

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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RICKY LEE SMITH, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 17-1606  
 )  
 ) NANCY A. BERRYHILL, ACTING )  
 )  
 ) COMMISSIONER OF SOCIAL SECURITY, )  
 )  
 ) Respondent. )  
- - - - -

Pages: 1 through 63  
Place: Washington, D.C.  
Date: March 18, 2019

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IN THE SUPREME COURT OF THE UNITED STATES

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RICKY LEE SMITH, )

Petitioner, )

v. ) No. 17-1606

NANCY A. BERRYHILL, ACTING )

COMMISSIONER OF SOCIAL SECURITY, )

Respondent. )

- - - - -

Washington, D.C.

Monday, March 18, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

1 APPEARANCES:

2

3 MICHAEL B. KIMBERLY, ESQ., Washington, D.C.; on behalf  
4 of the Petitioner.

5 MICHAEL R. HUSTON, Assistant to the Solicitor General,  
6 Department of Justice, Washington, D.C.; for the  
7 United States, as amicus curiae, in support of  
8 reversal and remand.

9 DEEPAK GUPTA, ESQ., Washington, D.C.; Court-appointed  
10 amicus curiae in support of the judgment below.

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 17-1606, Smith versus  
5 Berryhill.

6 Mr. Kimberly.

7 ORAL ARGUMENT OF MICHAEL B. KIMBERLY

8 ON BEHALF OF THE PETITIONER

9 MR. KIMBERLY: Mr. Chief Justice, and  
10 may it please the Court:

11 The Appeals Council's decision in this  
12 case dismissing Petitioner's request for review  
13 as untimely was a final decision on his request  
14 for benefits. It brought the administrative  
15 review process to a close. After the Appeals  
16 Council's decision, there was nothing left for  
17 the agency to do, and the agency's denial of  
18 benefits became conclusive and binding.

19 Now the form and substance of the  
20 Appeals Council's decision in this case was a  
21 determination that Petitioner, by filing his  
22 application -- excuse me, by filing his request  
23 for review out of time, had failed to exhaust  
24 his administrative remedies.

25 And the question presented in this

1 case is whether the district court has  
2 authority under Section 405(g) to review that  
3 decision. It did.

4 The question of exhaustion ordinarily  
5 arises as a threshold matter as an affirmative  
6 defense in any case challenging agency action,  
7 as this Court held in Jones against Bock.  
8 Thus, if the government is not inclined to  
9 waive the Appeals Council's determination that  
10 a claimant failed to file a timely request for  
11 review, the government is free to raise it as  
12 an affirmative defense.

13 And the district court, in turn, of  
14 course has the authority to resolve the merits  
15 of that affirmative defense, to either sustain  
16 or overrule the government's affirmative  
17 defense of failure to exhaust by -- by  
18 reviewing the Appeals Council's decision for  
19 substantial evidence or otherwise abuse of  
20 discretion.

21 JUSTICE GINSBURG: What about "after a  
22 hearing"? Those words also, "final decision  
23 after a hearing"? There's no -- as I  
24 understand it, there are never hearings before  
25 the Appeals Council.

1           MR. KIMBERLY:  There is never a  
2 hearing before the Appeals Council, Your Honor,  
3 and that's true whether the Appeals Council  
4 grants review, denies review, or dismisses.

5           Our understanding of the words "after  
6 a hearing" are that they embody a exhaustion  
7 requirement and that the best reading of the  
8 word "hearing" in Section 405(g) is to give it  
9 the same meaning that it has in  
10 Section 405(b)(1), which is a hearing before an  
11 administrative law judge.  And, of course, that  
12 is not a bar to review in this case because  
13 Petitioner had such a hearing.

14           Now amicus's contrary position is that  
15 the district court in this case was required  
16 simply to take the Appeals Council's word for  
17 it that he had filed his request for review out  
18 of time, and that upon the government's raising  
19 of that affirmative defense, the district court  
20 was to reflexively dismiss the case without  
21 considering at all whether the Appeals  
22 Council's decision was correct.

23           CHIEF JUSTICE ROBERTS:  Well, it's not  
24 "take his word for it."  It's that there's no  
25 judicial review.  And if there's no judicial

1 review, that's -- that's the end of it. That's  
2 not necessarily agreeing or disagreeing. It's  
3 appreciating the fact that the legislature has  
4 precluded review.

5 MR. KIMBERLY: Well, the -- the  
6 legislature -- I think that would be a  
7 departure from this Court's cases indicating  
8 that there's a strong presumption in favor of  
9 judicial review. As the Court --

10 CHIEF JUSTICE ROBERTS: Well, on that,  
11 yes, there's normally a presumption, but surely  
12 here the presumption is at least out of the  
13 picture, if not overturned, because you have a  
14 situation where Congress in general said no  
15 review under 405(h).

16 It's not the typical case that you get  
17 review in this situation. So that ought to be  
18 enough to eliminate the presumption.

19 MR. KIMBERLY: I -- I don't think  
20 that's the right way of looking at 405(h), Your  
21 Honor. I think what Congress was attempting to  
22 do with 405(h) was make clear that the sole  
23 avenue for review of final decisions by the  
24 Commissioner of Social Security is a complaint  
25 filed under Section 405(g).

1           As to the scope of 405(g), I think the  
2       presumption in favor of judicial review, of  
3       course, applies. Any decision that is fairly  
4       characterized as a decision of the Commissioner  
5       of Social Security made after a hearing ought  
6       to be subject to review.

7           And that's particularly in light of  
8       Congress's use of the word "any" in front of  
9       "final decision." It does not limit it to any  
10      particular kind of decision. It does not limit  
11      it to decisions on the merits versus decisions  
12      based on procedural default. It says "any  
13      final decision."

14           And as the Court said in *Mach Mining*  
15      and *Michigan Academy*, in order to construe  
16      405(g) as depriving courts of their traditional  
17      role as overseers of agency action in  
18      circumstances like these, there would have to  
19      be a clear statement on the face of 405(g)  
20      itself that that was what Congress intended.

21           And there's no such clear statement on  
22      the text here. Indeed, the word "final" as it  
23      appears, we think, covers this case as a matter  
24      of -- covers the Appeals Council's decision in  
25      this case as a matter of plain text. The

1 dictionary definition --

2 JUSTICE SOTOMAYOR: It -- it seems to  
3 me -- may I go back to my question? I'm trying  
4 to see the difference between you and the  
5 government or trying to understand it.

6 The government's position appears  
7 fairly straightforward to me. They think the  
8 scope of the Court's review should be limited  
9 to the ground on which the appeal was  
10 dismissed, untimeliness. And, presumably, they  
11 would say, was there substantial evidence for  
12 the appellate court's decision to dismiss on  
13 untimeliness?

14 But I have a sense that you're arguing  
15 for a different kind of review, that you're --  
16 are you arguing that it's not just on the  
17 untimeliness question but it's on the substance  
18 question of whether or not --

19 MR. KIMBERLY: Our -- our view --

20 JUSTICE SOTOMAYOR: -- the merits of  
21 your -- your appeal was right?

22 MR. KIMBERLY: I -- we accept that if  
23 the government does not waive the question of  
24 exhaustion of administrative remedies, that the  
25 threshold issue has to be judicial review of

1 the Appeals Council's determination on  
2 untimeliness in particular.

3 But for --

4 JUSTICE SOTOMAYOR: And so -- and so  
5 assume that we were to find that the court was  
6 wrong on that, but if we say the court was  
7 right, nobody goes any further, correct?

