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IN THE

Supreme Court of the United States

ELISA ENCARNACION ON BEHALF OF ARLENE GEORGE,
ANA LORA ON BEHALF OF MICHELLE TAVARES,
HORTENSIA LACAYO, MATHEW LACAYO, AND ROSA
VELOZ ON BEHALF OF BEN-HEMIR COLLADO,
Petitioners,

v.

MICHAEL J. ASTRUE, COMMISSIONER OF
SOCIAL SECURITY,
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

BRIEF OF EMPIRE JUSTICE CENTER, DISABILITY RIGHTS CALIFORNIA, YOUTH LAW CENTER AND DISABILITY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Empire Justice Center (Empire Justice), Disability Rights California (DRC), Youth Law Center (YLC) and Disability Law Center (DLC) respectfully submit this brief as *amici curiae* in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae comprise a group of not-for-profit organizations from across the nation focused on advocating for and serving people with disabilities, and notably children with disabilities. A principal function of these organizations is to represent the interests of disabled children and their families in cases involving Supplemental Security Income (SSI) benefits. As a result, *amici* have a thorough understanding of the regulations and policies at issue, and substantial experience representing children and families before the Social Security Administration (SSA) and the courts regarding SSI benefits. Moreover, *amici* fully appreciate that SSI benefits are vital to the development of a disabled child and know firsthand that these benefits can help alter the life trajectory of some of our nation's most vulnerable children.

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief. Pursuant to Rule 37.2, all parties before the Court have consented in writing to the filing of this brief. A copy of that consent has been submitted to the Court.

The Empire Justice Center is a New York-based non-profit law firm serving poor and disabled New Yorkers through direct representation and systems change advocacy. Its attorneys regularly represent families before the SSA regarding SSI benefits and also consult with legal services advocates around the state regarding the same.

Disability Rights California serves about 25,000 Californians with disabilities each year through advocacy, legal representation, abuse investigations, and public education initiatives. Beyond helping with SSI eligibility determinations, the organization assists families in applying for Medicaid benefits for their child with disabilities.

The Disability Law Center is a Massachusetts-based non-profit organization that has worked to protect and advocate for the rights of individuals with disabilities since 1978. Among other sources, the DLC receives funding from the federal government and the Massachusetts Legal Assistance Corporation, and has provided statewide support to attorneys involved in SSA cases since 1983.

The Youth Law Center is a public interest law firm founded in 1978 that works nationwide to protect children in foster care and juvenile justice systems from abuse and neglect, and to ensure that these children receive the support and services they need to become healthy and productive adults.

Amici believe this Court's review of this case is necessary to ensure that SSI benefits have the full effect and impact that Congress intended. If allowed to stand, the Second Circuit's decision likely will have significant and unnecessary adverse consequences for thousands of children. In *amici's* experience, the SSA's current informal "non-combination" policy leads SSA Adjudicators and Administrative Law Judges (ALJs) to reach inconsistent and self-defeating conclusions, and prevents them from awarding benefits to some of the most patently-deserving candidates. The statute and regulations do not permit the SSA's informal policy or its detrimental implications for thousands of deserving families.

INTRODUCTION

This case involves the validity of an informal policy that the SSA uses to determine whether a child qualifies as "disabled" for the purposes of receiving benefits under the federal SSI program. Thousands of disabled children from low-income families in the United States—the most vulnerable among us—may be affected by whether the SSA is permitted to continue making misguided disability determinations pursuant to its informal policy. This informal policy is contrary to Congress's express directive that the "combined impact of the impairments shall be considered throughout the disability determination process"[2] and this Court's directive in *Sullivan v. Zebley*, 493 U.S. 521, 531 n.11, 535 n.16 (1990), that "individual consideration" must be given to the combined impact of multiple impairments in assessing eligibility for disability benefits.

Under the prevailing informal policy, the SSA does not consider the combined impact of a child's multiple impairments *throughout* the disability de-

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[2] 42 U.S.C. § 1382c(a)(3)(G) (2006).

termination process as mandated by Congress. Instead, the SSA counts only those impairments that give rise to marked limitations within one of six particular domains created by the SSA: (1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for yourself; and (6) health and physical well-being. 20 C.F.R. § 416.926a(b)(1) (2009). If a child has an "extreme" limitation in one domain or a "marked" limitation in two domains, the child will qualify for benefits. *Id.* § 416.926a(a). Under the challenged policy, however, the SSA specifically forbids adjudicators from assigning any weight, in the final determination of disability, to functional limitations below the marked level, either by combining the effects of limitations across domains or otherwise adjusting the overall level of disability found to account for the effects of all impairments on the whole child. As a result, in many cases, an impairment that causes near-marked limitations is dropped from consideration entirely. This "non-combination" policy is contrary to Congress's explicit instructions and leads to irrational results in the disability determination process.

