No. _____

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 a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Supplemental Security Income (SSI) program provides benefits to disabled children from poor families. Congress has instructed the Commissioner of Social Security to consider "throughout the disability determination process" whether "the combined effect of all of the individual's impairments" is of sufficient severity for the individual to be considered disabled, "without regard to whether any such impairment, if considered separately, would be of such severity," 42 U.S.C. § 1382c(a)(3)(G).

This case concerns one of the primary tests for disability under the SSI program. Under it, a child will be considered disabled only if his medical impairments produce an "extreme" limitation in at least one of six "domains" of functioning, or "marked" limitations in at least two domains. It is the Commissioner's policy not to "combine" findings from different domains; that is, limitations in separate domains cannot be "added up" or otherwise adjusted based on medical impairments that affect other domains, and even serious medical impairments are ignored in the final analysis of disability unless they contribute to a "marked" or "extreme" limitation.

The question presented is whether the Commissioner's "non-combination" policy for assessing disability in children violates Congress's instruction in Section 1382c(a)(3)(G) to consider the combined effect of all of the individual's impairments.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 568 F.3d 72. The opinion of the district court (App., *infra*, 22a-51a) is reported at 491 F. Supp. 2d 453.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. On August 26, 2009, the court of appeals denied a timely petition for panel rehearing and rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1382c(a)(3) provides in pertinent part:

> (C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations . . . .
>
> * * *
>
> (G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments

> without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

The following regulatory provisions are reprinted in pertinent part at App., *infra*, 90a-93a: 20 C.F.R. §§ 416.923, 416.924, 416.924a, and 416.926a.

STATEMENT

Under the Supplemental Security Income (SSI) program enacted by Congress in 1972, disabled children from low-income families are entitled to monthly cash benefits to help their families shoulder the burden of meeting their special needs. See generally 42 U.S.C. §§ 1381, 1381a, 1382, 1382c.[1] Currently about 400,000 SSI child-disability claims are adjudicated each year. See Office of Retirement and Disability Policy & Office of Research, Evaluation, and Statistics, Soc. Sec. Admin., Annual Statistical Report, 2008, at 133 (2009), available at http://www.ssa.gov/policy/docs/statcomps/ssi_asr/2008/ssi_asr08.pdf.

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[1] The program has been recognized as serving four primary purposes: (1) ensuring life's basic necessities to allow the disabled child to live at home or in an appropriate setting; (2) meeting added costs of raising and caring for the child; (3) promoting the child's development; and (4) offsetting the lost income of the parent(s) that must care for the child. NATIONAL COMMISSION ON CHILDHOOD DISABILITY, REPORT TO CONGRESS: THE SUPPLEMENTAL SECURITY INCOME FOR CHILDREN WITH DISABILITIES 40 (1995).

The method by which the Social Security Administration (SSA) determines that a child is disabled for purposes of entitlement to SSI benefits has been the subject of a prolonged tug-of-war between Congress and the agency. In particular, the SSA has historically resisted evaluating children's *function* (as opposed to medically measurable impairments), despite repeated congressional directives – sometimes enforced by the federal courts, including this Court – to do so. The result of that resistance is that legitimately disabled and indisputably needy children have been denied benefits to which Congress clearly thought them entitled.

The latest chapter in this saga began in the 1990s, when the Commissioner adopted his current methods of evaluating disability in children. Under the method at issue here, the Commissioner assesses whether a child has what the SSA regulations describe as a "limitation" in one of six defined "domains" of functioning. To qualify for benefits, a child must have an "extreme" limitation in at least one domain, or "marked" limitations in at least two domains. It is the Commissioner's policy not to "combine" findings from different domains. Limitations in separate domains cannot be "added up" or otherwise adjusted based on impairments that affect other domains. Accordingly, an impairment (no matter how serious) that does not contribute to a "marked" or "extreme" functional limitation plays no role in the ultimate analysis of disability. The Commissioner's policy denies adjudicators discretion to give weight to *all* impairments and find a child disabled based on the totality of the evidence. As a result, thousands of poor, largely unrepresented

children are being denied full and appropriate consideration of their claims.