8 MR. KIMBERLY: On -- on the merits of  
9 the Appeals Council's determination?

10 JUSTICE SOTOMAYOR: Right. If the  
11 Court says you didn't --

12 MR. KIMBERLY: I think that --

13 JUSTICE SOTOMAYOR: -- it was  
14 untimely, that ends the matter?

15 MR. KIMBERLY: I -- that's right, Your  
16 Honor. So, you know --

17 JUSTICE SOTOMAYOR: All right. Now,  
18 if we were to hold the opposite, that this  
19 wasn't untimely, who would decide the merits --

20 MR. KIMBERLY: I --

21 JUSTICE SOTOMAYOR: -- of the  
22 substance of whether what you argued was right  
23 on the merits?

24 MR. KIMBERLY: I think looking at the  
25 fourth sentence of 405(g), it would be in the

1 district court's discretion to reach the merits  
2 after overruling the Appeals Council on that  
3 question.

4 JUSTICE GINSBURG: How -- how to --  
5 skipping over the Appeals Council, when the  
6 regime that's set up is after the ALJ, you go  
7 to the Appeals Council. I think it's one thing  
8 to say the Appeals Council was wrong in saying  
9 the suit was untimely. But, if it is timely,  
10 why shouldn't the ALJ be the first person to  
11 determine the merits?

12 MR. KIMBERLY: Do you mean the Appeals  
13 Council or -- the ALJ has determined the merits  
14 in any case in which the question presented  
15 here arises. The question is whether if, upon  
16 a reversal of the Appeals Council's  
17 determination, that the --

18 JUSTICE GINSBURG: Oh, what I mean --  
19 I meant -- I misspoke. I meant the Appeals  
20 Council. The --

21 MR. KIMBERLY: Right.

22 JUSTICE GINSBURG: You're right, the  
23 ALJ has spoken, but the next one in line under  
24 the agency progression would be the Appeals  
25 Council.

1           You are urging that we skip over the  
2 Appeals Council and go back to consider the  
3 merits of the ALJ's decision.

4           MR. KIMBERLY: Well, I -- I -- I think  
5 what we're urging is that it would be in the  
6 district court's discretion. And I think that  
7 follows ineluctably from the fourth sentence of  
8 Section 405(g), which appears midway through  
9 the page on page 5a of the government's brief.

10           And if I could, I'll just very briefly  
11 read that sentence. It says, "The court shall  
12 have the power to enter, upon the pleadings and  
13 transcript of the record, a judgment affirming,  
14 modifying, or reversing the decision of the  
15 Commissioner of Social Security, with or  
16 without remanding the cause for a rehearing."

17           We think that is a clear textual  
18 rejection of the basic Chenery rule. But I  
19 want to stress that I don't think there's  
20 actually a lot of daylight between our position  
21 and the government's position on this score  
22 because, as a practical matter, in the Eleventh  
23 Circuit, where the rule that we advocate has  
24 been governing for nearly the last 40 years,  
25 district courts generally do remand back to the

1 Appeals Council when and if they determine that  
2 the Appeals Council made a mistake in  
3 dismissing the request for review as untimely.

4 And, certainly, there would be nothing  
5 in the text of the statute or our way of  
6 viewing this case that would prevent the  
7 district courts from doing that.

8 Our point is simply that the  
9 government certainly, for example, could waive  
10 the question whether the Petitioner had  
11 exhausted his administrative remedies, and if  
12 it did waive that question, surely, the  
13 district court would have the authority to move  
14 on to the merits of the case, just as it would  
15 if it found that some equitable exception to  
16 exhaustion had applied, as the Court did in  
17 Eldridge and City of Bowen. So our position is  
18 only that it would be a matter of discretion  
19 for the district court.

20 But I want to stress that the position  
21 that we take on the merits of the question  
22 presented really is fundamentally the same as  
23 the position that the government takes. Our  
24 view is that the -- a decision by the Appeals  
25 Council that a claimant has failed to file a

1 timely request for review must be reviewable  
2 under Section 405(g) by a district court and  
3 that to find otherwise would require the court  
4 to find that there's a clear statement on the  
5 face of 405(g) pointing the court in a  
6 different direction, divesting the courts of  
7 their traditional authority as overseers of  
8 agency action.

9           There is no clear statement on the  
10 face of 405(g) to that effect.

11           CHIEF JUSTICE ROBERTS: But your --  
12 your -- your clear statement is simply the  
13 reiteration of your presumption of  
14 reviewability point?

15           MR. KIMBERLY: That's right. Indeed,  
16 Your Honor, the -- the presumption of  
17 reviewability recognized four terms ago in *Mach*  
18 *Mining* and before that in the *Michigan Academy*  
19 is not merely a tie-breaking canon, it is a  
20 clear statement rule.

21           And absent a clear statement, the  
22 Court has held that there must be judicial  
23 review. It is Congress's prerogative alone to  
24 exercise its discretion to divest courts of  
25 their traditional role as overseers of agency

1 action, and unless it does so in a clear  
2 statement, it -- Congress must be presumed to  
3 have intended judicial review.

4 JUSTICE SOTOMAYOR: So this is a sort  
5 of strange case because it's not that Congress  
6 has chosen to divest the courts of total  
7 review. It told us we have review in a -- in a  
8 circumstance.

9 And so the question is, can the agency  
10 tell us what that circumstance is and/or what  
11 constitutes that circumstance? And that, I  
12 think, is a *Chenery* problem, which is, can the  
13 agency basically dictate to us the answer to  
14 that question?

15 MR. KIMBERLY: Well, I don't think  
16 that the agency can dictate to this Court the  
17 answer to the question whether there is  
18 judicial review.

19 The agency --

20 JUSTICE SOTOMAYOR: Exactly. Or what  
21 final judgment means.

22 MR. KIMBERLY: Well, I -- I -- and our  
23 view on that score is the agency of course has  
24 the authority to issue the rules and  
25 regulations that it deems necessary for a fair

1 and efficient resolution of the claims before  
2 it.

3 JUSTICE SOTOMAYOR: Without question.

4 MR. KIMBERLY: It -- it has the  
5 authority to say when it's done. It does not  
6 have the authority to dictate whether there is  
7 judicial review of its decision when it is done  
8 and when that process is concluded.

9 JUSTICE SOTOMAYOR: All right.

10 MR. KIMBERLY: Thank you. I'll  
11 reserve my time.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Huston.

15 ORAL ARGUMENT OF MICHAEL R. HUSTON  
16 FOR THE UNITED STATES, AS AMICUS CURIAE, IN  
17 SUPPORT OF REVERSAL AND REMAND

18 MR. HUSTON: Mr. Chief Justice, and  
19 may it please the Court:

20 The Social Security Appeals Council  
21 dismissal order in this case was a final  
22 decision because it marked the agency's last  
23 word on Petitioner's application for  
24 disability.

25 JUSTICE SOTOMAYOR: Mr. Huston, if you

1 believe that, is the government instructing its  
2 line attorneys to waive exhaustion of remedies  
3 in all appeals from timeliness demands?

4 MR. HUSTON: Yes, during the pendency  
5 of this -- of -- until this Court rules in this  
6 case, we are, Your Honor, as we described in  
7 our brief, in our opening brief.

8 We are no longer notifying claimants  
9 who receive an untimely dismissal -- a  
10 dismissal for untimeliness from the Appeals  
11 Council that they cannot seek judicial review,  
12 and where the cases are going to litigation,  
13 the Department of Justice is no longer invoking  
14 that -- that rule.

15 JUSTICE SOTOMAYOR: So why don't you  
16 just continue doing that irrespective of what  
17 we do? Should we have granted, should we have  
18 just dug in this case?