The question of the legality of the SSA's informal non-combination policy is of exceptional importance. Low-income families with a disabled child rely on SSI benefits to offset costs for treatment, medical devices and social services, to make structural changes to homes, and to offset wages lost by parents who stay home to care for a disabled child. Failure of a disabled child to qualify for SSI benefits can have a devastating effect on low-income families.

The decision below upholding the SSA's non-combination policy should not stand. The SSA's interpretation of the Act directly contradicts Congress's statutory directive and substantially disserves a core purpose of the Act: to aid the disabled and their families. As such, this Court should grant certiorari and provide relief to the thousands of disabled children who are unfairly deemed unqualified for SSI benefits under the SSA's informal non-combination policy.

SUMMARY OF ARGUMENT

Since the implementation of the SSA's informal non-combination policy, thousands of children who otherwise would qualify for SSI benefits if their impairments were considered in the aggregate have instead been disqualified from the SSI program. The informal non-combination policy departs from Congress's intent and conflicts with this Court's precedent. Without action from this Court, the informal non-combination policy will continue to have dramatic and widespread adverse consequences for thousands of families.

1. The SSA's informal non-combination policy prevents some of our most vulnerable children from receiving vital assistance. Parents who raise and care for a child with multiple disabilities face real and substantial barriers to obtaining and keeping gainful employment. Caregivers of a disabled child also face additional, unavoidable expenses not incurred by those raising children without disabilities. The federal assistance from SSI benefits provides much-needed relief to parents whose earning potential is already lessened by caring for a disabled child.

The effect of the SSA's non-combination policy ranges beyond the SSI program itself, because SSI benefits determinations affect eligibility and coverage decisions in other vital federal and state assistance programs. A child qualified as disabled under the SSI program is eligible in most states for Medicaid coverage that will pay for necessary medical services and treatment, even if the child's family does not otherwise qualify for SSI benefits because of their income level.

2. The SSA's policy prohibiting adjudicators from assigning weight to impairments that do not directly contribute to a marked limitation inevitably leads to irrational results. Under the policy, children suffering from myriad problems across most or all of the relevant domains of functioning—and suffering from overall disability as severe as many children with marked limitations in just two domains—are denied benefits. Social Security Adjudicators and ALJs should have the flexibility to assess a child holistically—*i.e.*, to consider the "whole child"—in deciding whether that child is disabled.

Two real-life examples illustrate the irrational conclusions routinely reached by ALJs constrained by the non-combination policy. The first involves a young girl diagnosed with anxiety, depression, attention deficit hyperactivity disorder (ADHD), post-traumatic stress disorder (PTSD), and a non-verbal learning disability who was deemed ineligible for benefits despite the ALJ's finding that she suffered limitations across four of six relevant domains. The second involves a young boy diagnosed with Asperger's Syndrome, a disorder that greatly hindered his social functioning and motor skills, who was also deemed ineligible for SSI benefits. Neither child's impairments were considered as "marked" limitations in more than one domain, and as a result each was therefore deemed ineligible for SSI benefits under the SSA's informal non-combination policy. However, their overall level of disability might well have met the statutory standard had the ALJs been granted the necessary discretion to consider all of their limitations together. These two children—and the thousands of others like them—were locked out of a federal assistance program designed to help them overcome the substantial hindrances to their everyday functioning.

3. According adjudicators the discretion to take account of the combined impact of *all* impairments as required by the statute is workable in practice. Although the Second Circuit criticized petitioners for not presenting an easily administered alternative to the current non-combination policy, the statutory authority—and responsibility—to implement Congress's commands rests with the SSA. Further, a policy that allows Social Security Adjudicators and ALJs to combine factors and make adjustments across domains has already proved workable: the SSA previously granted its adjudicators and ALJs the flexibility to consider the combined effects of multiple impairments across domains. Restoration of that flexibility would ensure that benefits are awarded in a way that aligns with a common-sense assessment of a child's overall level of impairment, and will not ignore real, disabling impairments simply because their effects are not measured as "marked" within a particular domain.