A. Background: Congress and this Court Insist on an Overall Functional Assessment

The critical statutory provision in this case is 42 U.S.C. § 1382c(a)(3)(G), which directs the Commissioner, in assessing the medical severity of an individual's physical or mental impairments, to "consider the *combined effect* of *all* of the individual's impairments without regard to whether" any of the impairments would, "if considered separately," be sufficiently severe to qualify the individual for benefits (emphasis added). The statute further provides (as relevant here) that "the combined impact of the impairments shall be considered *throughout the disability determination process*" (emphasis added).

Congress enacted Section 1382c(a)(3)(G) in 1984, see Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 4(b), 98 Stat. 1794, 1800 and it did so specifically to reject an earlier regulatory regime that threatened to "preclude realistic assessment of those cases involving individuals who have several impairments which in combination may be disabling," H.R. Conf. Rep. 98-1039, at 30, reprinted in 1984 U.S.C.C.A.N. 3080, 3087-3088. Before the enactment of Section 1382c(a)(3)(G), the SSA's policy[2] towards any individual suffering from

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[2] SSA is currently an independent agency, but before 1995, it was part of the Department of Health and Human Services (HHS). At that time, the policies and regulations applicable to SSA were formally promulgated by the Secretary of HHS rather than the Commissioner of Social Security. This petition

multiple impairments had been to consider the combined impact only of impairments that individually qualified as more than *de minimis* – "severe" impairments in the somewhat counter-intuitive parlance of the regulation. Impairments that failed this test were disregarded and not combined with other impairments in assessing overall disability.

Despite the *de minimis* quality of the impairments being disregarded, the 1984 legislation unambiguously rejected SSA's approach. See, *e.g.*, App., *infra*, 58a-61a. Congress thereby confirmed an unbroken line of court of appeals decisions rejecting SSA's non-combination policy. See, *e.g.*, *Johnson* v. *Heckler*, 769 F.2d 1202, 1204 (7th Cir. 1985) (gathering pre-1984 cases). After 1984, courts continued to enforce the combination principle in the face of on-going agency resistance. See, *e.g.*, *Dixon* v. *Shalala*, 54 F.3d 1019, 1031 (2d Cir. 1995).

For children, however, that was not the end of the story. In 1990, this Court by a 7-2 vote rejected the SSA's methods for determining whether a child claimant was eligible because those methods did not provide the kind of "individualized, functional approach" called for by Congress. *Sullivan* v. *Zebley*, 493 U.S. 521, 539 (1990). At that time, the statutory definition of a disabled child was one who "suffers from an impairment of comparable severity" to an impairment that would make an adult "unable to

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nevertheless refers to applicable regulations, policies, and determinations as "SSA's" without regard to whether formal authority lay with the Secretary of HHS or the Commissioner.

engage in any substantial gainful activity," 42 U.S.C. § 1382c(a)(3)(A) (1988). Under the SSA's regulations, an *adult* could qualify by showing (in addition to factors not relevant here) *either* (1) a set of "specific medical signs, symptoms, or laboratory test results," 493 U.S. at 530, that matched, or was "equivalent" to, one of a specified list of impairments developed by the agency, *or* (2) an inability to work. *Id.* at 525-526. By contrast, a *child* could qualify *only* by showing (as relevant here) medical evidence that matched, or was "equivalent" to, one of a specified list of impairments. *Id.* at 526.

In other words, there was no "safety valve" for children, as there was for adults, in the form of a separate inquiry into an individual's *functional* limitations when that individual did not fit within rigid, pre-established medical criteria. See *id.* at 533-536. For adults, the "functioning" in question was vocational. But, as this Court noted, even though a vocational analysis is inapplicable to children, there was no reason why a functional analysis could not be applied to "the normal daily activities of a child of the claimant's age." *Id.* at 539-540.

Relatedly, "equivalen[ce]" to a listed medical impairment meant only that there were medical findings equal in severity to each of the criteria for some listed impairment, *not* that "*the overall functional impact*" of an individual's condition was as severe as that of a listed impairment. *Id.* at 531 (emphasis added). For example, as this Court observed, a child with both (a) a growth impairment slightly less severe than required by the listing and (b) mental retardation that produced an IQ just

above the cut-off set forth in the listing would not qualify, "no matter how devastating the combined impact of mental retardation and impaired physical growth." *Id.* at 531 n.11.

