SUPREME COURT
OF THE UNITED STATES

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.)

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Pages: 1 through 63

Place: Washington, D.C.

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3 RICKY LEE SMITH,)

4 Petitioner,)

5 v.) No. 17-1606

6 NANCY A. BERRYHILL, ACTING)

7 COMMISSIONER OF SOCIAL SECURITY,)

8 Respondent.)

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11 Washington, D.C.

12 Monday, March 18, 2019

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14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 11:09 a.m.

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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 --
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
14 merits. In any case in which the question
15 presented here arises, the question is whether
16 if upon 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 really 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.
3 And that to find otherwise would
4 require the court to find that there's a clear
5 statement on the face of 405(g) pointing the
6 court in a different direction, divesting the
7 courts of their traditional authority as
8 overseers of 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 clear statement is simply the reiteration
13 of your presumption of reviewability point?
14 MR. KIMBERLY: That's right. Indeed,
15 Your Honor, the presumption of reviewability
16 recognized four terms ago in Mach Mining and
17 before that in the Michigan Academy is not
18 merely a tie-breaking canon, it is a clear
19 statement rule.
20 And absent a clear statement, the
21 court has held that there must be judicial
22 review. It is Congress's prerogative alone to
23 exercise its discretion to divest courts of
24 their traditional role as overseers of agency
25 action, and unless it does so in a clear

1 statement, it -- Congress must be presumed to
2 have intended judicial review.
3 JUSTICE SOTOMAYOR: So this is a sort
4 of strange case because it's not that Congress
5 has chosen to divest the courts of total
6 review. It told us we have review in a -- in a
7 circumstance.
8 And so the question is, can the agency
9 tell us what that circumstance is and/or what
10 constitutes that circumstance? And that, I
11 think, is a Chenery problem, which is, can the
12 agency basically dictate to us the answer to
13 that question?
14 MR. KIMBERLY: Well, I don't think the
15 -- the agency can dictate to this Court the
16 answer to the question whether there is
17 judicial review.
18 The agency --
19 JUSTICE SOTOMAYOR: Exactly. Or what
20 final judgment means.
21 MR. KIMBERLY: Well, I -- I -- and our
22 view on that score is the agency of course has
23 the authority to issue the rules and
24 regulations that it deems necessary for a fair
25 and efficient resolution of the claims before

1 it.

2 JUSTICE SOTOMAYOR: Without question.

3 MR. KIMBERLY: It -- it has the

4 authority to say when it's done. It does not

5 have the authority to dictate whether there is

6 judicial review of its decision when it is done

7 and when that process is concluded.

8 JUSTICE SOTOMAYOR: All right.

9 MR. KIMBERLY: Thank you. I'll

10 reserve my time.

11 CHIEF JUSTICE ROBERTS: Thank you,

12 counsel.

13 Mr. Huston.

14 ORAL ARGUMENT OF MICHAEL R. HUSTON

15 FOR THE UNITED STATES, AS AMICUS CURIAE, IN

16 SUPPORT OF REVERSAL AND REMAND

17 MR. HUSTON: Mr. Chief Justice, and

18 may it please the Court:

19 The Social Security Appeals Council

20 dismissal order in this case was a final

21 decision because it marked the agency's last

22 word on Petitioner's application for --

23 JUSTICE SOTOMAYOR: Mr. Huston, if you

24 believe that, is the government instructing its

25 line attorneys to waive exhaustion of remedies

1 in all appeals from timeliness demands?
2 MR. HUSTON: Yes, during the pendency
3 of this -- of -- until this Court rules in this
4 case, we are, Your Honor, as we described in
5 our brief, in our opening brief.
6 We are no longer notifying claimants
7 who receive an untimely dismissal -- a
8 dismissal for untimeliness from the Appeals
9 Council that they cannot seek judicial review,
10 and where the cases are going to litigation,
11 the Department of Justice is no longer invoking
12 that -- that rule.
13 JUSTICE SOTOMAYOR: So why don't you
14 just continue doing that irrespective of what
15 we do? Should we have granted, should we have
16 just dug in this case?
17 MR. HUSTON: Well, Your Honor, there
18 -- there is a entrenched, long-standing
19 division among the circuits on the question
20 whether the existing regulation --
21 JUSTICE SOTOMAYOR: You've mooted the
22 -- you've mooted the split --
23 MR. HUSTON: Well --
24 JUSTICE SOTOMAYOR: -- with your
25 action.

1 MR. HUSTON: Your Honor, again, the --
2 the court granted the petition in order to
3 resolve the disagreement among the courts of
4 appeals on the question whether the agency's
5 regulation, which is published through notice
6 and comment rule-making, is a reasonable
7 interpretation of the statute.
8 Now we believe --
9 CHIEF JUSTICE ROBERTS: You haven't
10 mooted the case, have you?
11 MR. HUSTON: No. No. We certainly
12 have not mooted this particular --
13 CHIEF JUSTICE ROBERTS: Mr. Smith is
14 still a loser, right?
15 MR. HUSTON: Absolutely, Your Honor,
16 that's correct. And he -- he --
17 CHIEF JUSTICE ROBERTS: You know, of
18 course, he lost.
19 (Laughter.)
20 MR. HUSTON: He -- he lost. And --
21 and on remand, Your Honor, we will continue to
22 take the position that his dismissal from the
23 Appeals Council was correct, that he did not
24 timely exhaust his administrative remedies,
25 and, as a result, he cannot get judicial

1 review.

2 But the question on which the courts

3 are divided is whether the existing regulation

4 is a reasonable one. We submit that the answer

5 to that question is no, again, because the

6 plain text of the statute under the plain

7 meaning of final, it -- the agency's decision

8 was conclusive, the agency has no more work to

9 do, and the agency held a hearing in an --

10 before an Administrative Law Judge on

11 Petitioner's application for Social Security

12 benefits.

13 CHIEF JUSTICE ROBERTS: Now your view

14 --

15 JUSTICE KAVANAUGH: The government's

16 -- go ahead.

17 CHIEF JUSTICE ROBERTS: Your view is

18 simply that requirement made after a hearing is

19 purely chronological, doesn't have anything to

20 do with the basis of finality at all?

