed the "general rule" and "general principle" in *Sims* v. *Apfel*, 530 U.S. 103, 109 (2000) (citations omitted); see *id.* at 112 (O'Connor, J., concurring in part and concurring in the judgment) ("On this underlying principle of administrative law, the Court is unanimous."); *id.* at 114 (Breyer, J., dissenting) (characterizing the doctrine as an "ordinary principle[ ] of administrative law"). The Court again applied the "general rule" in *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743, 762 (2002) (citation omitted). And it referred once more to the "general rule" in *Woodford* v. *Ngo*, 548 U.S. 81, 90 (2006) (citation omitted).

This Court has also made clear, however, that "rigid and undeviating" application of the "general principle" can defeat "the ends of justice." *Hormel*, 312 U.S. at 557. It has accordingly declined to apply the doctrine where presentation of the argument to the agency would be "utterly futile," *The Montana Nat'l Bank of*

Billings v. *Yellowstone County*, 276 U.S. 499, 505 (1928); where the party seeks to raise the issue as a defense in a criminal case rather than in an affirmative challenge to agency action, see *McKart* v. *United States*, 395 U.S. 185, 197 (1969); and in "exceptional cases or particular circumstances" where the doctrine would cause "injustice," *Hormel*, 312 U.S. at 557.

2. The forfeiture rule reflects what this Court has called "[s]imple fairness." *L. A. Tucker*, 344 U.S. at 37. It is an old maxim that equity aids the vigilant, not those who sleep on their rights, whether by design or inadvertence. 1 Joseph Story, *Commentaries on Equity Jurisprudence, As Administered in England and America* 155 (1836). A claimant's failure to speak up before the agency makes it inequitable for him to complain for the first time in court. See *Northern Pacific*, 288 U.S. at 494. The rule also prevents sandbagging, the strategic practice of remaining silent while the agency hears the case but then objecting if the agency's decision turns out to be unfavorable. See *ibid.*

Further, the forfeiture rule promotes "orderly procedure and good administration." *L. A. Tucker*, 344 U.S. at 37. It is an axiom of administrative law that agencies make decisions in the first instance, while courts *review* those decisions to ensure their lawfulness. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). When a court considers an issue never presented to the agency, it goes beyond its reviewing role and "usurps the agency's function" as the tribunal of first instance. *Aragon*, 329 U.S. at 155; see *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141-145 (1940) (noting limited role of courts in reviewing administrative actions). In addition, if the claimant had presented the issue to the agency, the agency might have agreed with

it or taken other steps to address it—saving everyone the time and burden of litigation. See *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992). Even if the agency had disagreed with the objection, it would at least have had the opportunity to dispose of the matter on other grounds or to address the point and produce a useful record for the court. *Ibid.*

B. Under The Court's Appointments Clause Cases, Parties Who Fail To Raise Timely Objections Have No Right To New Hearings Before New Adjudicators

1. This Court's precedents also are best read as treating a timely challenge as a prerequisite to relief under the Appointments Clause. At common law, courts redressed wrongful appointments through writs of quo warranto, ousting wrongful appointees from their positions and preventing them from continuing to exercise official power going forward. See 3 William Blackstone, *Commentaries on the Laws of England* 262-263 (1768). Courts refused, however, to redress wrongful appointments by invalidating the appointee's past acts, even if the affected party objected at the time. See, *e.g.*, *Norton* v. *Shelby County*, 118 U.S. 425, 441-442 (1886). Courts instead invoked a principle known as the *de facto* officer doctrine, under which "[t]he acts of an officer *de facto*, within the sphere of the powers and duties of the office he assumes to hold, are as valid and binding * * * as if they had been done by an officer *de jure*." *Phillips* v. *Payne*, 92 U.S. 130, 132 (1876). Courts applied that rule even to constitutional defects in the appointments of adjudicators. See, *e.g.*, *Ex parte Ward*, 173 U.S. 452, 454 (1899); *Bolling* v. *Lersner*, 91 U.S. 594, 594-596 (1876); *Griffin's Case*, 11 F. Cas. 7, 27 (C.C.D. Va. 1869) (No. 5815). Courts defended that

strict rule on the ground that invalidating past acts because of later-discovered defects in appointments could cause "endless confusion" and threaten the "good order and peace of society." *Norton*, 118 U.S. at 441-442; see Gov't Reply and Response Br. at 26-47, *Financial Oversight Mgmt. Bd.* v. *Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020) (No. 18-1334).

In *Ryder* v. *United States*, 515 U.S. 177 (1995), this Court took a different approach. There, a party made a timely constitutional challenge to the appointment of judges in a military court. *Id.* at 179-180. This Court held that, notwithstanding the *de facto* officer doctrine, "one who makes a *timely challenge* to the constitutional validity of the appointment of an officer who adjudicates his case is entitled" to relief—specifically, to a new "hearing before a properly appointed" officer. *Id.* at 182, 188 (emphasis added). "Any other rule," the Court observed, "would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." *Id.* at 183. The Court then awarded the party a new hearing, noting that the party had "raised his objection to the judges' titles before those very judges and prior to their action on his case." *Id.* at 182.

This Court reaffirmed *Ryder*'s basic approach in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018)—a case about appointment of SEC ALJs, and the very case on which petitioners' Appointments Clause challenge here rests. In *Lucia*, the Court explained that "the 'appropriate' remedy for an adjudication * * * is a new 'hearing before a properly appointed' official." *Id.* at 2055 (citation omitted). The Court further noted that "one who makes a *timely challenge* to the constitutional validity of the ap-

pointment of an officer who adjudicates his case" is entitled to such relief. *Ibid.* (emphasis added). It observed that the challenger there had "made just such a timely challenge: He contested the validity of [the ALJ's] appointment *before the Commission*, and continued pressing that claim in the Court of Appeals and this Court." *Ibid.* (emphasis added).

Taken together, *Ryder* and *Lucia* show that a party may obtain a new hearing to cure a violation of the Appointments Clause if he has made a timely challenge. And *Lucia* shows that making a timely challenge requires (at the least) objecting in the agency proceedings, not just later in court. A party may not claim the benefits of the new-hearing remedy after foregoing a timely challenge.