Zebley held that this refusal to give "individualized consideration" to the effect of combinations of impairments violated the statutory directive to consider "the combined impact of [multiple] impairments . . . throughout the disability determination process." *Id.* at 535 n.16. The Court was troubled that the agency would necessarily deny benefits to a child with a combination of unlisted impairments that were not (as defined by the agency) "equivalent" to a listing, "even if their impairments are of 'comparable severity' to ones that would . . . render an adult disabled." *Id.* at 535-536. The Court found it problematic, too, that the agency's system would exclude "children with impairments that might not disable any and all children, but which actually disable *them*, due to symptomatic effects such as pain, nausea, side effects of medication, etc., or due to their particular age, educational background, and circumstances." *Id.* at 535.[3]

Congress revisited SSI benefits for children in 1996, enacting legislation intended to raise the overall level of disability required. However, far

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[3] Following *Zebley*, SSA adopted new regulations that introduced the "domain" concept and provided, generally, that a child claimant would be disabled based on one "marked" plus one "moderate" limitation, or three "moderate" limitations, or any combination of limitations that, practically speaking, compromised overall functioning to an equivalent degree. See 20 C.F.R. § 416.924e (1994).

from ignoring or overruling *Zebley*, Congress confirmed the need to consider overall function by providing that a child is "disabled" if he or she "has a medically determinable physical or mental impairment, which results in marked and severe *functional limitations*." Pub. L. No. 104-193, § 211(a)(4), 110 Stat. 2105, 2188 (emphasis added); 42 U.S.C. § 1382c(a)(3)(C)(i). Indeed, the Conferees expressly reminded the Commissioner to comply with § 1382c(a)(3)(G), and noted *Zebley*'s conclusion that the SSA had previously been "remiss" in failing to "ensure that the combined effects of all the [child's] physical or mental impairments are taken into account" in making the disability determination. H.R. Conf. Rep. 104-725, at 328, reprinted in 1996 U.S.C.C.A.N. 2649, 2716. The Conferees also took care to note that they did "not intend to limit the use of functional information, if reflecting sufficient severity and [if] otherwise appropriate," and they pointed out that "Congress may revisit the definition of childhood disability and the scope of benefits, if deemed appropriate." *Ibid.*

B. The Commissioner's "Non-Combination" Policy

In the late 1990s, the SSA promulgated a series of regulations designed to implement the 1996 legislation. Under the regulations, the SSA asks as a threshold matter whether the child has an impairment (or combination of impairments) that is "severe." If the answer is no, the child is not disabled. If the answer is yes, the SSA then asks whether the impairment (or combination of impairments) either (1) meets or is medically

equivalent to an impairment listed in an appendix to the regulations, or (2) "functionally equals the listings." See 20 C.F.R. § 416.924(a) (2009).

At issue in this case is the latter method of demonstrating disability. For purposes of deciding whether a child's impairment (or combination of impairments) "functionally equals the listings," the SSA has defined six "domains of functioning." They are: (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). Within each domain, the SSA rates the child's limitations as "less than marked," "marked," or "extreme." See *id.* § 416.926a(a), (d). A child's impairments will "functionally equal the listings" only if she has an "extreme" limitation in one domain or "marked" limitations in two domains. See, *e.g.*, 20 C.F.R. § 416.926a(a).

That approach could theoretically be acceptable, except that under an informal "non-combination" policy set out in rulebooks and training manuals, adjudicators may not consider the interaction between the effects of limitations in separate domains in determining the child's overall level of functioning. Specifically, adjudicators cannot adjust the level of limitation in one domain to reflect the cumulative and interactive impact that less-than-marked limitations in *other* domains may have on the overall level of functioning. *E.g.*, App., *infra*, 9a; C.A. App. 1068, 1756-1759. Rather, after adjudicators have considered the impact of all of a claimant's

impairments *within* each particular domain, they assign no weight to – for all practical purposes they forget about – any impairment that does not contribute to at least a "marked" limitation in a particular domain.

For instance, under the regulations, a child whose IQ is accurately measured at precisely 70 is deemed to have a marked limitation in the domain of acquiring and using information. A child with an IQ of 71 is not, absent other impairments that also affect the level of disability in that domain. In assessing overall function, the Commissioner gives no weight to the second child's less-than-marked limitation. He simply treats her as having average intelligence.

The result is that many children will be denied benefits even though they are, on any reasonable understanding, severely impaired. For example, a child whose impairments cause one nearly extreme limitation and five limitations that are just less than marked cannot be found disabled, no matter how devastating the combined impact of these limitations is on the child's overall ability to function at home and in school.