21 MR. HUSTON: Well, I think I would say

22 two things about that, Mr. Chief Justice.

23 The first is that it is chronological

24 in the sense that there -- there is a reference

25 to a hearing in Section 405(b)(1), 405(h), as

1 Your Honor mentioned, and in 405(g). And we
2 think it means the same thing in all three
3 places, which is that the basic unit of
4 decision by which this agency resolved --
5 resolves claims for benefits is an ALJ hearing.
6 But I don't think that I would -- that
7 it's quite right to say that it has nothing to
8 do with finality. I think as the court has
9 said in Salfi, in Eldridge, and in City of New
10 York, the phrase "final decision after a
11 hearing" in Section 405(g) refers to the
12 requirement that the claimant must fully
13 exhaust his administrative remedies before a
14 court reviews his entitlement to benefits.
15 And we fundamentally agree with that
16 proposition. This case is not about whether
17 Petitioner is required to complete the entire
18 administrative process and exhaust.
19 He is. But the question -- the basis
20 for the Social Security Administration's
21 decision, its final decision in this case, was
22 a determination that he had failed to complete
23 the administrative process. And that is a type
24 of determination that courts review pursuant to
25 a wide range of statutes that, just like this

1 one, require a court to undertake judicial
2 review only after the agency gives its final
3 decision beside its --
4 JUSTICE KAGAN: Mr. Huston, if I could
5 just understand your position correctly,
6 suppose that before the ALJ hearing happened,
7 there was a filing that was not timely, so
8 let's say that the person had not timely filed
9 a motion for reconsideration.
10 What would happen then according to
11 the government?
12 MR. HUSTON: So there's one thing that
13 I think is clear and one thing that -- that is
14 a little bit more difficult.
15 The clear thing is that the -- the
16 claimant in that case would absolutely be
17 required to continue to pursue the
18 administrative process to essentially appeal up
19 the chain the question of timeliness. He would
20 be required to go seek a hearing and seek
21 review from the Appeals Council on the question
22 whether he had, in fact --
23 JUSTICE KAGAN: Okay. So --
24 MR. HUSTON: Yeah.
25 JUSTICE KAGAN: But let's say he did

1 that.

2 MR. HUSTON: Right.

3 JUSTICE KAGAN: But in none of these

4 steps is -- is he ever granted a hearing --

5 MR. HUSTON: Right.

6 JUSTICE KAGAN: -- because nobody

7 needs a hearing to decide whether your filing

8 was timely or not. So then what?

9 MR. HUSTON: So I think that's a -- a

10 more difficult case than this one that the

11 Court doesn't have to resolve today.

12 I think the right way to think about

13 the problem is probably this Court's decision

14 in Salfi. And I think that the logic of the

15 Court's decision in that case is that where the

16 agency has reasonably determined that it

17 doesn't need a hearing in order to make a final

18 decision on a particular issue, then the after

19 a hearing requirement is not a barrier to

20 judicial review.

21 But, again, I don't --

22 JUSTICE KAGAN: I mean, Salfi is a

23 constitutional avoidance case, isn't it?

24 MR. HUSTON: In part, Your Honor. The

25 courts -- but the Court is, I think, quite

1 consciously addressing the reason why judicial
2 review in that case was consistent with its
3 understanding of the -- a final decision and
4 after a hearing.
5 I think the court said a similar thing
6 in Bowen against City of New York, which was
7 not about a constitutional claim. That was an
8 allegation that the agency had failed to
9 properly apply its own regulation.
10 I think that's the -- the essential
11 feature of the claimant's claim in this case,
12 that the agency made a mistake in applying its
13 timeliness regulation.
14 JUSTICE KAGAN: And that -- that does
15 seem to read out the "made after a hearing"
16 from the statute.
17 MR. HUSTON: So, Your Honor, again, I
18 think that the reason why "after a hearing" is
19 in 405(g) is because it's also in 405(h) and
20 it's in 405(b)(1). 405(b)(1) is the basic
21 instruction to the agency to hold a hearing in
22 order to make a decision.
23 And so the statute then says, because
24 the agency typically needs to hold a hearing in
25 order to make a decision, judicial review is

1 available for a final decision after a hearing.
2 I think it holds together in the ordinary
3 course.
4 What I think Salfi, Eldridge, and City
5 of New York recognized is that there may be
6 occasional cases where the agency resolves a
7 particular question but doesn't feel it's
8 necessary to hold a hearing. And in that case,
9 there's at least a strong claim for judicial
10 review.
11 JUSTICE GINSBURG: Are you -- are you
12 not agreeing with counsel who told us that
13 "after a hearing" refers only to the ALJ, so we
14 don't have to worry about the appeals court --
15 the Appeals Council never holding hearings
16 because the hearing that counts is the one
17 before the ALJ?
18 MR. HUSTON: Your Honor, we agree with
19 that as a basic proposition. The hearing
20 requirement, we agree with -- I agree with my
21 friend Mr. Kimberly that 405(g)'s reference to
22 a hearing is talking about the same thing as
23 405(b)(1) when it refers to a hearing.
24 It's talking about an ALJ hearing. We
25 had an ALJ hearing in this case. And so that's

1 fine. I think the problem with the amicus's
2 argument is that it would mean that Appeals
3 Council decisions, of which there are
4 approximately 22,000 every year, are never
5 reviewable. And that simply would not make any
6 sense because the Appeals Council virtually
7 never holds a hearing. They -- they decide
8 cases typically on the papers.
9 And so I just don't think that is
10 consistent with this statutory regime, as it's
11 been set up. I -- I also agree with my friend,
12 Mr. Kimberly, that I don't think the
13 predictions by the amicus of a sort of flood of
14 claims on the federal courts have been borne
15 out. That certainly hasn't been the experience
16 of the Eleventh Circuit.
17 Going forward, there's likely to be
18 even fewer of these type of disputes because,
19 as of 2018, so after the proceedings at issue
20 in this case, but as of 2018, the -- the
21 administration authorizes e-filing, and that
22 generates an electronic receipt. So the type
23 of disputes about postmarks and when something
24 was submitted, we expect there to be fewer of
25 those in the future.