19 MR. HUSTON: Well, Your Honor, there  
20 -- there is a entrenched, long-standing  
21 division among the circuits on the question  
22 whether the existing regulation can be --

23 JUSTICE SOTOMAYOR: You've mooted the  
24 -- you've mooted the split --

25 MR. HUSTON: Well --

1 JUSTICE SOTOMAYOR: -- with your  
2 action.

3 MR. HUSTON: Your Honor, again, the --  
4 the court granted the petition in order to  
5 resolve the disagreement among the courts of  
6 appeals on the question whether the agency's  
7 regulation, which is published through notice  
8 and comment rule-making, is a reasonable  
9 interpretation of the statute.

10 Now we believe --

11 CHIEF JUSTICE ROBERTS: You haven't --  
12 haven't mooted the case, have you?

13 MR. HUSTON: No. No. We certainly  
14 have not mooted this particular --

15 CHIEF JUSTICE ROBERTS: Mr. Smith is  
16 still a loser, right?

17 MR. HUSTON: Absolutely, Your Honor,  
18 that's correct. And he -- he --

19 CHIEF JUSTICE ROBERTS: Well, you  
20 know, of course, he lost.

21 (Laughter.)

22 MR. HUSTON: He -- he lost. And --  
23 and on remand, Your Honor, we will continue to  
24 take the position that his dismissal from the  
25 Appeals Council was correct, that he did not

1 timely exhaust his administrative remedies,  
2 and, as a result, he cannot get judicial  
3 review.

4 But the question on which the courts  
5 are divided is whether the existing regulation  
6 is a reasonable one. We submit that the answer  
7 to that question is no, again, because the  
8 plain text of the statute under the plain  
9 meaning of final, it -- the agency's decision  
10 was conclusive, the agency has no more work to  
11 do, and the agency held a hearing in an --  
12 before an administrative law judge on  
13 Petitioner's application for Social Security  
14 benefits.

15 CHIEF JUSTICE ROBERTS: Now your view  
16 --

17 JUSTICE KAVANAUGH: The government's  
18 -- go ahead.

19 CHIEF JUSTICE ROBERTS: Your view is  
20 simply that requirement made after a hearing is  
21 purely chronological, doesn't have anything to  
22 do with the basis of finality at all?

23 MR. HUSTON: Well, I think I would say  
24 two things about that, Mr. Chief Justice.

25 The first is that it is chronological

1 in the sense that there -- there is a reference  
2 to a hearing in Section 405(b)(1), 405(h), as  
3 Your Honor mentioned, and in 405(g). And we  
4 think it means the same thing in all three  
5 places, which is that the basic unit of  
6 decision by which this agency resolved --  
7 resolves claims for benefits is an ALJ hearing.

8 But I don't think that I would -- that  
9 it's quite right to say that it has nothing to  
10 do with finality. I think, as the Court has  
11 said in *Salfi*, in *Eldridge*, and in *City of New*  
12 *York*, the phrase "final decision after a  
13 hearing" in Section 405(g) refers to the  
14 requirement that the claimant must fully  
15 exhaust his administrative remedies before a  
16 court reviews his entitlement to benefits.

17 And we fundamentally agree with that  
18 proposition. This case is not about whether  
19 Petitioner is required to complete the entire  
20 administrative process and exhaust.

21 He is. But the question -- the basis  
22 for the Social Security Administration's  
23 decision, its final decision in this case, was  
24 a determination that he had failed to complete  
25 the administrative process. And that is a type

1 of determination that courts review pursuant to  
2 a wide range of statutes that, just like this  
3 one, require a court to undertake judicial  
4 review only after the agency gives its final  
5 decision beside its --

6 JUSTICE KAGAN: Mr. Huston, if I could  
7 just understand your position correctly,  
8 suppose that before the ALJ hearing happened,  
9 there was a filing that was not timely, so  
10 let's say that the person had not timely filed  
11 a motion for reconsideration.

12 What would happen then according to  
13 the government?

14 MR. HUSTON: So there's one thing that  
15 I think is clear and one thing that -- that is  
16 a little bit more difficult.

17 The clear thing is that the -- the  
18 claimant in that case would absolutely be  
19 required to continue to pursue the  
20 administrative process to essentially appeal up  
21 the chain the question of timeliness. He would  
22 be required to go seek a hearing and seek  
23 review from the Appeals Council on the question  
24 whether he had, in fact --

25 JUSTICE KAGAN: Okay. So --

1 MR. HUSTON: Yeah.

2 JUSTICE KAGAN: But let's say he did  
3 that.

4 MR. HUSTON: Right.

5 JUSTICE KAGAN: But in none of these  
6 steps is -- is he ever granted a hearing --

7 MR. HUSTON: Right.

8 JUSTICE KAGAN: -- because nobody  
9 needs a hearing to decide whether your filing  
10 was timely or not. So then what?

11 MR. HUSTON: So I think that's a -- a  
12 more difficult case than this one that the  
13 Court doesn't have to resolve today.

14 I think the right way to think about  
15 the problem is probably this Court's decision  
16 in *Salfi*. And I think that the logic of the  
17 Court's decision in that case is that where the  
18 agency has reasonably determined that it  
19 doesn't need a hearing in order to make a final  
20 decision on a particular issue, then the after  
21 a hearing requirement is not a barrier to  
22 judicial review.

23 But, again, I don't --

24 JUSTICE KAGAN: I mean, *Salfi* is a  
25 constitutional avoidance case, isn't it?

1           MR. HUSTON: In part, Your Honor. The  
2 courts -- but the Court is, I think, quite  
3 consciously addressing the reason why judicial  
4 review in that case was consistent with its  
5 understanding of the -- a final decision and  
6 after a hearing.

7           I think the court said a similar thing  
8 in Bowen against City of New York, which was  
9 not about a constitutional claim. That was an  
10 allegation that the agency had failed to  
11 properly apply its own regulation.

12           I think that's the -- the essential  
13 feature of the claimant's claim in this case,  
14 that the agency made a mistake in applying its  
15 timeliness regulation.

16           JUSTICE KAGAN: And that -- that does  
17 seem to read out the "made after a hearing"  
18 from the statute.

19           MR. HUSTON: So, Your Honor, again, I  
20 think that the reason why "after a hearing" is  
21 in 405(g) is because it's also in 405(h) and  
22 it's in 405(b)(1). 405(b)(1) is the basic  
23 instruction to the agency to hold a hearing in  
24 order to make a decision.

25           And so the statute then says, because

1 the agency typically needs to hold a hearing in  
2 order to make a decision, judicial review is  
3 available for a final decision after a hearing.  
4 I think it holds together in the ordinary  
5 course.

6 What I think Salfi, Eldridge, and City  
7 of New York recognized is that there may be  
8 occasional cases where the agency resolves a  
9 particular question but doesn't feel it's  
10 necessary to hold a hearing. And in that case,  
11 there's at least a strong claim for judicial  
12 review.

13 JUSTICE GINSBURG: Are you -- are you  
14 not agreeing with counsel, who told us that  
15 "after a hearing" refers only to the ALJ, so we  
16 don't have to worry about the appeals court --  
17 the Appeals Council never holding hearings  
18 because the hearing that counts is the one  
19 before the ALJ?

20 MR. HUSTON: Your Honor, we agree with  
21 that as a basic proposition. The hearing  
22 requirement, we agree with -- I agree with my  
23 friend Mr. Kimberly that 405(g)'s reference to  
24 a hearing is talking about the same thing as  
25 405(b)(1) when it refers to a hearing.

1           It's talking about an ALJ hearing. We  
2 had an ALJ hearing in this case. And so that's  
3 fine. I think the problem with the amicus's  
4 argument is that it would mean that Appeals  
5 Council decisions, of which there are  
6 approximately 22,000 every year, are never  
7 reviewable. And that simply would not make any  
8 sense because the Appeals Council virtually  
9 never holds a hearing. They -- they decide  
10 cases typically on the papers.