The child plaintiffs in this case exemplify many children with multiple, interactive impairments directly affected by the non-combination policy. Arlene George has learning disabilities, attention deficit hyperactivity disorder ("ADHD"), and severe behavioral problems variously labeled as impulse control disorder, conduct disorder, or oppositional defiant disorder. C.A. App. 305-307. Michelle Taveras has severe learning disabilities, ADHD, and asthma and displays oppositional and aggressive

behavior. C.A. App. 307-309. Mathew Lacayo has learning disabilities, a borderline to low average IQ, and oppositional defiant disorder, conduct disorder, depression, and/or ADHD. C.A. App. 309-312. Ben-Hemir Collado has significant, language-based cognitive deficits, severe ADHD, and asthma. C.A. App. 312-314.

Thus, each of the named child plaintiffs has multiple severe impairments that the Commissioner was statutorily obligated to consider *in combination* throughout the disability determination process. In each case, the interactive and cumulative effects of these multiple impairments are devastating. However, each child's claim was adjudicated by an administrative law judge (ALJ) who had been instructed to assign no weight to any impairment that did not contribute to a marked limitation in a particular domain. As a result, in three cases out of four, the ALJ, constrained by the Commissioner's policy, found a marked limitation in only a single domain. *Encarnacion* v. *Barnhart*, 2003 U.S. Dist. LEXIS 3884, at *2-*3 (S.D.N.Y. 2003) (George); C.A. App. 1832-1837 (Tavares); C.A. App. 498-514 (Lacayo). In the fourth case, Ben-Hemir Collado's, the ALJ found that the child's impairments impacted every domain, but none severely enough to be counted at all in the final, decisive step of the disability determination process. C.A. App. 527-532. Since the ALJs found that the named plaintiffs did not have at least two marked limitations or one extreme limitation, they denied benefits.

The SSA's regulations, however, contemplate – just as Congress did – a more flexible analysis. For

instance, echoing the statute, the SSA promised to "consider the combined effect of all of [a child's] impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity." 20 C.F.R. § 416.923 (2009). And, once the SSA determines (at the earlier step of the inquiry) that the child has a "severe combination of impairments," the SSA guarantees – just as Congress demanded, see 42 U.S.C. § 1382c(a)(3)(G) – that "the combined impact of the impairments will be considered *throughout the disability determination process*." 20 C.F.R. § 416.923 (emphasis added). Similarly, the SSA promises to "look *comprehensively* at the *combined effects* of [the child's] impairments on [his] day-to-day functioning *instead of considering the limitations resulting from each impairment separately*," *id.* § 416.924a(b)(4) (2009) (emphasis added), to "consider the combined effects of *all [of the child's] impairments* upon [his] *overall health and functioning*," *id.* § 416.924(a) (emphasis added), and to assess the "interactive and cumulative effects" of all of the impairments, *id.* § 416.926a(a).

C. Proceedings Below

Petitioners are the parents of the child plaintiffs described above.[4] Their children's claims for SSI disability benefits were denied because of the non-combination policy. Some nine years ago, one of the petitioners filed suit on behalf of herself and all others similarly situated. She and others challenged, as inconsistent with Section 1382c(a)(3)(G), the Com-

[4] The exception is petitioner Mathew Lacayo, who was denied benefits while a child but had reached the age of 18 before this action was filed. Petitioner Hortensia Lacayo is his mother.

missioner's methods of determining whether a child's combination of impairments "functionally equals the listings." The district court dismissed the complaint.

On appeal, the Second Circuit agreed with the plaintiffs that the SSA's methods "would be contrary to the statute if the SSA gave no weight to some of a claimant's impairments in appraising the claimant's level of disability," but held that the SSA's regulations allow for the very flexibility that plaintiffs contended was lacking. App., *infra*, 55a. In his opinion for the panel, Judge Katzmann noted the regulations' instructions to "look comprehensively at the combined effects of [a claimant's] impairments . . . instead of considering the limitations resulting from each impairment separately," and to consider the "interactive and cumulative effects" of all impairments, whether or not severe. *Id.* at 74a. On the panel's understanding, "nothing would preclude SSA from adjusting an otherwise moderate, but nearly marked, limitation in domain A up to fully marked to account for the effect of a limitation in domain B." *Id.* at 77a. The panel thought that this "flexibility to account for cumulative effects . . . is likely essential to a permissible implementation of the Act." *Id.* at 78a.