2. It makes sense to award a new hearing to parties who object on time but not to parties who fail to do so. Most obviously, that requirement performs (in a more limited way) the same function that the *de facto* officer doctrine performed in this context: promoting stability. When a court concludes that the appointment of the relevant adjudicating official violated the Constitution, the court will grant relief in the particular case and, if the court's ruling is broadly binding, the government will change the appointment practice going forward. But the practical need for stability and finality makes it infeasible to go back, annul everything that the appointee has done in the past (along with actions by others who were similarly appointed), and start over from scratch. The common-law rule limited such disruption by denying relief to everyone, whether they objected or not; modern law since *Ryder* limits disruption by providing relief to those who spoke up before the relevant adjudicatory forum, but not to those who sat on their rights.

In the long run, such assurances against disruption promote the proper interpretation of the Appointments Clause itself; without them, judges might "incline [them]selves towards finding that no [violation] exists" in the first place. *Freytag* v. *Commissioner*, 501 U.S. 868, 900 (1991) (Scalia, J., concurring in part and concurring in the judgment).

The timely-challenge requirement also reflects the purpose of *Ryder*'s departure from strict application of the *de facto* officer doctrine: creating "incentives to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5 (brackets and citation omitted); see *Ryder*, 515 U.S. at 183 ("Any other rule would create a disincentive to raise Appointments Clause challenges."). The best way to create incentives to raise Appointments Clause claims is to reward parties who raise Appointments Clause claims at the right time. Awarding new hearings to parties who did *not* raise such challenges would not advance that purpose, and indeed would create an incentive to sandbag the government. Where the remedy's rationale ceases to apply (and countervailing concerns arise), the remedy should cease.

C. Petitioners Have Forfeited Their Appointments Clause Challenges In These Cases

The two lines of precedent just discussed resolve these cases. Under principles of administrative law, a Social Security claimant may not raise in court an objection (including a challenge to the appointment of an agency adjudicator) neither pressed nor passed upon at the agency level. And under the principles that govern Appointments Clause cases, a Social Security claimant may not demand the new-hearing remedy without sat-

isfying the timely-challenge prerequisite to that remedy. Either way, petitioners' demand for a new hearing comes too late.

1. Each of the administrative-law justifications for requiring timely objections applies to Social Security claimants' challenges to the appointments of their ALJs. To start, principles of equity cut strongly against setting aside the agency's decisions. Petitioners had every opportunity to raise their present objections. The ALJ proceeding begins after the claimant files a request for a hearing. See 20 C.F.R. 404.929. The agency then mails the claimant a notice of hearing "before the date of the hearing," identifying the "specific issues to be decided" at the hearing. 20 C.F.R. 404.938(a) and (b)(1). The agency requires the claimant to write back to the ALJ if he has any objections to those issues. 20 C.F.R. 404.939. Prior to the hearing, the claimant may "enter written statements about the facts and law." 20 C.F.R. 404.949. At the hearing, the claimant "may raise a new issue." 20 C.F.R. 404.946(b). He also may submit "a written summary of [his] case" or submit "oral arguments" in which he "state[s] [his] case." 20 C.F.R. 404.949 (emphasis omitted). After the ALJ rules, the claimant may request review by the Appeals Council. 20 C.F.R. 404.967. Throughout administrative proceedings, a claimant could (and every petitioner did) retain a representative to "[s]ubmit evidence," "[m]ake statements about facts and law," and "[m]ake any request or give any notice about the proceedings." 20 C.F.R. 404.1710(a). Yet petitioners never raised their Appointments Clause challenges in requests for hearings, responses to notices of hearing, written statements, written summaries, oral arguments, or requests

for Appeals Council review. Only after the agency completed its review did petitioners raise their current challenge in district court. Principles of equity should prevent consideration of petitioners' claim after they (and their representatives) forwent so many earlier chances to raise it.

The needs of orderly procedure under the statutory framework lead to the same result. The Social Security Act assigns SSA the responsibility to make "findings of fact" and "decisions as to the rights" of claimants. 42 U.S.C. 405(b)(1). It then assigns courts the responsibility to "review" SSA's decision. 42 U.S.C 405(g). Courts may conduct that review, however, only after parties have exhausted their administrative remedies, presenting their benefits claim to the agency and invoking all the administrative steps the agency has prescribed. See *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). Deviating from ordinary forfeiture rules would allow courts to decide issues in the first instance, even though the Act makes the courts reviewing bodies. It also would allow a claimant to submit a bare-bones application to the agency, say nothing while his claim makes its way through the agency's multi-step process, and then bring all his objections forward after going to court, thus draining the elaborate administrative process of its essential function.

The remedial principles underlying the Court's cases on the Appointments Clause apply equally here as well. If any agency illustrates the importance of the timely-objection rule's stabilizing function, it is SSA. "The Social Security hearing system is 'probably the largest adjudicative agency in the western world.'" *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omit-

ted). "The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971). SSA on its own "employ[s] more ALJs"—over 1,500—"than all other Federal agencies combined." *Ruling 19-1p*, 84 Fed. Reg. at 9583; SSA, *About Hearings and Appeals*. Each year, it receives about 2.3 million initial disability claims, its ALJs adjudicate over 760,000 claims, and it pays about $203 billion in disability benefits and supplemental security income payments to over 15 million people. SSA, *Annual Performance Report, Fiscal Years 2019-2021*, at 4, 44, 46 (2020).

That system would become unworkable if, even in the absence of timely objections, SSA were required to reopen its files, rehear old cases, and re-decide old claims every time a new issue was raised in court. That would be equally so if those consequences followed whenever there were a new development in the law concerning an asserted defect in the ALJ's authority—whether a decision about who counts as an officer, see *Lucia*, *supra*; or a decision about who counts as a principal officer, see *United States* v. *Arthrex, Inc.*, No. 19-1434 (oral argument scheduled for Mar. 1, 2021); or a decision about the extent of the removal power, see *Collins* v. *Mnuchin*, No. 19-422 (argued Dec. 9, 2020). In petitioners' view, *every* claimant with a claim pending before the Appeals Council or for whom the statute of limitations had not yet expired at the time *Lucia* was decided would have been justified in raising an Appointments Clause challenge for the first time in district court, and those already in district court would similarly have been justified in amending their complaints to

raise that challenge. The disruptive effects of petitioners' underlying theory would be indisputably vast. See, *e.g.*, SSA, *Appeals Council Requests for Review FY 2020* (noting 191,734 Appeals Council dispositions in fiscal year 2020).