1 JUSTICE KAVANAUGH: You -- you portray
2 this as a straightforward question of statutory
3 interpretation, correct?
4 MR. HUSTON: That's right, Your Honor.
5 JUSTICE KAVANAUGH: But the
6 government's been on the opposite side of this
7 for a long time. Is there an explanation for
8 that?
9 MR. HUSTON: Your Honor, we take the
10 text of the statute very seriously. And we had
11 occasion, once the Seventh Circuit weighed in
12 on the other side of the split, to -- to
13 reconsider the question. And we had occasion
14 when the petition for writ of certiorari was
15 filed in this case to -- to think very
16 seriously about the question.
17 And we became convinced that the
18 statutory text is plain and dictates the
19 result, and, moreover, that the reasons that
20 have been offered by the various circuits on
21 the other side of the split just don't simply
22 hold up.
23 JUSTICE BREYER: There is -- there is
24 an argument on the other side, that -- that the
25 -- look, you read the statute, it has to be an

1 individual. It has to be a final decision.
2 You see a -- an unnamed plaintiff class is not
3 an individual within the meaning here.
4 There has to be a final decision. A
5 decision to reopen is not a final decision.
6 That's Salfi. They mean the final decision on
7 the merits, not reopening. And it has to be
8 made after a hearing.
9 Well, that could be read as saying
10 that the final decisions that are reviewable
11 are final decisions that had something to do
12 with the hearing, some kind of relationship.
13 But that means -- that would mean a
14 decision that is made solely on procedural
15 grounds. And those procedural grounds relate
16 solely to the appeals process, does not fall
17 within the statute.
18 Now that's a possible reading. So --
19 so -- so your -- your response to that is what?
20 MR. HUSTON: I think it's inconsistent
21 with the Court's decisions in Salfi, in
22 Eldridge, and in City of New York, all of which
23 have said that the way to read this statute,
24 405(g), is as a waiveable exhaustion of
25 remedies requirement.

1 And in all three cases, the Court
2 authorized judicial review of a question that
3 had not been before the ALJ as part of the
4 disability proceeding. I'm glad you brought up
5 Sanders, Your Honor, which is obviously the
6 sort of -- the amicus's key case, but Sanders
7 is really about a fundamentally different
8 procedure; a reopening is something that is
9 entirely undressed by the statute.
10 And anytime a claimant is seeking to
11 reopen a claim, he will have received the one
12 opportunity for judicial review that the
13 statute guarantees him.
14 I do want to spend just a moment, if I
15 might, picking up Justice Ginsburg and Justice
16 Sotomayor's questions about what judicial
17 review would look like in the event that a
18 court were to conclude that the agency's
19 decision regarding timeliness was not supported
20 by substantial evidence.
21 We think it's very, very important for
22 the Court to hold that at that time, if -- if
23 that were the decision of the district court,
24 the only appropriate remedy is a remand. The
25 court should not just simply skip over the

1 Appeals Council and proceed to decide the
2 question.
3 There's three basic reasons. The
4 first is that we think it's compelled by this
5 Court's decision in Heckler v. Ringer, which
6 holds that where a claimant has a viable path
7 to pursue relief in the agency, exhaustion will
8 not be excused. And that would be exactly
9 Petitioner's situation. He could go back to
10 the Appeals Council and attempt to assert the
11 grounds of error that he has.
12 We also think that's consistent with
13 this Court's entire body of precedent starting
14 from Chenery. And we think it's also
15 consistent with Salfi, which recognized that
16 one critical feature of exhaustion is to enable
17 the agency to compile a record that is adequate
18 for judicial review.
19 That's exactly what the Appeals
20 Council exists to do. I'd urge the Court to
21 look at JA 26, which is Petitioner's request
22 for Appeals Council review. He says, the
23 problem I have with the ALJ decision is that it
24 was based on an incomplete record.
25 That's exactly the type of question

1 where the Appeals Council can bring its
2 expertise to bear. And until it does so, this
3 Court is really not well suited to undertake
4 the substantial evidence review that applies.
5 Now Mr. Kimberly referenced the -- the
6 fourth sentence of Section 405(g), the court's
7 power to affirm, reverse, or modify the
8 agency's decision. That's not an unusual
9 formulation.
10 There are other statutes that have the
11 same text, the FTC Act, 15 U.S. Code 45(c)
12 authorizes the same thing, but this Court has
13 held in FTC v. Sperry, against Sperry and
14 Hutchison that judicial questions by the FTC
15 are subject to the Chenery principle.
16 CHIEF JUSTICE ROBERTS: So -- so there
17 you're not so focused on the text?
18 MR. HUSTON: No, Your Honor, I think
19 the Court as -- the Court as a general matter
20 has the authority in a case to affirm, modify,
21 or reverse a decision, but the principle of
22 Chenery is that it would be an abuse of that
23 discretion to simply skip over the
24 administrative process and substitute a
25 decision that Congress has assigned to the

1 agency for a decision made by a court.
2 In a -- in a more ordinary case, where
3 the entire administrative process is borne out
4 and the appeals -- the agency has no more work
5 to do, it would be appropriate for a court
6 potentially to affirm, modify -- or modify the
7 decision, but in this case where the -- the
8 principle of Chenery is that the agency's
9 decision has to be judged on the rationale that
10 the agency gave.
11 And so, for all those reasons, we
12 would urge the Court to hold that judicial
13 review is authorized in this case, but to make
14 clear that it must be limited only to the
15 rationale that the agency gave for its
16 decision.
17 Thank you.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.
20 Mr. Gupta.
21 ORAL ARGUMENT OF DEEPAK GUPTA
22 COURT-APPOINTED AMICUS CURIAE
23 IN SUPPORT OF THE JUDGMENT BELOW
24 MR. GUPTA: Mr. Chief Justice, and may
25 it please the Court:

1 The way that Section 405(g) has
2 successfully cabined judicial review for eight
3 decades for the more than a dozen massive
4 claims processes to which it now applies is to
5 limit judicial review not just to any final
6 agency action but to a particular kind of
7 action.
8 Each of the words, a final decision of
9 the Commissioner made after a hearing, and
10 especially those last four words, needs to be
11 read together, rather than in isolation,
12 because each word qualifies and modifies the
13 kind of action in question.
14 In SSI cases like this one under Title
15 XVI of the Social Security Act, Section 405(g)
16 guarantees judicial review only for disputes
17 over the eligibility or the amount of welfare
18 benefits, the matters on which the Social
19 Security Act itself requires a hearing and a
20 final determination, not on procedures afforded
21 under the agency's regulations.
22 So the key words to start with, I
23 think, are the ones that the Chief Justice,
24 Justice Kagan, and Justice Breyer have all
25 asked about, which are "after a hearing."