The court of appeals nevertheless affirmed the dismissal because it read the complaint as failing actually to allege that such flexibility was lacking: "We have searched the Complaint in vain, however, for an allegation that SSA does not, in fact, adjust the level of a claimant's limitation within one or two domains to 'look comprehensively' at the claimant and account for the 'interactive and cumulative

effects' of limitations in other domains." *Id.* at 76a-77a (quoting SSA regulations). The panel did not "intend[] to foreclose Plaintiffs from raising a future challenge" based on such an allegation. *Id.* at 77a n.7.

Petitioners then filed this action. On behalf of themselves and all others similarly situated, they renewed the challenge to the SSA's methods of determining "functional equivalence," but this time more explicitly alleged the existence of the non-combination policy. Petitioners also claimed that the Commissioner's methods produce irrational results by arbitrarily excluding some claimants while paying benefits to others who are no more deserving. C.A. App. 13-15, 37-38. At the summary judgment stage, plaintiffs supported the latter claim with the expert declaration of a nationally recognized school psychologist. He explained that the Commissioner's policy ignores good professional practice and is irrational because it leads to the denial of benefits for many children whom any reasonable clinician would find to be at least as disabled as plenty of other children who qualify under the Commissioner's strict methodology. See C.A. App. 1892-1893, 1902-1903. Judge Swain granted summary judgment for the Commissioner. App., *infra*, 22a-51a.

The court of appeals affirmed. In its view, Judge Katzmann's previous opinion for the court did not actually resolve the permissibility of the non-combination policy because his panel believed (contrary to plaintiffs' current allegations) that there was a real "possibility of cross-domain adjustment." App., *infra*, 13a-14a. The court of appeals also

thought that, to the extent the earlier panel "meant to suggest that the Act required the agency to make cross-domain adjustments, any such comments are dicta." *Id.* at 13a n.1.

The court proceeded to review the non-combination policy. Despite applying diminished deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), Judge McLaughlin's opinion for the court concluded that the policy is consistent with the statutory directive to consider the "combined impact of the impairments . . . throughout the disability determination process" because "the SSA considers all impairments within each domain, the final step of the process as the Commissioner has defined it." App., *infra*, 16a-17a. The court of appeals dismissed *Zebley* in a footnote; it thought that the domain system, despite the non-combination policy, provides the "individualized assessment" of the "combined impact of [all] impairments" that *Zebley* had demanded. *Id.* at 17a n.3. The Second Circuit also believed that the non-combination policy was consistent with congressional "efforts to tighten eligibility," including Congress's rejection of an earlier procedure that "had allowed the SSA greater flexibility to award benefits to children with fewer than two marked limitations." *Id.* at 18a.

In addition, the court of appeals criticized petitioners for failing to offer "an alternative system that would satisfy the statute and be efficiently administered." *Id.* at 19a. Finally, observing that it was "ill-equipped . . . to decide the best method to determine childhood disability," the court chose to reject the school psychologist's testimony and to

defer to the SSA's experience in "administering a complex statute" and attempting to "align [the disability-determination process for children] with congressional purposes." *Id.* at 19a-20a. In that regard, the Second Circuit was impressed that the Commissioner has not "waffled in his interpretation of the statute or regulations." *Id.* at 20a.

The court of appeals denied plaintiffs' petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision upholding the Commissioner's non-combination policy contravenes *Sullivan* v. *Zebley*, 493 U.S. 521 (1990), and violates Congress's plain command that SSI disability claimants are entitled to have the combined effects of *all* of their impairments considered at *every* stage of the disability determination process – not just at most steps. The policy, moreover, leads to irrational results for the same reasons articulated in *Zebley*. Further review is warranted to prevent a severe impact on thousands of needy claimants in a largely unrepresented population.

I. The Court of Appeals' Decision Flies in the Face of *Zebley*

Congress and this Court have repeatedly indicated that the SSA should consider, at *all* stages of the disability determination process, the functional impact of *all* of the impairments experienced by an applicant for disability benefits. The Second Circuit has failed to follow suit.