Further, granting new hearings here would not serve the purposes of that remedy or seemingly any useful purpose at all. Granting relief is not needed to stop an ongoing constitutional violation; SSA has already changed its appointment practices. Nor is it needed to create incentives to raise future Appointments Clause challenges; a court creates such incentives by rewarding those who do raise their challenges on time, not by rewarding those who do not. Nor do these cases involve any personal injustice to petitioners; no petitioner suggests that the method of his ALJ's appointment had anything to do with the outcome of his hearing. On the other side of the ledger, for every claimant here who would get a new hearing, other claimants in line behind him would have their hearings delayed. To grant relief in these circumstances would violate the principle that, even in constitutional cases, a court choosing a remedy must take account of "what is necessary, what is fair, and what is workable." *North Carolina* v. *Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (citation omitted).

2. This Court's decision in *L. A. Tucker*—which comes closer to these cases than any other precedent of the Court—confirms that courts should not award relief in these circumstances. In *L. A. Tucker*, a party that lost an adjudication before the Interstate Commerce Commission argued for the first time in district court that the Commission's method of appointing its hearing examiners violated the Administrative Procedure Act

(APA). 344 U.S. at 35. In holding that the district court should not have entertained the objection, this Court explained that the party "did not offer * * * any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding." *Ibid.* The party "d[id] not claim to have been misled or in any way hampered in ascertaining the facts about the examiner's appointment." *Ibid.* "The apparent reason for [its] complacency was that it was not actually prejudiced by the conduct or manner of appointment of the examiner"; there was "no suggestion that he exhibited bias, favoritism or unfairness." *Ibid.* "The issue [was] clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits." *Id.* at 36. In those circumstances, "considerations of practical justice" weighed heavily against hearing the objection, and in favor of applying the "general rule that courts should not topple over administrative decisions unless the administrative body * * * has erred against objection." *Id.* at 36-37. The Court could write the same opinion in these cases.

3. SSA's *Ruling 19-1p*, the March 2019 ruling in which the agency explained how it would address claims under *Lucia*, supports the same result. The agency observed that "[t]he essential requirement for any system of administrative review in a program as large and complex as [SSA's] is that it 'must be fair—and it must work.'" *Ruling 19-1p*, 84 Fed. Reg. at 9583 (quoting *Perales*, 402 U.S. at 399). The agency continued that, "[i]n adjudicating the millions of claims [it] receive[s] each year, [it] strive[s] to balance the two overriding concerns of fairness and efficiency, consistent with the law." *Ibid.*

SSA then explained how it would "balance the two overriding concerns of fairness and efficiency" after *Lucia*. *Ruling 19-1p*, 84 Fed. Reg. at 9583. In the interests of fairness, SSA provided that the Appeals Council would review any case in which a claimant had raised an Appointments Clause objection before the ALJ. *Ibid.* It also agreed that claimants could raise Appointments Clause claims for the first time before the Appeals Council, even if the claimants had not raised them before the ALJ. *Ibid.* At the same time, in the interests of efficiency, the agency declined to go any further, such as by retroactively opening closed cases. It explained that, "[b]ecause [SSA] employ[s] more ALJs than all other Federal agencies combined, and [its] ALJs issue hundreds of thousands of decisions each year, *Lucia* has the potential to significantly affect [its] hearings and appeals process." *Ibid.*

We do not argue here that SSA's *Ruling 19-1p* (issued in March 2019, after petitioners' hearings) creates a binding legal rule that controls these cases. The ruling does, however, reflect SSA's considered judgment. The agency has determined that the need for fairness to claimants justifies entertaining all Appointments Clause challenges raised before the ALJ or for the first time at the Appeals Council level, but that the need for stability and efficiency counsels against going any further. This Court should not undermine SSA's considered judgment by carving out a broad exception to background rules of forfeiture and internal agency procedure.

II. PETITIONERS' ARGUMENTS LACK MERIT

Petitioners raise four main arguments: (1) courts should not apply general forfeiture rules at all; (2) for-

feiture rules do not apply to Social Security adjudications; (3) forfeiture rules do not apply to these Appointments Clause challenges to SSA ALJs; and (4) the Court should exercise discretion to excuse the forfeitures. Each argument lacks merit.

A. Courts Should Continue To Apply Forfeiture Rules

Petitioners' broadest arguments (Carr Br. 33-36; Davis Br. 33-34) take aim at settled forfeiture rules themselves. Petitioners' arguments are unsound.

1. On petitioners' telling, these cases concern whether to "impose" (Carr Br. 3) or "craft" (Davis Br. 34) a new rule that precludes them from raising their Appointments Clause challenges. But the government does not ask this Court to impose any new rule. The government merely asks the Court to enforce and apply two old rules: the "general rule that courts should not topple over administrative decisions unless the administrative body * * * has erred against objection," *L. A. Tucker*, 344 U.S. at 37, and the rule that only one who makes a "timely challenge" may demand a new hearing before a proper appointee, *Lucia*, 138 S. Ct. at 2055. It is petitioners who ask this Court to "craft" (Davis Br. 34) new exceptions to those rules.

Petitioners argue that this Court's previous cases requiring timely objections "are best understood not to rest on any general rule" at all (Davis Br. 34), but instead to reflect a series of "*ad hoc*" improvisations (Carr Br. 34). That supposed understanding is wrong. The Court has time and again referred to administrative forfeiture as the general rule, general principle, or general practice. See *Woodford*, 548 U.S. at 90 ("general rule") (citation omitted); *South Carolina State Ports Authority*, 535 U.S. at 763 ("general rule") (citation omitted); *L. A. Tucker*, 344 U.S. at 37 ("general rule"); *Hormel*,

312 U.S. at 556 ("general principle"); *id.* at 557 ("general principle"); *id.* at 558 ("general practice"); *id.* at 559 ("general practice"); *id.* at 560 ("general principle"); *ibid.* ("general practice"). In *Lucia*, too, the Court treated the principles it applied as general features of "Appointments Clause remedies." 138 S. Ct. at 2055 n.5.

Against the weight of authority the government has put forward, see pp. 12-13, *supra*, petitioners cite (Carr Br. 34; Davis Br. 32-33) three cases—*Hormel*, *Aragon*, and *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950)—in an effort to show that the Court has applied forfeiture rules to administrative proceedings only inconsistently. But those cases show no such thing. In *Hormel*, the Court acknowledged the "general principle" of forfeiture; the Court simply found that an exception to that principle applied because of the "exceptional" circumstances of that case. 312 U.S. at 557. In *Aragon*, the Court rejected a claim on the ground that a party had failed to present it to the agency, and then, as an alternative holding, also rejected it on the merits. 329 U.S. at 155. And the Court already rejected reliance on *Wong Yang Sung* in this context: "The effect of the [failure to present the issue to the agency] was not there raised in the briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point." *L. A. Tucker*, 344 U.S. at 38.