11           And so I just don't think that is  
12 consistent with this statutory regime as it's  
13 been set up. I -- I also agree with my friend,  
14 Mr. Kimberly, that I don't think the  
15 predictions by the amicus of a sort of flood of  
16 claims on the federal courts have been borne  
17 out. That certainly hasn't been the experience  
18 of the Eleventh Circuit.

19           Going forward, there's likely to be  
20 even fewer of these type of disputes because,  
21 as of 2018, so after the proceedings at issue  
22 in this case, but as of 2018, the -- the  
23 administration authorizes e-filing, and that  
24 generates an electronic receipt. So the type  
25 of disputes about postmarks and when something

1 was submitted, we expect there to be fewer of  
2 those in the future.

3 JUSTICE KAVANAUGH: You -- you portray  
4 this as a straightforward question of statutory  
5 interpretation, correct?

6 MR. HUSTON: That's right, Your Honor.

7 JUSTICE KAVANAUGH: But the  
8 government's been on the opposite side of this  
9 for a long time. Is there an explanation for  
10 that?

11 MR. HUSTON: Your Honor, we take the  
12 text of the statute very seriously. And we had  
13 occasion, once the Seventh Circuit weighed in  
14 on the other side of the split, to -- to  
15 reconsider the question. And we had occasion  
16 when the petition for a writ of certiorari was  
17 filed in this case to -- to think very  
18 seriously about the question.

19 And we became convinced that the  
20 statutory text is plain and dictates the  
21 result, and, moreover, that the reasons that  
22 have been offered by the various circuits on  
23 the other side of the split just don't simply  
24 hold up.

25 JUSTICE BREYER: There is -- there is

1 an argument on the other side that -- that the  
2 -- look, you read the statute, it has to be an  
3 individual. It has to be a final decision.  
4 You see a -- an unnamed plaintiff class is not  
5 an individual within the meaning here.

6 There has to be a final decision. A  
7 decision to reopen is not a final decision.  
8 That's Salfi. They mean the final decision on  
9 the merits, not reopening. And it has to be  
10 made after a hearing.

11 Well, that could be read as saying  
12 that the final decisions that are reviewable  
13 are final decisions that had something to do  
14 with the hearing, some kind of relationship.

15 But that means -- that would mean a  
16 decision that is made solely on procedural  
17 grounds. And those procedural grounds relate  
18 solely to the appeals process, does not fall  
19 within the statute.

20 Now that's a possible reading. So --  
21 so -- so your -- your response to that is what?

22 MR. HUSTON: I think it's inconsistent  
23 with the Court's decisions in Salfi, in  
24 Eldridge, and in City of New York, all of which  
25 have said that the way to read this statute,

1 405(g), is as a waiveable exhaustion of  
2 remedies requirement.

3 And in all three cases, the Court  
4 authorized judicial review of a question that  
5 had not been before the ALJ as part of the  
6 disability proceeding. I'm glad you brought up  
7 Sanders, Your Honor, which is obviously the  
8 sort of -- the amicus's key case, but Sanders  
9 is really about a fundamentally different  
10 procedure; a reopening is something that is  
11 entirely unaddressed by the statute.

12 And anytime a claimant is seeking to  
13 reopen a claim, he will have received the one  
14 opportunity for judicial review that the  
15 statute guarantees him.

16 I do want to spend just a moment, if I  
17 might, picking up Justice Ginsburg and Justice  
18 Sotomayor's questions about what judicial  
19 review would look like in the event that a  
20 court were to conclude that the agency's  
21 decision regarding timeliness was not supported  
22 by substantial evidence.

23 We think it's very, very important for  
24 the Court to hold that at that time, if -- if  
25 that were the decision of the district court,

1 the only appropriate remedy is a remand. The  
2 court should not just simply skip over the  
3 Appeals Council and proceed to decide the  
4 question.

5 There's three basic reasons. The  
6 first is that we think it's compelled by this  
7 Court's decision in Heckler v. Ringer, which  
8 holds that where a claimant has a viable path  
9 to pursue relief in the agency, exhaustion will  
10 not be excused. And that would be exactly  
11 Petitioner's situation. He could go back to  
12 the Appeals Council and attempt to assert the  
13 grounds of error that he has.

14 We also think that's consistent with  
15 this Court's entire body of precedent starting  
16 from Chenery. And we think it's also  
17 consistent with Salfi, which recognized that  
18 one critical feature of exhaustion is to enable  
19 the agency to compile a record that is adequate  
20 for judicial review.

21 That's exactly what the Appeals  
22 Council exists to do. I'd urge the Court to  
23 look at JA 26, which is Petitioner's request  
24 for Appeals Council review. He says, the  
25 problem I have with the ALJ decision is that it

1 was based on an incomplete record.

2 That's exactly the type of question  
3 where the Appeals Council can bring its  
4 expertise to bear. And until it does so, this  
5 Court is really not well suited to undertake  
6 the substantial evidence review that applies.

7 Now Mr. Kimberly referenced the -- the  
8 fourth sentence of Section 405(g), the court's  
9 power to affirm, reverse, or modify the  
10 agency's decision. That's not an unusual  
11 formulation.

12 There are other statutes that have the  
13 same text, the FTC Act, 15 U.S. Code 45(c)  
14 authorizes the same thing, but this Court has  
15 held in *FTC v. Sperry*, against *Sperry* and  
16 *Hutchison* that judicial questions by the FTC  
17 are subject to the *Chenery* principle.

18 CHIEF JUSTICE ROBERTS: So -- so there  
19 you're not so focused on the text?

20 MR. HUSTON: No, Your Honor, I think  
21 the Court as -- the Court as a general matter  
22 has the authority in a case to affirm, modify,  
23 or reverse a decision, but the principle of  
24 *Chenery* is that it would be an abuse of that  
25 discretion to simply skip over the

1 administrative process and substitute a  
2 decision that Congress has assigned to the  
3 agency for a decision made by a court.

4 In a -- in a more ordinary case, where  
5 the entire administrative process is borne out  
6 and the appeals -- the agency has no more work  
7 to do, it would be appropriate for a court  
8 potentially to affirm, modify -- or modify the  
9 decision, but in this case where the -- the --  
10 the principle of *Chenery* is that the agency's  
11 decision has to be judged on the rationale that  
12 the agency gave.

13 And so, for all those reasons, we  
14 would urge the Court to hold that judicial  
15 review is authorized in this case, but to make  
16 clear that it must be limited only to the  
17 rationale that the agency gave for its  
18 decision.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Mr. Gupta.

23

24

25

1 ORAL ARGUMENT OF DEEPAK GUPTA  
2 COURT-APPOINTED AMICUS CURIAE  
3 IN SUPPORT OF THE JUDGMENT BELOW

4 MR. GUPTA: Mr. Chief Justice, and may  
5 it please the Court:

6 The way that Section 405(g) has  
7 successfully cabined judicial review for eight  
8 decades for the more than a dozen massive  
9 claims processes to which it now applies is to  
10 limit judicial review not just to any final  
11 agency action but to a particular kind of  
12 action.

13 Each of the words, a final decision of  
14 the Commissioner made after a hearing, and  
15 especially those last four words, needs to be  
16 read together, rather than in isolation,  
17 because each word qualifies and modifies the  
18 kind of action in question.

19 In SSI cases like this one under Title  
20 XVI of the Social Security Act, Section 405(g)  
21 guarantees judicial review only for disputes  
22 over the eligibility or the amount of welfare  
23 benefits, the matters on which the Social  
24 Security Act itself requires a hearing and a  
25 final determination, not on procedures afforded

1 under the agency's regulations.

2 So the key words to start with, I  
3 think, are the ones that the Chief Justice,  
4 Justice Kagan, and Justice Breyer have all  
5 asked about, which are "after a hearing."