ARGUMENT

As the petition explains, the SSA's informal non-combination policy sharply departs from Congress's express requirement that the SSA consider the combined effects of a child's impairments at each and every stage of the benefits determination process, resulting in denial of benefits to thousands of needy and deserving children. The Court should take this opportunity to provide much needed guidance concerning the SSA's interpretation and application of the Social Security Act, and in particular, the agency's use of the informal non-combination policy.

I. THE SSA'S INFORMAL NON-COMBINATION POLICY DENIES FAMILIES OF AMERICA'S MOST VULNERABLE POPULATION THE RESOURCES TO PROVIDE THE SPECIAL CARE THEIR CHILDREN REQUIRE

The SSA's informal non-combination policy unfairly excludes thousands of families whose children would otherwise qualify for SSI benefits from receiving assistance that Congress found they desperately need. The program's main objective is "to provide a national income floor for needy people who are aged, blind or disabled . . . whose income and resources were below specified levels and [to] lift them out of poverty."[3] SSI cash payments are provided "to dis-

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[3] Soc. Sec. Online, *Supplemental Security Income Modernization Project: Final Report of the Experts*, ch. 1 at 5 (Aug. 1992), http://www.socialsecurity.gov/history/reports/ssiexperts.html. The programs "SSI replaced generally did not provide benefits for children." But "SSI was designed to provide benefits to qualified persons of all ages. The House Committee on

abled children because their needs are 'often greater than those of non-disabled children' (House Report 92-231 [28, p.2]) and because they help a family cope with lost wages and medical expenses beyond the coverage of Medicaid . . . (Senate Report 104-096)."[4]

Qualification for SSI benefits is thus important for multiple reasons: it provides crucial, direct financial support to help meet disability-related expenses, it helps replace lost wages caused by the need for parents to care for a disabled child, and it serves as a gateway to other federal and state benefits, including qualification for Medicaid, that provide vital support for needy families.

A. SSI Benefits Provide Income For Families to Meet a Child's Disability-Related Expenses

Low-income families with disabled children need SSI benefits to offset disability-related costs left uncovered by Medicaid. One of the first reports to examine disability-related expenses incurred by families with SSI children was a 1999 Government Accountability Office report, which in turn was based on a 1994-95 National Health Interview Survey (NHIS) by the National Center for Health Statistics

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Ways and Means was instrumental in including disabled children in the SSI program because such children who were in low-income households were 'certainly among the most disadvantaged of all Americans' and deserved 'special assistance in order to help them become self-supporting members of our society.'" *Id.* at 6.

[4] Anne DeCesaro & Jeffrey Hemmeter, *Unmet health care needs and medical out-of-pocket expenses of SSI children,* 30 J. Vocational Rehab. 177, 177 (2009).

and a 1996 survey of Florida families with SSI children by the University of Florida's Institute for Child Health Policy.[5]

> [A]bout 87 percent of the Florida families surveyed reported that they purchased disability related services for their SSI children such as special diet or formula, special or additional clothing, or modifications to the home. . . . [F]or many of the services asked about in the NHIS and for almost every service asked about in the Florida survey – some proportion of families reported that they had incurred disability related costs during the previous year. . . . transportation to and from service providers, specialized day care, home-related services, special diet or formula, medical supplies, special or additional clothing, diapers (for use beyond the usual age), or assistive technologies (for example, devices to assist speech).[6]

The reported disability-related costs ranged from $10 to more than $26,000 annually.[7]

A separate national survey of SSI children and their families performed by the SSA in 2001-02 focused only on out-of-pocket disability-related medical expenses. The survey found that 32 percent of the

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[5] United States Gen. Accounting Office, Report to Congressional Committees, *SSI Children: Multiple Factors Affect Families' Costs for Disability-Related Services* (June 1999), http://www.gao.gov/archive/1999/he99099.pdf.

[6] *Id.* at 25, 26-28 tbls. 2.1 & 2.2.