2. Petitioners also suggest (Carr Br. 17-18; Davis Br. 33-34) that, even if this Court has applied judicially recognized forfeiture rules in the past, it should stop doing so going forward. As explained, this Court has applied such rules to agency proceedings for one hundred years. See pp. 12-13, *supra*. In addition, the very prec-

edents on which petitioners rely in seeking a new hearing treat a timely objection as a prerequisite for that relief. See pp. 15-17, *supra*. Petitioners face a heavy burden in asking this Court to abandon a century of precedent concerning administrative law, and to keep what they want from the Court's precedents on Appointments Clause remedies while discarding the rest. They fall well short of satisfying that burden.

Petitioners suggest (Carr Br. 17-18; Davis Br. 33-34) that courts lack the authority to apply forfeiture rules never adopted by Congress or agencies. But forfeiture rules govern what arguments the courts themselves will entertain—surely a matter also within the courts' bailiwick. And the legal system is (and traditionally has been) replete with judge-made rules about forfeiture and preservation. See, *e.g.*, *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 140 n.2 (2014) (rule against considering issues raised only in a reply brief); *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (rule against deciding matters not pressed or passed upon below); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977) (procedural default in habeas corpus); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936) (standard for exercising discretion to correct argument forfeited below in a criminal case).

Applying such background rules to constitutional claims is hardly a novel judicial task. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 169 (1803) (considering whether "legal principles" make mandamus "a proper remedy" for withholding a commission). And here, it was the Court—not Congress or an agency—that modified the common-law *de facto* officer doctrine and that recognized the remedy of a new hearing for a timely and meritorious Appointments Clause objection.

See pp. 15-17, *supra*. Having taken that step, it is proper for the Court to determine the prerequisites for, and contours of, that remedy. And it is hardly consistent for petitioners to demand the judge-made remedy of a new hearing, yet to condemn as illegitimate any judge-made limits on that remedy.

Finally, petitioners argue (Carr Br. 19-20; Davis Br. 22-24) that, because Congress sometimes provides by statute that claimants must raise objections in agency proceedings before raising them in court, courts may not apply similar requirements on their own. But as a general matter, codifying a common-law rule in one area does not implicitly abolish the rule in other areas. Many rules codify the common-law principle that litigants must make timely objections in court to preserve issues for further review. See, *e.g.*, Fed. R. Crim. P. 51 (criminal cases); Fed. R. Civ. P. 12(h) (motions to dismiss in civil cases); Fed. R. Civ. P. 46 (objections to rulings in civil cases); Fed. R. Civ. P. 51 (objections to jury instructions in civil cases); Sup. Ct. R. 15.2 (briefs in opposition). Yet that does not abolish the rules of waiver and forfeiture outside those settings. See *L. A. Tucker*, 344 U.S. at 36 (observing that forfeiture has been recognized in both "decisions" and "statutes").

B. Forfeiture Rules Apply To Social Security Cases

Petitioners next urge this Court (Carr Br. 17-36; Davis Br. 18-30) to exempt SSA ALJ hearings from traditional forfeiture rules. The Court should decline that invitation. Both existing law and practical considerations counsel against recognizing an exception to traditional forfeiture principles in this context, and petitioners' contrary argument, based on *Sims* v. *Apfel*, *supra*, lacks merit.

1. Precedent and practical considerations support the application of standard forfeiture doctrine to Social Security proceedings

To resolve these cases, this Court should simply apply the standard forfeiture rules set out in decisions such as *L. A. Tucker* and *Lucia*. While the application of a simple background rule grounded in structure and experience comports with the courts' constitutional role, attempts to craft special exceptions for particular agencies would require courts to make the very kinds of "'policy-laden'" judgments that petitioners say contradict "modern principles of statutory interpretation." Davis Br. 33-34 (citation omitted). A clear rule also has practical virtues: it simplifies the work of the lower courts, it gives private parties clear notice of their obligations, and it gives Congress and agencies a stable background against which to legislate and regulate. If the default rule needs fine-tuning, Congress or the agency can attend to it.

A special Social Security exception also would clash with this Court's decision in *Richardson* v. *Perales*, *supra*. In *Perales*, a Social Security hearing examiner (as the ALJ was then known) considered a written medical report in deciding a claim, even though the claimant lacked the opportunity to cross-examine the doctors who prepared the report. 402 U.S. at 402. The claimant argued in court that the examiner denied him due process. *Ibid.* In rejecting that contention, the Court observed, among other things, that the claimant could have cured any inability to cross-examine the doctors by seeking subpoenas for their testimony. *Id.* at 404-405. The claimant, however, "did not take advantage of the opportunity afforded him." *Id.* at 404. "This inaction on the claimant's part," the Court concluded, meant

that the claimant was "precluded from now complaining that he was denied the rights of confrontation and cross-examination." *Id.* at 405. *Perales* involved the effect of the failure to obtain a subpoena rather than the failure to raise an objection, but it supports the more general proposition that a Social Security claimant may be "precluded" from "complaining" in court, even with respect to a constitutional claim, because of "inaction" before the ALJ. *Ibid.*

Petitioners' proposed Social Security exception also would unsettle existing law in the lower courts. Petitioners cite no case in which a court of appeals has adopted that broad exception. To the contrary, for decades before *Lucia*, courts of appeals consistently applied forfeiture principles when Social Security claimants failed to raise matters at ALJ hearings. See, *e.g.*, *Krysztoforski* v. *Chater*, 55 F.3d 857, 860-861 (3d Cir. 1995) (per curiam); *Brewer* v. *Chater*, 103 F.3d 1384, 1393 (7th Cir. 1997), overruled on other grounds, *Johnson* v. *Apfel*, 189 F.3d 561, 562-563 (7th Cir. 1999); *Anderson* v. *Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003); *Meanel* v. *Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999); *Sullivan* v. *Commissioner of Social Security*, 694 Fed. Appx. 670, 671 (11th Cir. 2017) (per curiam). And since *Lucia*, several courts of appeals have held (or reiterated) that normal forfeiture principles apply to Social Security ALJ hearings. See p. 8, *supra* (the courts below); *Shapiro* v. *Saul*, No. 20-15505, 2021 WL 164917, at *1 (9th Cir. Jan. 19, 2021).