1 And I think that the parties'
2 interpretation comes perilously close to
3 reading -- either reading the words out of the
4 statute or reading them so that there isn't
5 really any plausible relationship between the
6 decision and the -- and the "after a hearing"
7 requirement.
8 And I think, actually, Congress chose
9 those words carefully and they meant there to
10 be a relationship.
11 JUSTICE GINSBURG: Before we go into
12 "after a hearing," final decision. A decision
13 of a tribunal dismissing a case on a procedural
14 ground, that means that the tribunal is
15 disassociating itself from the case, it has
16 spoken its last word, is generally considered a
17 final decision.
18 So before we get to your "after a
19 hearing," do you agree that this determination
20 to dismiss for untimeliness is a final
21 decision, the end of the -- the end of the road
22 for the agency? The agency has now
23 disassociated itself from this case?
24 MR. GUPTA: Well, as I said, I don't
25 think those words can be read in isolation,

1 Justice Ginsburg. And I think even if you set
2 aside "after a hearing," you still have the
3 words "final decision of the Commissioner."
4 And I think that does some work here,
5 because one way to think about this is the way
6 that cases come to this Court from the state
7 courts under 1257.
8 So, if you have an intermediate state
9 court decision, the Petitioner has to first go
10 to the state supreme court and find a -- file a
11 timely petition.
12 And only when they do that, if the --
13 if the state court says we're not taking the
14 case, right, that then becomes the final
15 decision of the state court system and it comes
16 here.
17 And the way that the Social Security
18 process works is similar. When the Appeals
19 Council denies review, that becomes the final
20 decision. So the -- the -- the statute
21 delegates to the Social Security Administration
22 the ability to determine when it produces a
23 final decision of the Commission.
24 JUSTICE SOTOMAYOR: Mr. Gupta, that --
25 that's a somewhat awkward way of putting it, in

1 my mind.
2 MR. GUPTA: Well --
3 JUSTICE SOTOMAYOR: Certainly, the
4 agency has the full power under the Act to say
5 what steps the individual has to take to
6 exhaust their process. But that seems and
7 feels substantially different to me than it
8 having the final word of whether someone has
9 actually followed that process or not.
10 And this comes perilously close to
11 reading the words "final judgment" out of the
12 Act and saying that the agency can tell us what
13 that means. It may tell us how to exhaust its
14 processes, but I don't think it can tell us
15 what constitutes the exhaustion of that
16 process.
17 Let -- let -- let me give you the --
18 the extreme hypothetical. Let's say the agency
19 here had said they presented us with a proof of
20 mailing that consisted of a stamp by the post
21 office, but we've never seen that stamp before,
22 so we're not going to believe it. And the
23 Petitioner says: I'm going to a court because
24 that's ridiculous, you know, the stamp is --
25 and brings us all sorts of proof or presents

1 the agency with all sorts of proof that this is
2 an actual stamp by the post office.
3 You would suggest that we don't have a
4 right to tell the agency it made a mistake
5 there?
6 MR. GUPTA: Okay, so a couple of
7 responses, Justice Sotomayor.
8 First, the -- the analogy to the --
9 the way cases get here in the state court
10 system, I'd love to take credit for that
11 analogy. That was actually the solicitor
12 general's analogy in Sims versus Apfel. That's
13 the way they described the way this works.
14 And I think this Court has said
15 repeatedly, most recently in Sims versus Apfel,
16 that the word "final decision" isn't fully
17 defined by the statute and it leaves to the
18 agency the ability to flesh out the process.
19 So I think this Court has always recognized
20 that the agency gets to decide how it produces
21 a final decision of the Commissioner.
22 Now I'll grant you, Justice Sotomayor,
23 that in the typical exhaustion regime that
24 we're used to, questions about whether
25 exhaustion occurred goes to court. And in --

1 in this respect, you know, this is different.
2 It's more like a procedural default regime if
3 you'd like.
4 And -- and I think Congress chose this
5 regime advisedly because it was dealing with a
6 massive claims process. It could have chosen
7 no review, which was true of the processes to
8 which it compared this. So it was thinking
9 about the war veterans' process, longshoremen
10 process, workers' compensation for federal
11 workers. All of those schemes at the time had
12 no judicial review.
13 And Congress could have chosen to do
14 that. You didn't have judicial review of
15 veterans' appeals until 1988. Congress could
16 have chosen review of everything, which would
17 have been untenable at a time in 1939 when you
18 had 179 federal district judges and you were
19 about to unleash millions of claims onto the
20 system.
21 And so they chose to land somewhere in
22 between. And the question is, where did they
23 land in between? And I think, you know, we can
24 talk about final decision in isolation, but I
25 think, again, Congress chose all of these

1 words, and they're all working together as a
2 coherent phrase.
3 And so I'd like to turn to -- to the
4 "after a hearing" requirement because I think
5 it does a lot of work here. And in Califano
6 versus Sanders, what this Court held is that
7 "after a hearing," adopting Judge Friendly's
8 reasoning, means that -- that the -- the matter
9 on which a claimant seeks review does not come
10 within 405(g) if it's one that may be denied
11 without a hearing or where the hearing would be
12 afforded only under the agency's regulations
13 and not by the Social Security Act itself.
14 JUSTICE GORSUCH: Mr. Gupta, I -- I
15 appreciate your heroic efforts there with that
16 argument and -- and -- and your appointment to
17 the Court. Thank you for your service.
18 MR. GUPTA: Thank you.
19 JUSTICE GORSUCH: But, on that, Judge
20 Friendly also admitted his reading was -- what
21 did -- the tyranny of literalism, I think is
22 what he complained about.
23 MR. GUPTA: Right.
24 JUSTICE GORSUCH: So you -- you argue
25 that we should pay close attention to the