6 And I think that the parties'  
7 interpretation comes perilously close to  
8 reading -- either reading the words out of the  
9 statute or reading them so that there isn't  
10 really any plausible relationship between the  
11 decision and the -- and the "after a hearing"  
12 requirement.

13 And I think, actually, Congress chose  
14 those words carefully and they meant there to  
15 be a relationship.

16 JUSTICE GINSBURG: Before we go into  
17 "after a hearing," final decision. A decision  
18 of a tribunal dismissing a case on a procedural  
19 ground, that means that the tribunal is  
20 disassociating itself from the case, it has  
21 spoken its last word, is generally considered a  
22 final decision.

23 So, before we get to your "after a  
24 hearing," do you agree that this determination  
25 to dismiss for untimeliness is a final

1 decision, the end of the -- the end of the road  
2 for the agency? The agency has now  
3 disassociated itself from this case?

4 MR. GUPTA: Well, as I said, I don't  
5 think those words can be read in isolation,  
6 Justice Ginsburg. And I think even if you set  
7 aside "after a hearing," you still have the  
8 words "final decision of the Commissioner."

9 And I think that does some work here,  
10 because one way to think about this is the way  
11 that cases come to this Court from the state  
12 courts under 1257.

13 So, if you have an intermediate state  
14 court decision, the petitioner has to first go  
15 to the state supreme court and find a -- file a  
16 timely petition.

17 And only when they do that -- if the  
18 -- if the state court says we're not taking the  
19 case, right, that then becomes the final  
20 decision of the state court system and it comes  
21 here.

22 And the way that the Social Security  
23 process works is similar. When the Appeals  
24 Council denies review, that becomes the final  
25 decision. So the -- the -- the statute

1 delegates to the Social Security Administration  
2 the ability to determine when it produces a  
3 final decision of the Commission.

4 JUSTICE SOTOMAYOR: Mr. Gupta, that --  
5 that's a somewhat awkward way of putting it, in  
6 my mind.

7 MR. GUPTA: Well --

8 JUSTICE SOTOMAYOR: Certainly, the  
9 agency has the full power under the Act to say  
10 what steps the individual has to take to  
11 exhaust their process. But that seems and  
12 feels substantially different to me than it  
13 having the final word of whether someone has  
14 actually followed that process or not.

15 And this comes perilously close to  
16 reading the words "final judgment" out of the  
17 Act and saying that the agency can tell us what  
18 that means. It may tell us how to exhaust its  
19 processes, but I don't think it can tell us  
20 what constitutes the exhaustion of that  
21 process.

22 Let -- let -- let me give you the --  
23 the extreme hypothetical. Let's say the agency  
24 here had said they presented us with a proof of  
25 mailing that consisted of a stamp by the post

1 office, but we've never seen that stamp before,  
2 so we're not going to believe it. And the  
3 petitioner says: I'm going to a court because  
4 that's ridiculous, you know, the stamp is --  
5 and brings us all sorts of proof or presents  
6 the agency with all sorts of proof that this is  
7 the actual stamp by the post office.

8           You would suggest that we don't have a  
9 right to tell the agency it made a mistake  
10 there?

11           MR. GUPTA: Okay, so a couple of  
12 responses, Justice Sotomayor.

13           First, the -- the analogy to the --  
14 the way cases get here in the state court  
15 system, I'd love to take credit for that  
16 analogy. That was actually the Solicitor  
17 General's analogy in Sims versus Apfel. That's  
18 the way they described the way this works.

19           And I think this Court has said  
20 repeatedly, most recently in Sims versus Apfel,  
21 that the word "final decision" isn't fully  
22 defined by the statute and it leaves to the  
23 agency the ability to flesh out the process.  
24 So I think this Court has always recognized  
25 that the agency gets to decide how it produces

1 a final decision of the Commissioner.

2 Now I'll grant you, Justice Sotomayor,  
3 that in the typical exhaustion regime that  
4 we're used to, questions about whether  
5 exhaustion occurred goes to court. And in --  
6 in this respect, you know, this is different.  
7 It's more like a procedural default regime if  
8 you'd like.

9 And -- and I think Congress chose this  
10 regime advisedly because it was dealing with a  
11 massive claims process. It could have chosen  
12 no review, which was true of the processes to  
13 which it compared this. So it was thinking  
14 about the war veterans' process, longshoremen  
15 process, workers' compensation for federal  
16 workers. All of those schemes at the time had  
17 no judicial review.

18 And Congress could have chosen to do  
19 that. You didn't have judicial review of  
20 veterans' appeals until 1988. Congress could  
21 have chosen review of everything, which would  
22 have been untenable at a time in 1939 when you  
23 had 179 federal district judges and you were  
24 about to unleash millions of claims onto the  
25 system.

1           And so they chose to land somewhere in  
2     between. And the question is, where did they  
3     land in between? And I think, you know, we can  
4     talk about final decision in isolation, but I  
5     think, again, Congress chose all of these  
6     words, and they're all working together as a  
7     coherent phrase.

8           And so I'd like to turn to -- to the  
9     "after a hearing" requirement because I think  
10    it does a lot of work here. And in *Califano*  
11    *versus Sanders*, what this Court held is that  
12    "after a hearing," adopting Judge Friendly's  
13    reasoning, means that -- that the -- the matter  
14    on which a claimant seeks review does not come  
15    within 405(g) if it's one that may be denied  
16    without a hearing or where the hearing would be  
17    afforded only under the agency's regulations  
18    and not by the Social Security Act itself.

19           JUSTICE GORSUCH: Mr. Gupta, I -- I  
20    appreciate your heroic efforts there with that  
21    argument and -- and -- and your appointment to  
22    the Court. Thank you for your service.

23           MR. GUPTA: Thank you.

24           JUSTICE GORSUCH: But, on that, Judge  
25    Friendly also admitted his reading was -- what

1 did -- the tyranny of literalism, I think is  
2 what he complained about.

3 MR. GUPTA: Right.

4 JUSTICE GORSUCH: So you -- you argue  
5 that we should pay close attention to the  
6 statute. I've been listening to you for a  
7 number of minutes tell me I need to do that.  
8 And I don't see in the statute the words "a  
9 hearing pursuant to" some statutory command. I  
10 see "pursuant after a hearing." There was a  
11 hearing here.

12 MR. GUPTA: Let -- let me take you  
13 then to the text. And I think, Justice Gorsuch  
14 --

15 JUSTICE GORSUCH: So -- so -- so --  
16 so, I mean, an argument from literalism seems  
17 to me it might have to live with the tyranny of  
18 literalism, Mr. Gupta.

19 MR. GUPTA: Sure. And -- and -- and,  
20 you know, I think it's important to emphasize  
21 here that we're not only dealing with the text  
22 that -- that Congress enacted in 1939. I  
23 mentioned that Congress has incorporated this  
24 statute by reference a dozen times over the  
25 years, almost every decade, in fact, since the

1 statute was enacted. And one time that they  
2 did that was in 1972, when they created the SSI  
3 system, the case -- the system under which this  
4 case proceeds.

5 So what you actually need to look at  
6 first, I think, is Section 1383(c)(3). That's,  
7 if you pick up the Solicitor General's brief,  
8 the gray brief, and you look at page 9a, the  
9 text is set forth there. And that is not a  
10 text that I think the -- the parties have paid  
11 much attention to.

12 But what it says is, "The final  
13 determination of the Commissioner of Social  
14 Security after a hearing under paragraph  
15 (1)" -- so there's your reference, Justice  
16 Gorsuch -- "a hearing under paragraph (1) shall  
17 be subject to judicial review as provided in  
18 Section 405(g) of this title to the same extent  
19 as the Commissioner's final determinations  
20 under Section 405 of this title."