The three courts of appeals that have sided with petitioners on the question presented have all done so on narrow grounds limited to Appointments Clause challenges to SSA ALJs, not on the broad ground that for-

feiture rules categorically do not apply to Social Security cases. See *Probst* v. *Saul*, 980 F.3d 1015, 1020 (4th Cir. 2020); *Ramsey* v. *Commissioner of Social Security*, 973 F.3d 537, 544-545 (6th Cir. 2020); *Cirko* v. *Commissioner of Social Security*, 948 F.3d 148, 153 (3d Cir. 2020). And even on that narrower issue, those cases are outliers. See, *e.g.*, *Gagliardi* v. *SSA*, 441 F. Supp. 3d 1284, 1289 (S.D. Fla. 2020) ("[S]ince *Lucia*, the vast majority of district courts have rejected Appointments Clause challenges to SSA ALJs where the plaintiff did not raise the issue during the administrative proceedings."), appeal pending, No. 20-10858 (11th Cir. filed Mar. 2, 2020).

Finally, although these cases involve Appointments Clause claims, petitioners' expansive theory would force courts in other cases to address questions concerning the application of SSA's own regulations and policies on technical and often fact-based issues that the agency has never considered, and that the claimant is airing for the first time in court. Here are some examples (all taken from cases finding issues forfeited): whether there was "an insufficient number" of "surveillance systems monitor position[s]" in the claimant's "local area," *Meanel*, 172 F.3d at 1115; whether a claimant's "high blood pressure, gout, arthritis, poor vision and a nervous condition," considered alongside "vocational factors," established inability to work, *Gonzalez-Ayala* v. *Secretary of Health & Human Servs.*, 807 F.2d 255, 256 (1st Cir. 1986); and whether a claimant's "employment as a gambling cashier [or] as a phlebotomist lasted long enough for her to learn the job and meet the durational requirement to qualify as past relevant work" under "Step 4 of the disability analysis," *Hulsey*

v. *Saul*, 794 Fed. Appx. 659, 660 (9th Cir. 2020) (emphasis omitted), petition for cert. pending, No. 20-5686 (filed Sept. 4, 2020). Allowing claimants to raise such matters for the first time in court would deprive courts of the agency's expertise and drain the administrative proceedings of much of their utility.

2. Sims *v.* Apfel *does not require a contrary result*

a. Petitioners' case for carving out a Social Security exception rests on this Court's decision in *Sims* v. *Apfel*, *supra*. There, despite the general rule of forfeiture, the Court held that an SSA claimant who fails to include a contention in a request for Appeals Council review does not thereby lose that contention forever. A plurality emphasized that "Social Security proceedings are inquisitorial rather than adversarial," that agency regulations explain that the agency will review the entire record on its own, and that a form issued by the agency "provides only three lines for the request for review," "strongly suggest[ing] that the Council does not depend much, if at all, on claimants to identify issues." 530 U.S. at 110-112. A concurrence, meanwhile, stated that "the regulations provide no notice that claimants must * * * raise specific issues before the Appeals Council," and that the regulations in fact "affirmatively suggest that specific issues need not be raised before the Appeals Council." *Id.* at 113 (O'Connor, J., concurring in part and concurring in the judgment).

This Court's decision in *Sims* was deliberately narrow; in sharp contrast to *L. A. Tucker*, the Court announced no "general rule." 344 U.S. at 37. The *Sims* Court expressly limited its holding to requests for Appeals Council review, stating that "[w]hether a claimant must exhaust issues before the ALJ is not before us." *Sims*, 530 U.S. at 107. And the dissent predicted that

"the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ." *Id.* at 117 (Breyer, J., dissenting). Before *Sims*, courts of appeals reached conflicting results about the applicability of forfeiture rules at the Appeals Council stage, see *id.* at 106 (majority opinion), but consistently applied those rules at the ALJ stage without recognizing a categorical exception for Social Security cases, see p. 30, *supra*. And after *Sims*, a number of courts have held that the decision does not extend to the ALJ stage. See *Mills* v. *Apfel*, 244 F.3d 1, 4 (1st Cir. 2001), cert. denied, 534 U.S. 1085 (2002); *Shaibi* v. *Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017); see also *Anderson*, 344 F.3d at 814.

There are sound reasons for drawing a line between the ALJ and Appeals Council stages. From the perspective of fairness or equity, a claimant has more opportunities to raise an issue at the ALJ stage than at the Appeals Council. At the Appeals Council, the claimant has no right to review, and may request review "by sending a letter or filling out a 1-page form that should take 10 minutes to complete." *Sims*, 530 U.S. at 114 (O'Connor, J., concurring in part and concurring in the judgment). If the Appeals Council denies review, the claimant has no further opportunities to bring objections to its attention. See 20 C.F.R. 404.972. In contrast, because the ALJ exercises mandatory review (subject to certain narrow procedural limitations, see 20 C.F.R. 404.957), the initial request for review is not the last opportunity for the claimant to raise arguments before the ALJ. The claimant still gets the chance to raise objections in response to the notice of hearing, to file written statements about the facts and law before

the hearing, to submit a written summary or oral argument at the hearing, and to speak to the ALJ during the hearing. See p. 19, *supra*. The repeated failure to raise objections at all those opportunities reflects less diligence (and creates a greater potential for sandbagging) than the omission of an issue from a one-page form that should take ten minutes to complete.

The procedures in *Sims* also affirmatively "indicate[d] that issue exhaustion before the Appeals Council [wa]s *not* required." 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment). To the plurality, the abbreviated form for requesting review suggested that "the Council does not depend much, if at all, on claimants to identify issues for review." *Id.* at 112. To the concurrence, the form "affirmatively suggest[ed] that specific issues need not be raised" in that form. *Id.* at 113; see *Mills*, 244 F.3d at 4-5 ("Justice O'Connor's 'swing vote' in *Sims* rested on the distinct and narrow ground that the regulations there in question might have misled applicants as to the duty to raise issues in the Appeals Council.").