1 statute. I've been listening to you for a
2 number of minutes tell me I need to do that.
3 And I don't see in the statute the words "a
4 hearing pursuant to" some statutory command. I
5 see "pursuant after a hearing." There was a
6 hearing here.
7 MR. GUPTA: Let -- let me take you
8 then to the text. And I think, Justice Gorsuch
9 --
10 JUSTICE GORSUCH: So -- so -- so --
11 so, I mean, an argument from literalism seems
12 to me it might have to live with the tyranny of
13 literalism, Mr. Gupta.
14 MR. GUPTA: Sure. And -- and -- and,
15 you know, I think its important to emphasize
16 here that we're not only dealing with the text
17 that -- that Congress enacted in 1939. I
18 mentioned that Congress has incorporated this
19 statute by reference a dozen times over the
20 years, almost every decade, in fact, since the
21 statute was enacted. And one time that they
22 did that was in 1972, when they created the SSI
23 system, the case -- the system under which this
24 case proceeds.
25 So what you actually need to look at

1 first, I think, is Section 1383(c)(3). That's,
2 if you pick up the solicitor general's brief,
3 the gray brief and you look at page 9a, the
4 text is set forth there. And that is not a
5 text that I think the -- the parties have paid
6 much attention to.
7 But what it says is, "The final
8 determination of the Commissioner of Social
9 Security after a hearing under paragraph
10 (1)" -- so there's your reference, Justice
11 Gorsuch -- "a hearing under paragraph (1) shall
12 be subject to judicial review as provided in
13 Section 405(g) of this title to the same extent
14 as the Commissioner's final determinations
15 under Section 405 of this title."
16 So then, in order to understand what
17 hearing the -- the statute is referring to, we
18 have to look at paragraph (1). And so the --
19 so -- so that what I just read to you was at
20 page 9a of the Petitioner -- of the SG's
21 appendix.
22 Now I'm going to read you from -- from
23 the reference to paragraph (1). And that is --
24 at the SG's brief, this is the appendix to
25 their brief at 7a. And it's a little bit of a

1 long sentence. It's at the bottom of the page.
2 And it starts with the words "The
3 Commissioner." So this is where the SSI
4 provision is telling us what hearing is
5 required for SSI claimants like Mr. Smith.
6 And it says -- and I'm going to just
7 skip a few words as I read, but the
8 Commissioner of Social Security shall provide a
9 hearing to any individual who is or claims to
10 be an eligible individual and is in
11 disagreement with any determination under this
12 subchapter -- remember that the -- the statute
13 used the word "determination," so it's saying a
14 determination under the Act -- with respect to
15 eligibility of such individual for benefits or
16 the amount of such individual's benefits.
17 JUSTICE GORSUCH: Mr. Gupta, I hate to
18 interrupt, but I understand you -- your basic
19 argument boils down to this, that no hearing
20 was required here under the various terms of
21 the statute.
22 MR. GUPTA: That's right.
23 JUSTICE GORSUCH: Okay. And I accept
24 that for argument's sake at least.
25 I still go back to 405(g) on judicial

1 review, and it doesn't say any of that. It
2 just says an individual after any final
3 decision -- and Justice Ginsburg has walked us
4 through that carefully -- made after a hearing
5 gets to -- gets to go to court.
6 MR. GUPTA: Right.
7 JUSTICE GORSUCH: It doesn't say this
8 particular kind of hearing to which he is
9 entitled. It says a hearing.
10 MR. GUPTA: Right.
11 JUSTICE GORSUCH: Maybe -- maybe one
12 given -- imagine that -- the executive branch
13 giving a hearing as a matter of grace.
14 MR. GUPTA: Right. And -- and I --
15 JUSTICE GORSUCH: Okay? So what about
16 that?
17 MR. GUPTA: Well, I think, Justice
18 Gorsuch, that's precisely the argument that
19 this Court rejected in Califano versus Sanders.
20 JUSTICE GORSUCH: If I don't read
21 Sanders -- I -- I -- I -- I -- I have parsed
22 Sanders. And I'm sure you have too.
23 MR. GUPTA: Right.
24 JUSTICE GORSUCH: And it is rather
25 cryptic on this score, and it doesn't directly

1 adopt Judge Friendly's concern about the
2 tyranny of literalism. So, if I don't feel
3 myself bound by Sanders on this score, why
4 shouldn't I follow the plain language of the
5 statute --
6 MR. GUPTA: Okay.
7 JUSTICE GORSUCH: -- which you've
8 otherwise argued we should attend to carefully?
9 MR. GUPTA: Sure. So, Justice
10 Gorsuch, I mean, of course, it's a -- it's a
11 precedent of this Court, and I do think it's on
12 -- you know, the only precedent precisely on
13 this text. But, if you want to set it aside, I
14 do think that you can get there just under the
15 text, and I think, remember, Congress enacted
16 the statute that I was just reading you in
17 1972.
18 And it's the only reason 405(g)
19 applies in this case. And it's -- so it did so
20 a number of times, and I think that reflects
21 some acquiescence on Congress's part on the way
22 that the -- the system was functioning. So --
23 JUSTICE GORSUCH: Last question and
24 I'll stop, I promise.
25 MR. GUPTA: Sure.