[7] *Id.*

families incurred out-of-pocket medical expenses with an annual mean amount of $840.[8]

To qualify for SSI benefits, a family must be deemed by the SSA to have limited income and resources. Extra expenses incurred for disability-related services and devices, therefore, could financially devastate an already vulnerable family. [9] Without SSI benefits, accordingly, a disabled child would often go without necessary services and devices so that the family could meet its basic needs.[10]

B. SSI Benefits Offset a Parent's Earnings Lost While Caring for a Disabled Child

Families with a disabled child also need SSI benefits to supplement lost income. A family's likelihood of falling below the poverty line more than doubles if the family includes a child with a disabil-

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[8] Kalman Rupp, et al., *A Profile of Children with Disabilities Receiving SSI: Highlights from the National Survey of SSI Children & Families,* Soc. Security Bull., Vol. 66, No. 2 (2005/2006), http://www.ssa.gov/policy/docs/ssb/v66n2/v66n2p-21.html.

[9] *See also,* Eileen P. Sweeney & Shawn Fremstad, *Supplemental Sec. Income: Supporting People with Disabilities & the Elderly Poor*, Ctr. on Budget & Policy Priorities, at 3-4 & 7 nn. 7 & 8 (Rev. Aug. 17, 2005), http://www.cbpp.org/files-/7-19-05imm.pdf (identifying the extra costs of specially adapted shoes, increased utility bills, home modifications).

[10] *See, e.g.*, Mark Duggan & Melissa Schettini Kearney, *The Impact Of Child SSI Enrollment On Household Outcomes: Evidence From The Survey Of Income & Program Participation,* Nat'l Bureau of Econ. Research, Working Paper No. 1158, at 13-16 (Aug. 2005), http://www.econ.yale.edu/seminars/labor-/lap05/duggan-kearney-051209.pdf.

ity. An analysis of the 2000 Census determined that 7.7% of families in which no child had a disability were below the poverty line, whereas 17.0% of families with a disabled child were below the poverty line.[11] That result is related to the fact that the parents of a disabled child often must forgo earning income to provide the specialized child care and other needs of the disabled child that a parent alone can provide.[12]

A parent's responsibility for caring for a disabled child creates barriers to maintaining a place in the workforce. For children with disabilities, informal childcare arrangements often are not an option because of the specialized care a disabled child requires. The difficulty of securing appropriate child care arrangements puts a strain on a parent's time and stamina, often making it impossible for the parent to engage in other work.[13] Appointments during the workday, health and mental crises, and countless special education meetings can frequently interfere with a parent's employment. The parent's integral role in implementing home therapy and behavioral intervention programs adds to these pres-

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[11] Anna Malsch, *Disabilities & Work-Family Challenges: Parents Having Children with Special Health Care Needs*, Sloan Worming Family Research Network, Boston College, Work & Family Encyclopedia (Aug. 2008), http://wfnetwork.-bc.edu/encyclopedia_entry.php?id=14822&area=All .

[12] *See, e.g.*, Duggan & Kearney, *supra*, at 7 n.9, 22 & tbl. 7. The receipt of SSI benefits helps families stay above the poverty line. "Thus for every 10 children who are awarded SSI benefits, three children are removed from deep poverty." *Id.* at 25.

[13] Malsch, *supra*.

sures.[14] Families thus rely on SSI benefits to replace lost income, and without the safety net provided by SSI benefits, families with a disabled child may continue to fall deeper and deeper into poverty.

C. The Non-Combination Policy Prevents Many Needy and Deserving Children from Receiving Disability-Based Medicaid and Related Services

The SSA's informal non-combination policy has a severe impact beyond the denial of SSI benefits themselves because a determination of "disability" is also a gateway to other crucial government benefits. Most significantly, the SSI disability standard governs eligibility for Medicaid, whether or not a family applies for SSI benefits.[15] Indeed, even families who do not meet the SSI program's financial qualifications may qualify for optional state Medicaid programs for children and adults with disabilities.

The SSA's informal non-combination policy thus denies disabled children timely access to specialized and often intensive services and therapies that would mitigate the effect of their disabilities—including many that are unavailable under tradi-

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[14] *Id.*

[15] 42 U.S.C. §§ 1396a(a)(10)(A)(ii)(X) and 1396a(m)(1)(A), 1396a(10)(C)(i)(III); 42 C.F.R. §§ 435.201(a)(3), 435.324(a) and 435.541(c). However, certain states have elected to impose stricter disability standards provided they are not stricter than the standards in effect in 1973. 42 U.S.C. § 1396a(f).

tional health plans, but available under Medicaid.[16] For example, Medicaid offers extensive services unavailable under State Children's Health Insurance Programs, which provide medical coverage for children in low-income families who do not qualify for Medicaid.[17] The added services can be significant for children with special health care needs and particularly for those whose disabilities meet the SSI disability standard.