The Social Security Act has long used a "functional approach to determining the effects of

medical impairments." *Bowen* v. *Yuckert*, 482 U.S. 137, 146 (1987) (citing *Heckler* v. *Campbell*, 461 U.S. 458, 459-460 (1983)); see also *Yuckert*, 482 U.S. at 156-158, 179-180 (five concurring and dissenting Justices agreeing that a purely medical severity criterion cannot be used to screen out claimants without consideration of other factors affecting ability to work); *Bowen* v. *City of New York*, 476 U.S. 467, 473-474 (1986) (describing an invalidated policy in which agency applied a presumption that eliminated steps of its evaluation process designed to determine whether an adult disability claimant is unable to work).

An individual's ability to function is affected by *all* of his impairments, not just some. The 1984 statute at issue in this case, 42 U.S.C. § 1382c(a)(3)(G), was designed to ensure that the SSA would consider impairments that were not individually of sufficient severity to warrant a finding of disability. The 1996 amendments continued that approach; indeed, the Conferees for the legislation expressly indicated their agreement with *Zebley*. Since 1996, moreover, Congress has not altered the statutory language, even though the 1996 Conferees specifically invited "Congress [to] revisit the definition of childhood disability and the scope of benefits, if deemed appropriate." See page 8, *supra*.

There is, accordingly, no doubt that *Zebley* is the law. And *Zebley* unambiguously held that, as part of SSA's mandate to assess "overall functional impact," 493 U.S. at 531, the agency is required under Section 1382c(a)(3)(G) to give "individualized consideration" to the effect of combinations of *all* impair-

ments at *all* stages of the disability determination process. 493 U.S. at 535 n.16. This Court specifically pointed to the example of a child with a nearly disabling growth impairment and nearly disabling mental retardation, and found it unacceptable that the child would not qualify "no matter how devastating the combined impact" on the child's functioning of the two impairments. *Id.* at 531 n.11.

The Commissioner's "non-combination" policy causes the SSA to do precisely what *Zebley* said Congress did not want the SSA to do: fail to factor certain impairments into the overall assessment of disability. The court of appeals' textual defense of the policy and its cursory attempt to avoid *Zebley* do not work. As the earlier Second Circuit panel understood, even given a domain system, the exclusion in the final analysis of sub-marked limitations (and the impairments that produce them) means that the SSA flatly fails to consider "the combined impact" of *all* impairments "throughout the disability determination process," 42 U.S.C. § 1382c(a)(3)(G).

Also impossible to reconcile with *Zebley* are the Second Circuit's other rationales for upholding the non-combination policy. The Second Circuit criticized petitioners for failing to offer "an alternative system" that could be "efficiently administered," but this Court in *Zebley* rejected a very similar argument. See 493 U.S. at 539. In any event, as this Court explained in *Zebley*, *Congress* has instructed the SSA to consider the combined effect of all impairments at all stages. It is the Commissioner's job to figure out how to fulfill his mandate. And sure enough (as Judge Katzmann's opinion recognized),

the Commissioner's own regulations already allow the very discretion that the non-combination policy prohibits.

Finally, the Second Circuit deferred to the SSA's experience and expertise.[5] But the SSA's experience and expertise do not automatically make its policies (even when they have not been the subject of any "waffl[ing]," App., *infra*, 20a) consistent with the statute, particularly when one considers the agency's history of resisting Congress's prescriptions regarding disability assessments in children. Indeed, even though *Zebley* applied a *more* deferential standard of review than the *Skidmore* standard that the court of appeals used here (see 493 U.S. at 528 (citing *Chevron*)), *Zebley* still concluded that the SSA was not giving effect to § 1382c(a)(3)(G) for children. (Similarly, Judge Katzmann's panel, despite applying *Chevron* deference, had no trouble seeing that a strict non-combination policy would violate the statute.)

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[5] The Second Circuit rejected the testimony of plaintiffs' expert because he used hypothetical examples to illustrate how the non-combination policy produces irrational and arbitrary outcomes. App., *infra*, 20a. But in *Zebley* this Court did the same thing. The core of its analysis (which drew heavily on *amicus* submissions from expert organizations, see 493 U.S. at 531 n.10, 534 n.13, 536 n.17) was based on categories and examples of potential or hypothetical applicants. See *id.* at 531 nn. 10-11, 534 n.13, 535-536 & nn. 16-17. Moreover, the Commissioner here offered nothing but lawyers' arguments to refute plaintiffs' expert, and has cited nothing in the rulemaking record to suggest that any healthcare professional has ever endorsed as rational or consistent with good medical or psychological practice the atomized assessment mandated by the Commissioner's non-combination policy.