1 JUSTICE GORSUCH: I promise.
2 (Laughter.)
3 JUSTICE GORSUCH: You'd agree that --
4 that the Social Security Administration could
5 grant a hearing that it is not statutorily
6 compelled to give?
7 MR. GUPTA: Absolutely.
8 JUSTICE GORSUCH: All right.
9 MR. GUPTA: Absolutely. But -- but I
10 think, you know, these questions, I -- I
11 welcome them because I think -- I'm glad we're
12 turning to Section 1383 because I think it's
13 critical here. It tells you what hearing. It
14 says --
15 JUSTICE BREYER: But there was that
16 kind of hearing here.
17 MR. GUPTA: No, there wasn't.
18 JUSTICE BREYER: There wasn't? There
19 was no hearing on whether he's entitled to
20 benefits or not?
21 MR. GUPTA: No -- there was a hearing
22 on -- on the question of benefits.
23 JUSTICE BREYER: Yeah.
24 MR. GUPTA: But that's not the matter
25 on which --

1 JUSTICE BREYER: Well, that's
2 different. That's different.
3 MR. GUPTA: -- Mr. Smith is seeking
4 judicial review. And I think --
5 JUSTICE BREYER: I'm sorry, there was
6 a hearing.
7 MR. GUPTA: So -- so now I --
8 JUSTICE BREYER: There was a hearing
9 of the kind set forth in paragraph (1).
10 MR. GUPTA: Right.
11 JUSTICE BREYER: And then there was a
12 final decision. Now it turns out that the
13 final decision rested not upon a ground having
14 to do with the hearing but on a different
15 ground, a ground having to do with Appeals
16 Council procedure, okay? We agree on that?
17 MR. GUPTA: Yes.
18 JUSTICE BREYER: Okay. So now you are
19 a Social Security applicant, and you would like
20 some money because you think you're entitled to
21 it. So you go to the hearing examiner, and he
22 says -- what's now called -- what used to be
23 called the hearing examiner, now it's the ALJ
24 -- okay, you go to the ALJ and he says: No.
25 And you think he's wrong. So you would like to

1 appeal. And they say: Go to the Appeals
2 Council. The Appeals Council says: Hey, you
3 made a mistake, you lose.
4 Does he care whether the mistake was,
5 well, the hearing examiner was right on the
6 merits, the mistake was that the hearing
7 examiner did something procedurally wrong or
8 right? He -- the Appeals Council procedure was
9 wrong or right? What does he care what the
10 mistake is?
11 All he knows is that there is a final
12 decision of the agency which was made after a
13 hearing. Now why would you write such a thing
14 "after a hearing"? Because whether or not
15 there is a hearing will weed out a lot of
16 worthless applications, and it will weed out
17 the people who didn't go through the right
18 procedure to begin with.
19 But we are dealing with people who
20 did. And so what do they care? And why would
21 a body of law that presumes when you lose, you
22 get judicial review, suddenly, without saying
23 so in the statute, make some kind of exception
24 as to whether the reason you lost was a
25 procedural one having to do with the Appeals

1 Council or that the reason you lost is because
2 both the hearing examiner and the Appeals
3 Council thought you didn't -- weren't entitled
4 to it? Why?
5 MR. GUPTA: I will say --
6 JUSTICE BREYER: That's not a tyranny
7 question.
8 MR. GUPTA: Yeah.
9 JUSTICE BREYER: That's a purposive,
10 consequential --
11 MR. GUPTA: Right.
12 JUSTICE BREYER: -- and basic question
13 for those who don't want to get bogged down in
14 the weeds.
15 MR. GUPTA: Okay. So, I mean, I --
16 Justice Breyer, I do think that this is -- it's
17 important to emphasize what I am defending is
18 the status quo. This is the way it has worked
19 under the Social Security regime and all of the
20 other regimes, the dozen regimes I mentioned,
21 with the exception of the Eleventh Circuit, for
22 -- for eight decades.
23 And -- and I think that's important
24 because Congress had something in mind here.
25 Congress was not --

1 JUSTICE BREYER: Yes, I told you what
2 it had in mind.
3 MR. GUPTA: Congress -- no --
4 JUSTICE BREYER: It had in mind making
5 sure there's a hearing, which means we weed out
6 the bad ones.
7 MR. GUPTA: Right. No, but Congress
8 was not concerned -- Congress's concern was
9 with ensuring that this entire massive process
10 was governed by law. It was not directing
11 cases into the federal courts for error
12 correction purposes. It was doing so to ensure
13 that -- that there would be a judicial
14 oversight of the process and that when people
15 had exhausted completely through the process
16 and had a determination on the merits, that
17 that merits determination on eligibility or
18 amount would be reviewed in court.
19 And I think it's important that
20 Congress chose those words carefully in 1972.
21 They said -- they were aware that -- of the way
22 that this had been -- this language had been
23 interpreted. And if you look in the appendix
24 to the -- the green brief, the amicus brief, we
25 laid out the dozen schemes where Congress has

1 expressly incorporated 405(g).
2 And -- and many of those are
3 compensation regimes. They're benefits
4 regimes. And in each of them, or many of them,
5 Congress either directly or by implication
6 limited review to the decision of compensation
7 or eligibility for benefits.
8 CHIEF JUSTICE ROBERTS: What do you
9 say about the application and the presumption
10 of review, which is one of the predicates to
11 the question?
12 MR. GUPTA: Right. I think, you know,
13 you asked about this, Mr. Chief Justice,
14 earlier, had mentioned 405(h). And I think
15 405(h) goes a long way to addressing the
16 question.
17 The -- the Court has said about the
18 presumption in favor of judicial review that
19 it's just that, it's a presumption. And it's
20 no substitute for looking at the specific words
21 of a statutory text and its -- its purpose and
22 history.
23 So, here, we know Congress took the
24 unusual step in 405(h) of saying there's no
25 review at all in Social Security cases by any

1 tribunal, except through this very specific
2 channel that we're creating. And then that
3 channel linked the decision with the hearing.
4 And I think Congress did that
5 advisedly. And then they followed up again in
6 1972 for this specific regime and said: We are
7 linking the -- the determination that can be
8 reviewed with the hearing requirement.
9 JUSTICE BREYER: But what does the
10 link is the word "after".
11 MR. GUPTA: So --
12 JUSTICE BREYER: It was after here.
13 MR. GUPTA: Right. It's true, it was
14 chronologically after.
15 JUSTICE BREYER: And, therefore, the
16 baddies were in doubt, there was a hearing.
17 And now we just have a different reason. The
18 reason is procedural, rather than the reason
19 being substantive review on the merits, which
20 was the four words that were my basic question,
21 why does that matter?
22 MR. GUPTA: So that was true in
23 Califano versus Sanders as well. There had
24 been an ALJ hearing. It was after in that
25 sense.