II. THE SSA'S INFORMAL NON-COMBINATION POLICY LEADS TO IRRATIONAL RESULTS THAT HARM DISABLED CHILDREN.

Amici know from their significant experience representing children seeking SSI benefits that the SSA's informal non-combination policy has devastating real-life impacts. It is very common for children to present with multiple impairments that produce limitations across many of the "domains" of functioning. The resulting limitations may not rise to the

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[16] These therapies often must be provided early in the developmental period for maximum effectiveness, including therapies addressing autism spectrum disorders, behavioral manifestations of disabilities, intense physical, occupational or speech therapy.

[17] *See generally* Joan Alker, et al., *Children & Health Care Reform: Assuring Coverage That Meets Their Health Care Needs*, Focus on Health Reform, Kaiser Family Foundation (Sept. 2009), http://www.kff.org/healthreform/upload/7980.pdf; Cindy Mann & Elizabeth Kenney: Family Coverage Matters: *Differences That Make a Difference: Comparing Medicaid & The State Children's Health Ins. Program Fed. Benefit Standards*, Georgetown Univ. Health Policy Inst., Ctr. for Children & Families, Issue Brief (Oct. 2005).

"marked" level in two specific domains, but the child's overall ability to function may still be severely compromised. If ALJs are barred from considering the combined effects of *all* impairments, thousands of children who should qualify for benefits will be denied.

In the following two real-life examples from the Empire Justice Center's case files, the irrational disability benefit determinations stemming from the SSA's informal non-combination policy are plainly evident.

A. Sylvia P. – Multiple Mental Health Diagnoses

Sylvia P. is a fourteen-year-old girl whose multiple psychiatric diagnoses included anxiety, depression, post traumatic stress disorder (due to a history of childhood sexual abuse), and attention deficit hyperactivity disorder (ADHD). Sylvia also had a significant non-verbal learning disorder characterized by poor pragmatic skills, and suffered from a serious sleep disorder that exacerbated her ADHD and depression.

An ALJ recently agreed that Sylvia had a marked limitation in the domain of "attending and completing tasks," primarily due to her ADHD. He also recognized that she had serious difficulties in the domain of "interacting and relating with others" because her psychiatric disorders caused her to behave inappropriately with peers and predisposed her to conflicts with adults (because her history of childhood sexual abuse made it difficult for her to interact with any adults she did not know well), and because her learning disability, which impaired pragmatic language, compromised all forms of social communication. Nevertheless, the ALJ concluded, arguably correctly, that the degree of overall limitation in this domain was less than marked.

Similarly, the ALJ found that Sylvia's non-verbal learning disorder, ADHD, mental illnesses and disturbed sleep patterns all adversely affected the domain of "acquiring and using information," and that her anxiety and sleep disorder caused her to have a degree of limitation in the domain of "health and physical well-being." Nonetheless, the ALJ again concluded (arguably correctly) that the degree of limitation was less than marked. Having found that Sylvia's impairments caused functional limitations in four domains, but that the marked level was reached in only one, the SSA's informal non-combination policy left the ALJ without freedom even to consider whether Sylvia was as disabled overall as a child with exactly two marked limitations. In effect, he was obliged to give zero weight to the impairments causing real functional limitations in three domains, and to find that she was not disabled and thus ineligible for SSI benefits.

B. Enrique M. – Asperger's Syndrome

Enrique is a nine-year-old boy with Asperger's Syndrome, an Autism Spectrum Disorder characterized by severe and sustained impairment in social interaction and the development of restrictive, repetitive patterns of behavior.[18]

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[18] Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders*, p. 84 (4th ed., text rev. 2000).

Enrique's condition affected all six domains of functioning. An ALJ recently found that despite above-average intelligence, Enrique's condition caused some limitation of function in "acquiring and using information." Concentration and organization deficits characteristic of Asperger's Syndrome required constant assistance of school personnel to keep Enrique on task, limiting function in the domain of "attending and completing tasks." Enrique's pronounced inability to read social cues, lack of social and emotional reciprocity, eccentric gestures and facial expressions, and poor personal hygiene adversely affected the domain of "interacting and relating with others." His physical clumsiness and lack of body awareness affected the domain of "moving about and manipulating objects." Enrique's lack of awareness of personal hygiene problems (he needed reminders to bathe, brush hair, and wear appropriate clothes) caused limitation of function in the domain of "caring for yourself." The ALJ also agreed that Enrique's limitations affected the domain of "health and physical well-being."