Petitioners focus on the similarities between the appeal-request forms at the ALJ and Appeals Council stages (Carr Br. 26; Davis Br. 26-27), but the ALJ procedures indicate that ALJs *do* depend on the active participation of claimants when making decisions, and the relevant regulations nowhere convey the impression that claimants may decline to raise objections throughout those ALJ proceedings. Written in the second person as instructions to the claimant, the regulations provide: "When you submit your request for hearing, you *should also submit information or evidence* as required by [certain other regulations]. * * * Each party *must make every effort* to ensure that the administrative law

judge receives all of the evidence and *must* inform us about or submit any written evidence, as required in [certain other regulations]." 20 C.F.R. 404.935(a) (emphasis added). Then, after the agency issues a notice of hearing, if "you object to the [ALJ]" on the ground that he is "prejudiced or partial * * * or has any interest in the matter," "you *must* notify the [ALJ] at your earliest opportunity." 20 C.F.R. 404.940 (emphasis added). Further, the notice of hearing lists the "specific issues to be decided," 20 C.F.R. 404.938(b)(1); "[i]f you object to the issues to be decided at the hearing, you *must* notify the [ALJ] in writing at the earliest possible opportunity, but no later than 5 business days before the date set for the hearing." 20 C.F.R. 404.939 (effective Jan. 17, 2017) (emphasis added). In addition, "[y]ou *must* state the reason(s) for your objection(s)." *Ibid.* (emphasis added). In short, the ALJ *does* "depend" on the involvement of claimants in specifically raising issues and objections. *Sims*, 530 U.S. at 112 (plurality opinion).[2]

ALJ proceedings also differ from requests for Appeals Council review from the perspective of promoting efficiency. Just as the trial is the main event in the judicial process, so too the ALJ hearing is the main event in the SSA administrative process. There, the agency conducts its principal and most thorough investigation

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[2] To clarify our position given petitioners' discussion (Carr Br. 21-22; Davis Br. 28-29): We do not argue that these regulations themselves impose a forfeiture rule that applies here. The regulations do, however, reinforce the soundness of applying background forfeiture principles and refute any claim that SSA has "indicate[d] that issue exhaustion before the [ALJ] is *not* required." *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment).

of the disability claim, typically culminating in a detailed written decision. The Appeals Council, by contrast, performs a more modest role, frequently culminating in a brief letter informing the claimant that it is denying review. Somewhat like a court of last resort in the judicial process, the Appeals Council grants review in limited circumstances, focusing on correcting abuses of discretion and other serious errors, on resolving questions of law, and on deciding "broad policy or procedural issue[s] that may affect the general public interest." 20 C.F.R. 404.970(a)(4); see 20 C.F.R. 404.970(a). In the context of Social Security proceedings, therefore, a failure to raise an issue "in the first instance to the ALJ" can be "far more disruptive" than the failure to raise an issue "at the Appeals Council stage." *Mills*, 244 F.3d at 4.

b. Petitioners argue (Carr Br. 23-28; Davis Br. 25-27) that, under Justice Thomas's lead opinion in *Sims*, the common-law rule of issue exhaustion applies only to adversarial proceedings, not to investigative ones. They then quote at length from agency regulations to show that ALJ proceedings, like the Appeals Council proceedings in *Sims*, follow the investigative model.

To be sure, a majority of the Court has stated that "the rationale for requiring issue exhaustion is at its greatest" where "the parties are expected to develop the issues in an adversarial administrative proceeding," but "much weaker" when "an administrative proceeding is not adversarial." *Sims*, 530 U.S. at 109. And a plurality of the Court focused on the investigative character of Appeals Council proceedings to conclude that the forfeiture rule does not apply at that stage. *Id.* at 110-112. But no basis exists to turn the investigative nature of a proceeding into a controlling legal test for

issue exhaustion. That would contradict *Perales*, where the Court recognized that SSA operates "as an adjudicator and not as an advocate or adversary," yet still went on to hold that a claimant's "inaction" before the hearing examiner "precluded" the claimant from "complaining" in court. 402 U.S. at 403, 405. It also would contradict *Hormel*, where the Court explained that the "general principle" of forfeiture applicable to "trial courts" remains "equally desirable" in "the *less formal* proceedings before administrative agencies." 312 U.S. at 556 (emphasis added). What is more, the rationales for administrative forfeiture rules go beyond the analogy to litigation. As noted, the doctrine reflects the maxim that equity aids the vigilant, and it ensures orderly judicial review of agency action. See pp. 14-15, *supra*. Neither justification depends on the adversarial or investigative character of agency proceedings.

c. Petitioners further argue (Carr Br. 28-33; Davis Br. 27-29) that, under Justice O'Connor's concurrence in *Sims*, rules of administrative forfeiture would apply only if SSA notified the claimant of that requirement in its regulations. Petitioners note that SSA did not notify them of such a requirement in these cases.

The concurrence took the view that courts should apply forfeiture rules only after "careful examination of 'the characteristics of the particular administrative procedure provided.'" *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted). The concurrence then stated that "the agency's failure to notify claimants of an issue exhaustion requirement *in this context* is a sufficient basis for [the Court's] decision." *Ibid.* (emphasis added). As explained, the "context" of these cases is meaningfully different from the Appeals Council stage. See pp. 33-36,

supra. And regardless, the concurrence rests on the premise that courts should fine-tune forfeiture rules to account for the characteristics of the administrative scheme at hand. The Court should not follow that approach here. See pp. 29-32, *supra*.

Moreover, this Court's general rule of administrative forfeiture *already* provides sufficient notice. "Administrative lawyers are normally aware of the basic 'exhaustion of remedies' rules, including the specific waiver principle here at issue." *Sims*, 530 U.S. at 118 (Breyer, J., dissenting). Any administrative representative "should have known the basic legal principle: namely, that, with important exceptions, a claimant must raise his objections in [administrative proceedings] or forgo the opportunity later to raise them in court." *Id.* at 119.

There also is no reason to conclude that even unrepresented claimants would affirmatively be of the view that they could fail to raise an issue before the ALJ and then raise it for the first time in court if they later sought judicial review. In any event, from 2011 to 2015, the most recent years for which statistics are available, 70 to 75% of Social Security claimants were represented by an attorney, and 10 to 13% had a non-attorney representative. See SSA, *Annual Data for Representation at Social Security Hearings* (May 23, 2018) (reflecting dispositions with hearings held). It would make little sense to excuse omissions by *all* Social Security claimants simply because a small fraction of them lacked a representative before the ALJ. And these cases do not present the opportunity to consider the possibility of a special exception for unrepresented claimants. See p. 7 & n.1, *supra*.

d. In all events, *Sims* carved out an exception, at the Appeals Council stage, from the general administrative-

law forfeiture rule. It did not address an Appointments Clause challenge, and thus did not recognize any exception to the more specific timely-challenge requirement in *Ryder* and *Lucia*.