1 But that is not -- that is not what
2 mattered. What mattered is whether the statute
3 requires a hearing. Otherwise, you could have
4 review where the agency just denied a hearing,
5 where there should have been a hearing. That
6 would not make much sense.
7 And you would also disincentivize the
8 agency from affording claimant-friendly
9 processes for fear that they would result in
10 review. So, instead, it makes much more
11 sense -- and this is what Judge Friendly said
12 and what this Court said in adopting his
13 reasoning -- to -- to look to what the statute
14 requires.
15 JUSTICE KAGAN: But, Mr. Gupta, on
16 your theory, doesn't that mean that merits
17 decisions of the Appeals Council would not be
18 reviewable?
19 MR. GUPTA: I don't think so. And I
20 think that's because the Appeals Council would
21 be -- would still be reviewing the matter on
22 which a hearing is required.
23 So, again, my test is, Justice Kagan,
24 you asked: Is the thing on which the claimant
25 seeks judicial review the -- the thing on which

1 the statute requires a hearing?
2 So, when the Appeals Council reviews
3 that thing, it's still the thing, the
4 eligibility or the amount of benefits, on which
5 there would be judicial review, providing, of
6 course, that they exhausted the process
7 provided by the agency and had a decision -- a
8 final decision of the Commissioner.
9 Then it would be a final decision of
10 the Commissioner after the hearing required by
11 the statute. And so --
12 JUSTICE GINSBURG: But it's so out of
13 sync with the normal understanding of a
14 dismissal on procedural grounds. Let's just
15 take a case in the federal court, and there's a
16 motion to dismiss for improper venue. The
17 court says: I agree, out with the case.
18 That certainly qualifies as a final
19 decision that would be reviewable.
20 MR. GUPTA: Right. And -- and I don't
21 deny that, Justice Ginsburg, that -- that, you
22 know, "final" means different things in
23 different contexts. And if all we had was the
24 word "final" here, this would be a very
25 difficult assignment for me to discharge. But

1 luckily we have other words in the statute and
2 they mean something.
3 And I think Congress chose these words
4 carefully. And they -- they chose these words
5 to address the situation in which they wanted
6 not no review, not review of everything, but
7 review of the merits, the substance.
8 And then I think it's -- it's
9 important that Congress chose this same regime
10 and expressly incorporated it over and over
11 again when it had these massive claims
12 processes, when it wanted to ensure that there
13 would be judicial review of the merits but not
14 judicial review of every fact mound or
15 discretionary dispute about compliance with the
16 agency's internal processes, because the
17 judiciary does not add a whole lot of
18 institutional competence to this very friendly,
19 claimant-friendly process, when those kinds of
20 cases are being channeled into federal court.
21 JUSTICE KAVANAUGH: Well, the
22 judiciary adds something when the Appeals
23 Council's wrong in how it enforces its
24 procedural rules.
25 MR. GUPTA: Right. No, of course.

1 And, you know -- and there is --
2 JUSTICE KAVANAUGH: Yeah. And that's
3 of value. That's a traditional role.
4 MR. GUPTA: That's right. And, of
5 course, there is still review of constitutional
6 questions and there will be mandamus review for
7 the -- for the egregious situation, but I think
8 the floodgates concerns were what were
9 animating Congress. It comes through loud and
10 clear.
11 JUSTICE KAVANAUGH: Well, on -- sorry
12 to interrupt -- on the floodgates, but if
13 that's all you're viewing, the flip side of my
14 prior question, if that's all you're reviewing,
15 that's not going to be overturned very often.
16 There probably won't be the floodgates because,
17 presumably, the Appeals Council is correctly
18 applying its timeliness rules and other
19 procedural rules in most cases.
20 So that's at least what the solicitor
21 general suggests, that the floodgates concern
22 is not -- not a problem because of the
23 narrowness of the review.
24 MR. GUPTA: Well, in all of the
25 previous cases where this regime has come up,

1 the solicitor general's office has actually
2 stressed the floodgates concerns.
3 JUSTICE KAVANAUGH: Yes.
4 MR. GUPTA: And I think -- I think
5 that's important.
6 JUSTICE GINSBURG: What about -- what
7 about the -- the practical experience? We're
8 told in the circuit that applies the -- yes,
9 this is a reviewable final decision, there have
10 been no floods.
11 MR. GUPTA: So I think a couple of
12 points on that, Justice Ginsburg.
13 First of all, that's one circuit.
14 It's very different when this Court says it.
15 That's one system, the Social Security system.
16 And even in that circuit, first of
17 all, it's difficult to tell with Social
18 Security cases because they're largely sealed.
19 But we've looked at them. And what you see are
20 they're mostly fact-bound disputes or disputes
21 about these discretionary decisions.
22 And I think even there you've had
23 difficult questions that have come up under
24 this Bloodsworth rule about how far does it
25 extend into these other processes like the

1 Medicare process. Medicare Part A, Part B,
2 Part C, Part D, all of these massive regimes
3 incorporate 405(g).
4 And I think the Solicitor General
5 really understates the floodgate concerns by
6 not grappling with all these other regimes that
7 will be implicated by a decision if you were to
8 adopt the party's position.
9 At page 15 of the Solicitor General's
10 reply brief, their only response really is to
11 shrug and say: Well that's not before this
12 Court. That -- you know, but -- but it may be
13 before this Court in the next case.
14 And I think part of the problem here
15 is just a flood of -- of individual cases.
16 There are thousands of cases that are decided
17 on timeliness or procedural grounds by the
18 Social Security Appeals Council.
19 There are many other thousands of
20 cases in all of these other regimes. And then
21 there are going to be questions about the
22 extent to which, if you were to adopt the
23 party's position, it applies to all of those
24 regimes.
25 JUSTICE KAGAN: Does it -- does it