The ALJ considered all the evidence in Enrique's case and concluded that, although his condition created limitations in each of the six domains, none of the limitations reached the marked level. As a result, whatever might have been his opinion of Enrique's overall degree of limitation, the ALJ was constrained to find him not disabled. This is not to say that Enrique necessarily was disabled, although *amici* submit that he likely was: An ALJ free to fully consider the combined effects of Enrique's impairments might have concluded that they did not reach the level of severity mandated by Congress. But the SSA's non-combination policy, by disaggregating Enrique's disability into components individually too small to matter, and then refusing to re-aggregate them, prevented the ALJ from following Congress's command to consider "the combined impact of the impairments . . . throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(G).

III. PROVIDING ADJUDICATORS WITH THE NECESSARY DISCRETION TO CONSIDER ALL IMPAIRMENTS IS WORKABLE

Providing ALJs with the necessary discretion to consider the combined effects of all impairments would be feasible and workable in actual practice. While the decision below faulted petitioners for failing to offer "an alternative system that would satisfy the statute and be efficiently administered,"[19] petitioners did not bear the burden of designing an administrative scheme to implement Congress's directive. Rather, it is the agency that initially has the authority and responsibility to design a methodology to implement Congress's command. The SSA has done so through the domain methodology, and neither petitioners nor *amici* challenge that basic methodology. But it is similarly the SSA's responsibility to refine that methodology to assure that it fully satisfies the statutory command to consider all impairments throughout the disability determination process.

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[19] *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 80 (2d Cir. 2009).

Moreover, the suggestion that adjusting the domain methodology to provide the necessary discretion would be "unworkable" is simply incorrect. The SSA has long provided ALJs with significant discretion in weighing medical evidence. Indeed, the earlier version of the "domain" regulations provided precisely the discretion required by the statute. In 1993, the Commissioner issued regulations setting forth the analysis for determining whether a child was disabled for the purposes of SSI benefits. 58 Fed. Reg. 47,532 (Sept. 9, 1993) (codified at 20 C.F.R. pt. 416). The regulations, necessitated by this Court's decision in *Zebley*, called for an assessment across six domains of functioning similar to that required under the current regulations. 20 C.F.R. § 416.924(a)-(b) (1994).[20] As a general matter, a child was disabled if he or she had a marked limitation in one domain and a moderate limitation in another domain or three moderate limitations. 20 C.F.R. § 416.924e(c)(2) (1994). The SSA, however, retained flexibility to consider two moderate limitations as the equivalent of one marked, and more generally to consider all impairments—including mild or nonsevere limitations—in reaching a final determination. *Id.* § 416.924e(a); *Encarnacion ex rel. George v. Barnhart*, 331 F.3d 78, 83, 88-89 (2d Cir. 2003). Congress required in 1996 that the overall disability standard provided under these regulations be raised to two marked limitations, but did not tell the SSA to eliminate the flexibility to consider all impairments—indeed, citing *Zebley*, it specifically

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[20] Note that the domains of functioning were different than those used in the current disability determination process for children. *Compare with* 20 C.F.R. § 416.924 (2009).

reminded the agency to continue to honor that obligation. H.R. Conf. Rep. 104-725, at 328 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2716.

In addition, speaking for a Second Circuit panel in an earlier decision in this case, Judge Katzmann acknowledged that the Commissioner had ample discretion in determining the process by which each of a child's impairments would be "given at least some effect during each step of the disability determination process." *Encarnacion*, 331 F.3d at 87, 90. The Court noted that the Commissioner was not "required in a mechanical way to add impairments across domains," but instead could allow ALJs to make an upward adjustment of limitation in one or more domains to account for the effect of impairments deemed to cause "less than marked" impairment in another domain. *Id.* at 87-89.

For those reasons, the Social Security Adjudicators and ALJs can retain the flexibility either to combine limitations (as in the 1993 regulations) or adjust limitations (as the Second Circuit described) to consider each child as a whole in the disability determination process, while still applying a stricter overall standard as required by the 1996 Social Security Act amendments.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioners, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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