21 So then, in order to understand what  
22 hearing the -- the statute is referring to, we  
23 have to look at paragraph (1). And so the --  
24 so -- so that what I just read to you was at  
25 page 9a of the Petitioner -- of the SG's

1 appendix.

2 Now I'm going to read you from -- from  
3 the reference to paragraph (1). And that is --  
4 at the SG's brief, this is the appendix to  
5 their brief at 7a. And it's a little bit of a  
6 long sentence. It's at the bottom of the page.  
7 And it starts with the words "The  
8 Commissioner." So this is where the SSI  
9 provision is telling us what hearing is  
10 required for SSI claimants like Mr. Smith.

11 And it says -- and I'm going to just  
12 skip a few words as I read, but the  
13 Commissioner of Social Security shall provide a  
14 hearing to any individual who is or claims to  
15 be an eligible individual and is in  
16 disagreement with any determination under this  
17 subchapter -- remember that the -- the statute  
18 used the word "determination," so it's saying a  
19 determination under the Act -- with respect to  
20 eligibility of such individual for benefits or  
21 the amount of such individual's benefits.

22 JUSTICE GORSUCH: Mr. Gupta, I hate to  
23 interrupt, but I understand you -- your basic  
24 argument boils down to this, that no hearing  
25 was required here under the various terms of

1 the statute.

2 MR. GUPTA: That's right.

3 JUSTICE GORSUCH: Okay. And I accept  
4 that for argument's sake at least.

5 I still go back to 405(g) on judicial  
6 review, and it doesn't say any of that. It  
7 just says an individual after any final  
8 decision -- and Justice Ginsburg has walked us  
9 through that carefully -- made after a hearing  
10 gets to -- gets to go to court.

11 MR. GUPTA: Right.

12 JUSTICE GORSUCH: It doesn't say this  
13 particular kind of hearing to which he is  
14 entitled. It says a hearing.

15 MR. GUPTA: Right.

16 JUSTICE GORSUCH: Maybe -- maybe one  
17 given -- imagine that -- the executive branch  
18 giving a hearing as a matter of grace.

19 MR. GUPTA: Right. And -- and I --

20 JUSTICE GORSUCH: Okay? So what about  
21 that?

22 MR. GUPTA: Well, I think, Justice  
23 Gorsuch, that's precisely the argument that  
24 this Court rejected in Califano versus Sanders.

25 JUSTICE GORSUCH: Well, if I don't

1 read Sanders -- I -- I -- I -- I -- I have  
2 parsed Sanders. And I'm sure you have too.

3 MR. GUPTA: Right.

4 JUSTICE GORSUCH: And it is rather  
5 cryptic on this score, and it doesn't directly  
6 adopt Judge Friendly's concern about the  
7 tyranny of literalism. So, if I don't feel  
8 myself bound by Sanders on this score, why  
9 shouldn't I follow the plain language of the  
10 statute --

11 MR. GUPTA: Okay.

12 JUSTICE GORSUCH: -- which you've  
13 otherwise argued we should attend to carefully?

14 MR. GUPTA: Sure. So, Justice  
15 Gorsuch, I mean, of course, it's a -- it's a  
16 precedent of this Court, and I do think it's on  
17 -- you know, the only precedent precisely on  
18 this text. But, if you want to set it aside, I  
19 do think that you can get there just under the  
20 text, and I think, remember, Congress enacted  
21 the statute that I was just reading you in  
22 1972.

23 And it's the only reason 405(g)  
24 applies in this case. And it's -- so it did so  
25 a number of times, and I think that reflects

1 some acquiescence on Congress's part on the way  
2 that the -- the system was functioning. So --

3 JUSTICE GORSUCH: Last question and  
4 I'll stop, I promise.

5 MR. GUPTA: Sure.

6 JUSTICE GORSUCH: I promise.

7 (Laughter.)

8 JUSTICE GORSUCH: You'd agree that --  
9 that the Social Security Administration could  
10 grant a hearing that it is not statutorily  
11 compelled to give?

12 MR. GUPTA: Absolutely.

13 JUSTICE GORSUCH: All right.

14 MR. GUPTA: Absolutely. But -- but I  
15 think, you know, these questions, I -- I -- I  
16 welcome them because I think -- I'm glad we're  
17 turning to Section 1383 because I think it's  
18 critical here. It tells you what hearing. It  
19 says --

20 JUSTICE BREYER: I know, but there was  
21 that kind of hearing here.

22 MR. GUPTA: No, there wasn't.

23 JUSTICE BREYER: There wasn't? There  
24 was no hearing on whether he's entitled to  
25 benefits or not?

1 MR. GUPTA: No -- there was a hearing  
2 on -- on the question of benefits.

3 JUSTICE BREYER: Yeah.

4 MR. GUPTA: But that's not the matter  
5 on which --

6 JUSTICE BREYER: Well, that's  
7 different. That's different.

8 MR. GUPTA: -- Mr. Smith is seeking  
9 judicial review. And I think --

10 JUSTICE BREYER: I'm sorry, there was  
11 a hearing.

12 MR. GUPTA: So -- so now I --

13 JUSTICE BREYER: There was a hearing  
14 of the kind set forth in paragraph (1).

15 MR. GUPTA: Right.

16 JUSTICE BREYER: And then there was a  
17 final decision. Now it turns out that the  
18 final decision rested not upon a ground having  
19 to do with the hearing but on a different  
20 ground, a ground having to do with Appeals  
21 Council procedure, okay? We agree on that?

22 MR. GUPTA: Yes.

23 JUSTICE BREYER: Okay. So now you are  
24 a Social Security applicant, and you would like  
25 some money because you think you're entitled to

1 it. So you go to the hearing examiner, and he  
2 says -- what's now called -- what used to be  
3 called the hearing examiner, now it's the ALJ  
4 -- okay, you go to the ALJ and he says: No.  
5 And you think he's wrong, so you would like to  
6 appeal. And they say: Go to the Appeals  
7 Council. The Appeals Council says: Hey, you  
8 made a mistake, you lose.

9 Does he care whether the mistake was,  
10 well, the hearing examiner was right on the  
11 merits, the mistake was that the hearing  
12 examiner did something procedurally wrong or  
13 right? He -- the Appeals Council procedure was  
14 wrong or right?

15 What does he care what the mistake is?  
16 All he knows is that there is a final decision  
17 of the agency which was made after a hearing.  
18 Now why would you write such a thing, "after a  
19 hearing"? Because whether or not there is a  
20 hearing will weed out a lot of worthless  
21 applications, and it will weed out the people  
22 who didn't go through the right procedure to  
23 begin with.

24 But we are dealing with people who  
25 did. And so what do they care? And why would

1 a body of law that presumes when you lose, you  
2 get judicial review, suddenly, without saying  
3 so in the statute, make some kind of exception  
4 as to whether the reason you lost was a  
5 procedural one having to do with the Appeals  
6 Council or that the reason you lost is because  
7 both the hearing examiner and the Appeals  
8 Council thought you didn't -- weren't entitled  
9 to it? Why?

10 MR. GUPTA: I will say --

11 JUSTICE BREYER: That's not a tyranny  
12 question.

13 MR. GUPTA: Yeah.

14 JUSTICE BREYER: That's a purposive,  
15 consequential --

16 MR. GUPTA: Right.

17 JUSTICE BREYER: -- and basic question  
18 for those who don't want to get bogged down in  
19 the weeds.

20 MR. GUPTA: Okay. So, I mean, I --  
21 Justice Breyer, I do think that this is -- it's  
22 important to emphasize what I am defending is  
23 the status quo. This is the way it has worked  
24 under the Social Security regime and all of the  
25 other regimes, the dozen regimes I mentioned,

1 with the exception of the Eleventh Circuit, for  
2 -- for eight decades.