1 feel a little strange, Mr. Gupta, to be making
2 this argument when the Solicitor General is
3 not?
4 MR. GUPTA: It is.
5 (Laughter.)
6 MR. GUPTA: But I --
7 JUSTICE KAGAN: I mean, one is tempted
8 --
9 MR. GUPTA: -- suppose that's why I'm
10 here.
11 JUSTICE KAGAN: -- to say, if they
12 don't care, why should anybody else?
13 MR. GUPTA: I think it's a good
14 question, Justice Kagan, and I think one reason
15 is that Congress cared about designing a scheme
16 in this way, with limited judicial review, and
17 I think the Court should care because I think
18 the --
19 JUSTICE SOTOMAYOR: But why should we
20 --
21 MR. GUPTA: -- the federal judiciary
22 has an institutional interest.
23 JUSTICE SOTOMAYOR: Yeah, but as an
24 institution, shouldn't we be worried when we're
25 being kicked out of review?

1 MR. GUPTA: No, no.
2 JUSTICE SOTOMAYOR: Meaning I -- I --
3 I -- I worry about having no avenue for
4 supplicants to ensure that an administrative
5 process is fair to them.
6 MR. GUPTA: Right.
7 JUSTICE SOTOMAYOR: And -- and if
8 you've a final decision saying no, after a
9 hearing's been given to you, it should -- as
10 Justice Breyer said, shouldn't you have that
11 one last crack at the apple?
12 MR. GUPTA: Well, what I'm defending
13 is the way that the process has worked since
14 1939. I think it is Congress that is the
15 branch of government that principally decides
16 that kind of policy question about where to
17 strike the balance. And Congress is evidently
18 satisfied because they have adopted this regime
19 over and over again.
20 It has worked. It has stood the test
21 of time. There is no --
22 JUSTICE SOTOMAYOR: And -- and --
23 MR. GUPTA: -- suggestion that the
24 regime is broken.
25 JUSTICE SOTOMAYOR: -- the SG tells

1 us, not you, that it's not that bad. It --
2 I -- I --
3 MR. GUPTA: Well, I --
4 JUSTICE SOTOMAYOR: I go back to
5 Justice Kagan's point.
6 MR. GUPTA: Right. And I think --
7 Justice Sotomayor, I think one thing the SG
8 really hasn't grappled with, it -- they haven't
9 said anything to you about what happens
10 under -- under those dozen other claims
11 processes.
12 They haven't said anything to you
13 about the other kinds of procedural
14 determinations. What about res judicata
15 determinations? What about, you know, belated
16 requests for belated appeals? They haven't
17 explained how their interpretation, if you were
18 to adopt it, would -- would apply to the mind
19 run of cases under all of these schemes.
20 And I think, you know, this is why in
21 schemes like this we -- the court generally
22 steps back and allows people who are expert in
23 designing processes like this to -- to, you
24 know, design them. And if Congress has a
25 problem with it, Congress can step in and do

1 something about it.

2 But this is like -- it -- it -- it's a

3 solution in search of a problem. You know, all

4 of a sudden after eight decades the Solicitor

5 General's Office has looked at this text and

6 decided it means something else from what it

7 has always meant and has come to this court --

8 they haven't changed the regulations. They've

9 come to this court and they've asked you to

10 adopt that interpretation.

11 And I think the Court should be

12 concerned for its own institutional interests

13 and for the institutional interests of the

14 lower federal courts, that the balance be

15 struck the way Congress designed it.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,

18 counsel.

19 Mr. Kimberly, three minutes.

20 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY

21 ON BEHALF OF THE PETITIONER

22 MR. KIMBERLY: Thank you, Mr. Chief

23 Justice. I'll -- I'll make just a few brief

24 points.

25 The first core fundamental point is

1 that the decision in this case was final in
2 both the dictionary sense of the meaning of the
3 word and in the traditional administrative law
4 sense of the word.
5 And it came after a hearing because
6 Petitioner had a Section 405(b)(1) hearing
7 before an Administrative Law Judge. By the
8 plain terms of Section 405(g), that is all that
9 Petitioner needed to bring his case and get
10 review before the district court.
11 I want to say something very briefly
12 about floodgates. My friend, Mr. Gupta, raised
13 a concern about appeals involving the Medicare
14 scheme. There are roughly 15,000 appeals
15 before the Medicare Appeals Council, the
16 equivalent of the Appeals Council in this case.
17 That's an order of magnitude less than what
18 occurs in the Social Security scheme.
19 And what's more is those -- review in
20 those cases is subject to a amount in
21 controversy requirement that filters out many
22 more additional cases. So there is very little
23 reason to think Medicare would be a basis for
24 thinking that there would be a floodgates
25 problem here.

1 And, finally, I'll just say something
2 briefly about Califano against Sanders since
3 that came up.
4 What I would say is that a denial of
5 reopening is not a decision, final or
6 otherwise, on an initial determination of
7 benefits.
8 And what this Court said in Califano
9 is, you get one chance to get judicial review.
10 It is when you reach the conclusion of the
11 initial -- on the initial determination of
12 benefits. That is all that we are asking for.
13 The Sixth Circuit's position is that
14 when you reach the end of that review and you
15 get kicked out on procedural grounds, you don't
16 get judicial review. There is simply no basis
17 in the text of this statute for reaching that
18 decision.
19 And one final point. Justice
20 Sotomayor, you raised the question whether we
21 could simply -- whether the Court could simply
22 dismiss the case on the basis of the
23 government's now waiver of this issue because a
24 number of the courts have determined that it's
25 a jurisdictional question. I don't think the

1 government's waiver would solve the problem in
2 those circuits, including the Sixth Circuit.
3 So I don't think that's a viable option here.
4 And for all of those reasons, and if
5 there are no further questions, we ask the
6 Court to reverse.
7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.
9 Mr. Gupta, this Court appointed you to
10 brief and argue this case as an amicus curiae
11 in support of the judgment below. You have
12 ably discharged that responsibility, for which
13 we are grateful.
14 The case is submitted.
15 (Whereupon, at 12:04 p.m., the case
16 was submitted.)
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