The investigative-adversarial distinction that the lead opinion discussed in *Sims* is inapt in the context of Appointments Clause claims. The timely-challenge requirement for such claims reflects the twin purposes of the Appointments Clause remedy: avoiding disruption while providing incentives to raise Appointments Clause claims. See pp. 17-18, *supra*. Those goals have nothing to do with the adversarial or investigative character of the agency adjudicatory proceedings. Regardless of the character of SSA proceedings, invalidating past decisions in the absence of timely challenges would cause disruption, but would not provide incentives for future challenges.

In addition, it makes little sense to fault the agency's investigative proceeding for failing to investigate issues concerning the Appointments Clause. The purpose of such a proceeding is to investigate the claim, not to investigate the investigator. Petitioners cite a host of administrative materials suggesting that ALJs will investigate claims, but none suggesting that ALJs will investigate matters unrelated to the substance of a benefits determination, such as their own authority. See 19-1442 Pet. App. 28a ("An SSA ALJ typically develops issues regarding benefits, but a claimant must object to an ALJ's authority.").

C. Forfeiture Rules Apply To Appointments Clause Challenges To Social Security ALJs

Petitioners next contend (Carr Br. 36-40; Davis Br. 37-43) that forfeiture rules should not apply to their Appointments Clause claims. They do not appear to seek

a categorical exemption for all Appointments Clause challenges—a difficult position to defend given *Ryder* and *Lucia*. They instead seek (Davis Br. 37) a gerrymandered exception for "Appointments Clause challenges to the appointment of Social Security ALJs." That argument fails for a multitude of reasons.

1. This Court has already developed a framework for deciding whether forfeiture rules apply to a given type of objection in a given tribunal: subject-matter jurisdiction. Objections to the tribunal's subject-matter jurisdiction may be raised at any time; non-jurisdictional objections are subject to waiver and forfeiture. See *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004). The Court has applied that distinction in the context of administrative tribunals. See *Union Pac. R.R.* v. *Brotherhood of Locomotive Engineers & Trainmen*, 558 U.S. 67, 81-86 (2009). For example, in *L. A. Tucker*, the Court concluded: "[W]e hold that the defect in the examiner's appointment [under the APA] was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during its hearings. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." 344 U.S. at 38.

No one argues here that a constitutional defect in the ALJ's appointment deprived SSA of jurisdiction. And *Ryder*'s and *Lucia*'s references to timely challenges show more generally that Appointments Clause defects do not affect jurisdiction. It follows that ordinary rules of waiver and forfeiture apply to these Appointments Clause challenges to Social Security ALJs.

2. Petitioners argue (Carr Br. 36-38; Davis Br. 37) that this Court has exempted constitutional challenges

from the related requirement of exhaustion of administrative remedies, and they argue that the Court should likewise exempt these Appointments Clause challenges from forfeiture rules. That contention misreads the Court's precedents.

This Court's precedents on exhaustion of remedies have distinguished "fixable" from "unfixable" constitutional claims. *Jones Bros.* v. *Secretary of Labor*, 898 F.3d 669, 678 (6th Cir. 2018) (Sutton, J.). The Court has required exhaustion where an agency can correct a constitutional problem on its own—for instance, where the party challenges the constitutionality of the agency's own practices, where the agency could adopt a limiting construction of the statute, or where the agency could avoid invoking the constitutionally doubtful authority in the first place. See, *e.g.*, *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20-21 (1974); *United States* v. *Illinois Central R.R.*, 291 U.S. 457, 463 (1934); *White* v. *Johnson*, 282 U.S. 367, 374 (1931); *Dalton Adding Machine Co.* v. *State Corp. Comm'n*, 236 U.S. 699, 700 (1915).

In contrast, as petitioners' primary citations show, the Court has (at least in certain circumstances) considered unexhausted constitutional claims where the agency has conceded that there was nothing it could do in response to an objection and effectively waived the exhaustion requirement. In *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), for example, the claimant challenged the constitutionality of a provision of the Social Security Act itself, and the Secretary failed to "raise any challenge to the sufficiency of the allegations of exhaustion" and, in fact, "conceded[ ]" that the claim was "beyond his competence" to address. *Id.* at 767. The Court thus concluded that exhaustion would have been "futile and

wasteful." *Ibid.* Similarly, in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), the claimant challenged "the constitutionality of the statute," and the government "stipulated" that it would deny the application "for failure to meet" the requirements of the challenged statute. *Id.* at 76. The Court treated the stipulation as "tantamount to a decision denying the application and as a waiver of the exhaustion requirements." *Id.* at 77.

The cases here do not involve any comparable waiver by SSA, and they raise a fixable rather than unfixable problem. Petitioners challenged SSA's own appointment practices, and SSA could have solved the problem if it had been raised earlier by ratifying the ALJs' appointments or appointing new ALJs to adjudicate petitioners' benefits applications. See pp. 44-46, *infra*.

Petitioners' other precedents (Carr Br. 37) raised distinct issues not presented in this case. In *Mathews* v. *Eldridge*, *supra*, the Court excused a claimant's failure to exhaust a claim that a termination of benefits required a pre-deprivation hearing, in part because a claimant demanding a *pre*-deprivation hearing necessarily cannot obtain "full relief" *after* exhausting remedies, and in part because the claimant's "physical condition and dependency upon the disability benefits" meant that "an erroneous termination would damage him in a way not recompensable through retroactive payments." 424 U.S. at 331. And in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), the Court excused a lack of exhaustion because, "as in *Eldridge*, the claimants * * * would be irreparably injured were the exhaustion requirement now enforced." *Id.* at 483; see *id.* at 483-484 (discussing the district court's findings that many claimants "ha[d] been hospitalized due to the trauma of having disability benefits cut off" and that "the ordeal

of having to go through the administrative appeal process [could] trigger a severe medical setback") (brackets and citation omitted).

Eldridge and *Bowen* thus reflect judicial discretion to depart from exhaustion rules in "particular circumstances * * * where injustice might otherwise result," *Hormel*, 312 U.S. at 557—not a general exception that would apply to petitioners' Appointments Clause claims. Petitioners have not demonstrated any special circumstances that would warrant an exception from standard forfeiture principles. Moreover, requiring claimants to raise any Appointments Clause challenges before the ALJ would not impede "prompt access to a federal judicial forum." Davis Br. 40 (quoting *McCarthy*, 503 U.S. at 146). Petitioners plainly were required to exhaust remedies at least as to the merits of their benefits claims, and they do not suggest that raising their Appointments Clause challenge would have appreciably delayed the completion of that process.