3 And -- and I think that's important  
4 because Congress had something in mind here.  
5 Congress was not --

6 JUSTICE BREYER: Yes, I told you what  
7 it had in mind.

8 MR. GUPTA: Congress -- no --

9 JUSTICE BREYER: It had in mind making  
10 sure there's a hearing, which means we weed out  
11 the bad ones.

12 MR. GUPTA: Right. No, but Congress  
13 was not concerned -- Congress's concern was  
14 with ensuring that this entire massive process  
15 was governed by law. It was not directing  
16 cases into the federal courts for error  
17 correction purposes. It was doing so to ensure  
18 that -- that there would be a judicial  
19 oversight of the process and that when people  
20 had exhausted completely through the process  
21 and had a determination on the merits, that  
22 that merits determination on eligibility or  
23 amount would be reviewed in court.

24 And I think it's important that  
25 Congress chose those words carefully in 1972.

1 They said -- they were aware that -- of the way  
2 that this had been -- this language had been  
3 interpreted. And if you look in the appendix  
4 to the -- the green brief, the amicus brief, we  
5 laid out the dozen schemes where Congress has  
6 expressly incorporated 405(g).

7 And -- and many of those are  
8 compensation regimes. They're benefits  
9 regimes. And in each of them, or many of them,  
10 Congress either directly or by implication  
11 limited review to the decision of compensation  
12 or eligibility for benefits.

13 CHIEF JUSTICE ROBERTS: What do you  
14 say about the application and the presumption  
15 of review, which is one of the predicates to  
16 the question?

17 MR. GUPTA: Right. I think, you know,  
18 you asked about this, Mr. Chief Justice,  
19 earlier, had mentioned 405(h). And I think  
20 405(h) goes a long way to addressing the  
21 question.

22 The -- the Court has said about the  
23 presumption in favor of judicial review that  
24 it's just that, it's a presumption, and it's no  
25 substitute for looking at the specific words of

1 a statutory text and its -- its purpose and  
2 history.

3 So, here, we know Congress took the  
4 unusual step in 405(h) of saying there's no  
5 review at all in Social Security cases by any  
6 tribunal, except through this very specific  
7 channel that we're creating. And then that  
8 channel linked the decision with the hearing.

9 And I think Congress did that  
10 advisedly. And then they followed up again in  
11 1972 for this specific regime and said: We are  
12 linking the -- the determination that can be  
13 reviewed with the hearing requirement.

14 JUSTICE BREYER: But what does the  
15 link is the word "after".

16 MR. GUPTA: So --

17 JUSTICE BREYER: It was after here.

18 MR. GUPTA: Right. It's true, it was  
19 chronologically after.

20 JUSTICE BREYER: And, therefore, the  
21 baddies were in doubt, there was a hearing.  
22 And now we just have a different reason. The  
23 reason is procedural, rather than the reason  
24 being substantive review on the merits, which  
25 was the four words that were my basic question,

1       why does that matter?

2                   MR. GUPTA:   So that was true in  
3       Califano versus Sanders as well.   There had  
4       been an ALJ hearing.   It was after in that  
5       sense.

6                   But that is not -- that is not what  
7       mattered.   What mattered is whether the statute  
8       requires a hearing.   Otherwise, you could have  
9       review where the agency just denied a hearing,  
10      where there should have been a hearing.   That  
11      would not make much sense.

12                   And you would also disincentivize the  
13      agency from affording claimant-friendly  
14      processes for fear that they would result in  
15      review.   So, instead, it makes much more  
16      sense -- and this is what Judge Friendly said  
17      and what this Court said in adopting his  
18      reasoning -- to -- to look to what the statute  
19      requires.

20                   JUSTICE KAGAN:   But, Mr. Gupta, on  
21      your theory, doesn't that mean that merits  
22      decisions of the Appeals Council would not be  
23      reviewable?

24                   MR. GUPTA:   I don't think so.   And I  
25      think that's because the Appeals Council would

1 be -- would still be reviewing the matter on  
2 which a hearing is required.

3 So, again, my test is, Justice Kagan,  
4 you asked: Is the thing on which the claimant  
5 seeks judicial review the -- the thing on which  
6 the statute requires a hearing?

7 So, when the Appeals Council reviews  
8 that thing, it's still the thing, the  
9 eligibility or the amount of benefits, on which  
10 there would be judicial review, providing, of  
11 course, that they exhausted the process  
12 provided by the agency and had a decision -- a  
13 final decision of the Commissioner.

14 Then it would be a final decision of  
15 the Commissioner after the hearing required by  
16 the statute. And so --

17 JUSTICE GINSBURG: But it's so out of  
18 sync with the normal understanding of a  
19 dismissal on procedural grounds. Let's just  
20 take a case in the federal court, and there's a  
21 motion to dismiss for improper venue. The  
22 court says: I agree, out with the case.

23 That certainly qualifies as a final  
24 decision that would be reviewable.

25 MR. GUPTA: Right. And -- and I don't

1 deny that, Justice Ginsburg, that -- that, you  
2 know, "final" means different things in  
3 different contexts. And if all we had was the  
4 word "final" here, this would be a very  
5 difficult assignment for me to discharge. But,  
6 luckily, we have other words in the statute and  
7 they mean something.

8           And I think Congress chose these words  
9 carefully, and they -- they chose these words  
10 to address the situation in which they wanted  
11 not no review, not review of everything, but  
12 review of the merits, the substance.

13           And then I think it's -- it's  
14 important that Congress chose this same regime  
15 and expressly incorporated it over and over  
16 again when it had these massive claims  
17 processes, when it wanted to ensure that there  
18 would be judicial review of the merits but not  
19 judicial review of every fact mound or  
20 discretionary dispute about compliance with the  
21 agency's internal processes, because the  
22 judiciary does not add a whole lot of  
23 institutional competence to this very friendly,  
24 claimant-friendly process, when those kinds of  
25 cases are being channeled into federal court.

1 JUSTICE KAVANAUGH: Well, the  
2 judiciary adds something when the Appeals  
3 Council's wrong in how it enforces its  
4 procedural rules.

5 MR. GUPTA: Right. No, of course.  
6 And, you know -- and there is --

7 JUSTICE KAVANAUGH: Yeah. And that's  
8 of value. That's a traditional role.

9 MR. GUPTA: That's right. And, of  
10 course, there is still review of constitutional  
11 questions and there will be mandamus review for  
12 the -- for the egregious situation, but I think  
13 the floodgates concerns were what were  
14 animating Congress. It comes through loud and  
15 clear.

16 JUSTICE KAVANAUGH: Well, on -- sorry  
17 to interrupt -- on the floodgates, but if  
18 that's all you're viewing, the flip side of my  
19 prior question, if that's all you're reviewing,  
20 that's not going to be overturned very often.  
21 There probably won't be the floodgates because,  
22 presumably, the Appeals Council is correctly  
23 applying its timeliness rules and other  
24 procedural rules in most cases.

25 So that's at least what the Solicitor

1 General suggests, that the floodgates concern  
2 is not -- not a problem because of the  
3 narrowness of the review.

4 MR. GUPTA: Well, in all of the  
5 previous cases where this regime has come up,  
6 the Solicitor General's office has actually  
7 stressed the floodgates concerns.

8 JUSTICE KAVANAUGH: Yes.

9 MR. GUPTA: And I think -- I think  
10 that's important.

11 JUSTICE GINSBURG: What about -- what  
12 about the -- the practical experience? We're  
13 told in the circuit that applies the -- yes,  
14 this is a reviewable final decision, there have  
15 been no floods.

16 MR. GUPTA: So I think a couple of  
17 points on that, Justice Ginsburg.

18 First of all, that's one circuit.  
19 It's very different when this Court says it.  
20 That's one system, the Social Security system.