II. The Question Presented Frequently Recurs and Is Extremely Important to Families Affected By It

SSI is a critical resource for the impoverished families of children with serious disabilities. Poor children who, because of a constellation of impairments, experience limitations in multiple domains (even if not rising to the very high level of "marked" or "extreme") are particularly at risk of life-long disability. C.A. App. 1901. It is common to find such children. Even if only one of their limitations is at the marked level whereas the others are below it, they are often at least as disabled as children deemed to satisfy the standard by virtue of having one "extreme" or two "marked" limitations. *Id.* at 1902-1903. To find the latter eligible for benefits but disqualify the former is arbitrary and irrational as well as contrary to the governing statute.

For example, 13-year-old Esteban Martinez[6] suffered from severe delays in expressive and receptive language abilities, with communication skills that fell below the first percentile. He also had severe learning disabilities, with reading and writing ability likewise below the first percentile. He received psychiatric counseling for ADHD, despite which he was often restless, impulsive, inattentive, and disruptive at school. Esteban also behaved aggressively towards other children, and demonstrated serious delays in self-care, including occasional encopresis (fecal incontinence). The ALJ found that Esteban was limited in no fewer than five domains

[6] Esteban was a proposed plaintiff in the district court. See App., *infra*, 50a-51a.

(acquiring and using information, attending and completing tasks, interacting and relating with others, caring for yourself, and health and physical well-being), but denied benefits because he determined – probably correctly – that the marked level of limitation had been reached only in a single domain (acquiring and using information). In the end, although Esteban's combination of impairments was far more disabling than that of many children with two marked limitations, he could not qualify for SSI because the only impairments that ultimately counted were those that affected one domain. C.A. App. 322-339.

Esteban's case is hardly exceptional. There is a high degree of "co-morbidity" between certain childhood impairments (*e.g.*, behavioral disorders, learning disabilities, ADHD), such that children, like Esteban, with one marked and multiple less-than-marked limitations are frequently encountered in the real world; they are often more seriously impaired overall than children with a single extreme, or two marked limitations, and they are on a clear trajectory towards truancy, delinquency, substance abuse, and crime. The Commissioner's policy, by intentionally discounting impairments that seriously affect functioning, irrationally treats them as less disabled than they are. C.A. App. 1903.

Reported decisions reflecting this phenomenon of co-morbidity are not uncommon. See, *e.g.*, *R.J.* v. *Astrue*, 2009 U.S. Dist. LEXIS 68455 (S.D. Ind. 2009) (claimant diagnosed with borderline intellectual functioning, ADHD, and conduct disorder); *Bausley* v. *Astrue*, 2009 U.S. Dist. LEXIS 83816 (W.D. Ark.

2009) (borderline IQ, ADHD, depression); *Trayvaughn P.* v. *Astrue*, 2009 U.S. Dist. LEXIS 75483 (E.D. Cal. 2009) (low average intelligence, ADHD, serious behavior problems), but their number likely understates the impact of this issue because, unlike petitioners here, applicants for child-disability SSI benefits typically do not have the legal representation necessary to pursue a claim in the courts. There is a bar that serves adult claimants under SSI (or under the larger and better-known Social Security disability insurance program), but no analogue for child claimants and their families. See *Maldonado* v. *Apfel*, 55 F. Supp. 2d 296, 299-301, 306-307 (S.D.N.Y. 1999) (discussing difficulty of obtaining counsel for child claimants). Accordingly, the question presented, despite the extremely high stakes it involves, is likely to continue to evade review unless the Court decides to hear this case.

* * * * *

To be sure, in this class action, there is no conflict in the circuits, nor is one likely to develop. Rather, the present case is the Court's best opportunity to correct a grievous error affecting thousands of needy children. The confusion reflected in the two decisions of the Second Circuit itself, which point in markedly different directions, is an indication that the issue is difficult and in need of definitive resolution by this Court. Moreover, the unfaithfulness of the decision below to this Court's own 7-2 decision in *Zebley* 19 years ago is itself a traditional basis for a grant of certiorari. See S. Ct. R. 10(c). There is no reason to allow the decision below to stand, and *Zebley* to be dishonored, while thousands

of disabled children are deprived of the benefits to which they are entitled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2009

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