3. Petitioners relatedly argue (Carr Br. 35; Davis Br. 39) that agencies lack expertise in addressing Appointments Clause claims. But while enabling agencies to exercise their expertise is one of the purposes of forfeiture doctrine, it is not the only purpose. Forfeiture rules also prevent inequity, promote order, avoid disruption, and—here—provide incentives to raise Appointments Clause challenges. See pp. 14-15, 17-18, *supra*. Those purposes have nothing to do with agency expertise. That explains why this Court has previously applied administrative forfeiture rules to constitutional claims. See, *e.g.*, *Vajtauer*, 273 U.S. at 113 (privilege against self-incrimination). It also explains why the

Court has required exhaustion with respect to constitutional challenges to the agency's own practices. See p. 41, *supra*.

Petitioners' argument also lacks merit on its own terms. While agencies may lack special expertise in interpreting the Appointments Clause, they do have expertise in identifying the circumstances to which the Clause must be applied. Whether someone qualifies as an officer depends on whether he exercises "significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Similarly, whether someone qualifies as an inferior rather than principal officer depends on whether he is "directed and supervised at some level by others." *Edmond* v. *United States*, 520 U.S. 651, 662 (1997). Applying those tests may require careful examination of the agency's organic statute and regulations. See *Lucia*, 138 S. Ct. at 2051-2055. Those matters lie at the heart of the agency's competence. And even when an agency lacks expertise on the constitutional question itself, the agency may use its expertise in other ways that "obviate the need to address the constitutional challenge," *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 22-23 (2012)—such as, in this case, by ratifying the appointments of the agency's ALJs in conformity with the Appointments Clause.

4. Petitioners next argue (Carr Br. 39; Davis Br. 38) that presenting their Appointments Clause challenges to the agency would have been futile. This Court's cases have excused a lack of exhaustion where resort to the agency would have been "utterly futile" (say, because the agency was "powerless" to grant any relief). *Montana Nat'l Bank*, 276 U.S. at 505. To avoid exhaustion on that basis, however, a claimant must show that denial

of relief was "a certainty." *Tesoro Refining & Marketing Co.* v. *FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009) (citations and emphasis omitted); see 3 Kenneth Culp Davis, *Administrative Law Treatise* § 20.07, at 99 (1958) ("certainty of an adverse decision"). In *L. A. Tucker*, for example, this Court held that objecting to the Interstate Commerce Commission's method of appointing hearing examiners would not have been futile, even though the agency allegedly "had a predetermined policy on this subject which would have required it to overrule the objection if made." 344 U.S. at 37. The Court explained: "[T]he Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence." *Ibid.*

The same reasoning applies to these cases. Although SSA had a policy of selecting ALJs through a merit-selection process without appointment by the Commissioner, "[r]epetition of the objection" in multiple cases could have led "to a change of policy." *L. A. Tucker*, 344 U.S. at 37. Even if it did not, SSA "would at least [have] be[en] put on notice of the accumulating risk of wholesale reversals." *Ibid.*

Petitioners observe that, in an emergency message issued in January 2018, SSA instructed its ALJs to note on the record but not resolve any Appointments Clause challenges to their appointments, observing that "SSA lacks the authority to finally decide constitutional issues such as these." Davis Br. 39-40 (quoting Jan. 30 Notice). But petitioners' ALJ hearings all occurred *before* SSA issued those instructions. "Ordinarily, a party invokes the futility doctrine to prove the worthlessness of

an argument before an agency that *has rejected it* in the *past*. [Petitioners] tr[y] to argue that it would have been futile to raise an argument because the agency *would reject it* in the *future*." *Tesoro*, 552 F.3d at 874. But the *Tesoro* court observed that it was "aware of no case * * * in which the futility doctrine has been invoked based on a subsequent agency decision." *Ibid.* And even if the agency lacked the power to "finally decide" the Appointments Clause issue, Jan. 30 Notice, the Commissioner could have *remedied* that issue by ratifying the ALJs' appointments in conformity with the Appointments Clause—as a rash of such claims raised in administrative proceedings may have prompted her to do. Indeed, the agency's instruction to ALJs to record Appointments Clause objections reflects an interest in tracking their volume. And of course later, in March 2019, SSA issued *Ruling 19-1p*, *supra*, in which it determined that it would provide a new decision from a properly appointed officer to a claimant who raised an Appointments Clause challenge before the ALJ or Appeals Council.

D. The Court Should Not Excuse Petitioners' Forfeitures As An Exercise Of Its Judicial Discretion

Petitioners argue last of all (Carr Br. 39-40; Davis Br. 44-46) that this Court should exercise discretion to excuse their forfeitures. "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.). This Court's cases identify the legal principle that should guide any exercise of discretion in this context: a court should forgive a failure to raise a timely objection only in "exceptional cases or particular circumstances * * *

where injustice might otherwise result." *Hormel*, 312 U.S. at 557. Petitioners, however, identify no exceptional circumstances that would result in an injustice in these cases. These cases are not exceptional; there have been over 1000 cases in district courts since *Lucia* raising the same forfeited Appointments Clause challenge. Petitioners do not assert that there was any unfairness in the conduct of their ALJ hearings. Thus, the Court should not exercise its discretion to forgive the forfeiture.

Petitioners nevertheless contend (Carr Br. 39-40; Davis Br. 38-39) that this Court should excuse their forfeiture solely because the Appointments Clause is a "structural" guarantee. But while "courts may, in truly exceptional circumstances, exercise discretion to hear forfeited claims," there is "no basis for the assertion that the structural nature of a constitutional claim in and of itself constitutes such a circumstance." *Freytag*, 501 U.S. at 894 (Scalia, J., concurring in part and concurring in the judgment). In fact, treating the structural character of a claim as a reason to excuse forfeiture would swallow *Ryder*'s and *Lucia*'s rule that a timely objection entitles a litigant to relief on an Appointments Clause challenge.

Petitioners observe (Carr Br. 39; Davis Br. 44) that this Court excused a forfeiture of an Appointments Clause claim in *Freytag*. The Court, however, adopted no categorical Appointments Clause exception to standard forfeiture rules, instead explaining that courts should excuse forfeitures only in "rare cases." 501 U.S. at 879. On other occasions, too, the Court has decided issues that no party has properly raised but that the Court has considered it important to settle. See, *e.g.*,

Mapp v. *Ohio*, 367 U.S. 643 (1961); *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938); see generally Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447 (2009) (discussing the Court's practice). The Court does not permanently exempt the relevant issue from normal forfeiture rules whenever it takes such a step.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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