21 And even in that circuit, first of  
22 all, it's difficult to tell with Social  
23 Security cases because they're largely sealed.  
24 But we've looked at them. And what you see are  
25 they're mostly fact-bound disputes or disputes

1 about these discretionary decisions.

2           And I think even there you've had  
3 difficult questions that have come up under  
4 this Bloodsworth rule about how far does it  
5 extend into these other processes, like the  
6 Medicare process. Medicare Part A, Part B,  
7 Part C, Part D, all of these massive regimes  
8 incorporate 405(g).

9           And I think the Solicitor General  
10 really understates the floodgate concerns by  
11 not grappling with all these other regimes that  
12 will be implicated by a decision if you were to  
13 adopt the party's position.

14           At page 15 of the Solicitor General's  
15 reply brief, their only response really is to  
16 shrug and say: Well, that's not before this  
17 Court. That -- you know, but -- but it may be  
18 before this Court in the next case.

19           And I think part of the problem here  
20 is just a flood of -- of individual cases.  
21 There are thousands of cases that are decided  
22 on timeliness or procedural grounds by the  
23 Social Security Appeals Council.

24           There are many other thousands of  
25 cases in all of these other regimes. And then

1 there are going to be questions about the  
2 extent to which, if you were to adopt the  
3 party's position, it applies to all of those  
4 regimes.

5 JUSTICE KAGAN: Does it -- does it  
6 feel a little strange, Mr. Gupta, to be making  
7 this argument when the Solicitor General is  
8 not?

9 MR. GUPTA: It is.

10 (Laughter.)

11 MR. GUPTA: But I --

12 JUSTICE KAGAN: You know, I mean, one  
13 is tempted --

14 MR. GUPTA: -- suppose that's why I'm  
15 here.

16 JUSTICE KAGAN: -- to say, if they  
17 don't care, why should anybody else?

18 MR. GUPTA: Well, I think it's a good  
19 question, Justice Kagan, and I think one reason  
20 is that Congress cared about designing a scheme  
21 in this way, with limited judicial review, and  
22 I think the Court should care because I think  
23 the --

24 JUSTICE SOTOMAYOR: But why should we  
25 --

1                   MR. GUPTA:  -- the federal judiciary  
2                   has an institutional interest.

3                   JUSTICE SOTOMAYOR:  Yeah, but, as an  
4                   institution, shouldn't we be worried when we're  
5                   being kicked out of review?

6                   MR. GUPTA:  No, no.

7                   JUSTICE SOTOMAYOR:  Meaning I -- I --  
8                   I -- I worry about having no avenue for  
9                   supplicants to ensure that an administrative  
10                  process is fair to them.

11                  MR. GUPTA:  Right.

12                  JUSTICE SOTOMAYOR:  And -- and if you  
13                  got a final decision saying no after a  
14                  hearing's been given to you, it should -- as  
15                  Justice Breyer said, shouldn't you have that  
16                  one last crack at the apple?

17                  MR. GUPTA:  Well, what I'm defending  
18                  is the way that the process has worked since  
19                  1939.  I think it is Congress that is the  
20                  branch of government that principally decides  
21                  that kind of policy question about where to  
22                  strike the balance.  And Congress is evidently  
23                  satisfied because they have adopted this regime  
24                  over and over again.

25                  It has worked.  It has stood the test

1 of time. There's no --

2 JUSTICE SOTOMAYOR: And -- and --

3 MR. GUPTA: -- suggestion that the  
4 regime is broken.

5 JUSTICE SOTOMAYOR: -- the SG tells  
6 us, not you, that it's not that bad. It --  
7 I -- I --

8 MR. GUPTA: Well, I --

9 JUSTICE SOTOMAYOR: -- I go back to  
10 Justice Kagan's point.

11 MR. GUPTA: Right. And I think --  
12 Justice Sotomayor, I think one thing the SG  
13 really hasn't grappled with, it -- they haven't  
14 said anything to you about what happens  
15 under -- under those dozen other claims  
16 processes.

17 They haven't said anything to you  
18 about the other kinds of procedural  
19 determinations. What about res judicata  
20 determinations? What about, you know, belated  
21 -- requests for belated appeals? They haven't  
22 explained how their interpretation, if you were  
23 to adopt it, would -- would apply to the mine  
24 run of cases under all of these schemes.

25 And I think, you know, this is why in

1 schemes like this we -- the court generally  
2 steps back and allows people who are expert in  
3 designing processes like this to -- to, you  
4 know, design them. And if Congress has a  
5 problem with it, Congress can step in and do  
6 something about it.

7 But this is like -- it -- it -- it's a  
8 solution in search of a problem. You know, all  
9 of a sudden, after eight decades, the Solicitor  
10 General's Office has looked at this text and  
11 decided it means something else from what it  
12 has always meant and has come to this Court --  
13 they haven't changed the regulations. They've  
14 come to this Court and they've asked you to  
15 adopt that interpretation.

16 And -- and I think the Court should be  
17 concerned for its own institutional interests  
18 and for the institutional interests of the  
19 lower federal courts that the -- the balance be  
20 struck the way Congress designed it.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Kimberly, three minutes.

25

1 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY  
2 ON BEHALF OF THE PETITIONER

3 MR. KIMBERLY: Thank you, Mr. Chief  
4 Justice.

5 I'll -- I'll make just a few brief  
6 points. The first core fundamental point is  
7 that the decision in this case was final in  
8 both the dictionary sense of the meaning of the  
9 word and in the traditional administrative law  
10 sense of the word.

11 And it came after a hearing because  
12 Petitioner had a Section 405(b)(1) hearing  
13 before an administrative law judge. By the  
14 plain terms of Section 405(g), that is all that  
15 Petitioner needed to bring his case and get  
16 review before the district court.

17 I want to say something very briefly  
18 about floodgates. My friend, Mr. Gupta, raised  
19 a concern about appeals involving the Medicare  
20 scheme. There are roughly 15,000 appeals  
21 before the Medicare Appeals Council, the  
22 equivalent of the Appeals Council in this case.  
23 That's an order of magnitude less than what  
24 occurs in the Social Security scheme.

25 And what's more is those -- review in

1 those cases is subject to a amount in  
2 controversy requirement that filters out many  
3 more additional cases. So there's very little  
4 reason to think that Medicare would be a basis  
5 for thinking that there would be a floodgates  
6 problem here.

7 And, finally, I'll just say something  
8 briefly about Califano against Sanders since  
9 that came up.

10 What I would say is that a denial of  
11 reopening is not a decision, final or  
12 otherwise, on an initial determination of  
13 benefits.

14 And what this Court said in Califano  
15 is you get one chance to get judicial review.  
16 It is when you reach the conclusion of the  
17 initial -- on the initial determination of  
18 benefits. That is all that we are asking for.

19 The Sixth Circuit's position is that  
20 when you reach the end of that review and you  
21 get kicked out on procedural grounds, you don't  
22 get judicial review. There's simply no basis  
23 in the text of the statute for reaching that  
24 decision.

25 And one final point. Justice

1 Sotomayor, you raised the question whether we  
2 could simply -- whether the Court could simply  
3 dismiss the case on the basis of the  
4 government's now waiver of this issue because a  
5 number of the courts have determined that it's  
6 a jurisdictional question. I don't think the  
7 government's waiver would solve the problem in  
8 those circuits, including the Sixth Circuit.  
9 So I don't think that's a viable option here.

10 And for all of those reasons, and if  
11 there are no further questions, we ask the  
12 Court to reverse.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Gupta, this Court appointed you to  
16 brief and argue this case as an amicus curiae  
17 in support of the judgment below. You have  
18 ably discharged that responsibility, for which  
19 we are grateful.

20 The case is submitted.

21 (Whereupon, at 12:04 p.m., the case  
22 was submitted.)

23

24

25

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