No.

In the Supreme Court of the United States

JOHN J. DAVIS, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

THOMAS HILLIARD, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a claimant seeking disability benefits or supplemental security income under the Social Security Act must exhaust an Appointments Clause challenge with the administrative law judge whose appointment the claimant is challenging in order to obtain judicial review of that challenge.

PARTIES TO THE PROCEEDING

Pursuant to Rule 12.4, this petition for a writ of certiorari covers the judgments in two cases.

Petitioners in *Davis* v. *Saul* are John J. Davis, Kimberly L. Iwan, and Destiny M. Thurman. Respondent is Andrew M. Saul, Commissioner of Social Security.

Petitioner in *Hilliard* v. *Saul* is Thomas Hilliard. Respondent is Andrew M. Saul, Commissioner of Social Security.

RELATED PROCEEDINGS

United States District Court (N.D. Iowa):

Davis v. *Berryhill*, Civ. No. 17-80 (July 27, 2018) (report and recommendation by magistrate judge)

Iwan v. *Commissioner*, Civ. No. 17-97 (July 12, 2018) (report and recommendation by magistrate judge)

Thurman v. *Commissioner*, Civ. No. 17-35 (June 28, 2018) (report and recommendation by magistrate judge)

Davis v. *Commissioner*, Civ. No. 17-80 (Sept. 10, 2018) (order by district court adopting report and recommendation)

Iwan v. *Commissioner*, Civ. No. 17-97 (Sept. 10, 2018) (order by district court adopting report and recommendation)

Thurman v. *Commissioner*, Civ. No. 17-35 (Sept. 10, 2018) (order by district court adopting report and recommendation)

United States District Court (S.D. Iowa):

Hilliard v. *Berryhill*, Civ. No. 18-156 (Nov. 14, 2018)

United States Court of Appeals (8th Cir.):

Davis v. *Saul*, Nos. 18-3422, 18-3451 & 18-3452 (June 26, 2020)

Hilliard v. *Saul*, No. 19-1169 (July 9, 2020)

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John J. Davis, Thomas Hilliard, Kimberly L. Iwan, and Destiny M. Thurman respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eighth Circuit in these cases. Pursuant to Rule 12.4, petitioners file a single petition covering both of the judgments in these cases, as they arise from the same court and involve identical or closely related questions.

OPINIONS BELOW

The opinion of the court of appeals in *Davis* v. *Saul* (App., *infra*, 1a-9a) is reported at 963 F.3d 790. The opinion of the court of appeals in *Hilliard* v. *Saul* (App., *infra*, 10a-14a) is not yet reported but is available at 2020 WL 3864288. The opinions of the district courts in these cases (App., *infra*, 15a-18a, 19a-38a, 39a-60a, 61a-82a) are unreported. The reports and recommendations of the magistrate judges in these cases (App., *infra*, 83a-104a, 105a-131a, 132a-159a) are also unreported.

JURISDICTION

The judgment of the court of appeals in *Davis* was entered on June 26, 2020. The judgment of the court of appeals in *Hilliard* was entered on July 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 2 of Article II of the United States Constitution provides in relevant part:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

STATEMENT

These cases present a recurring question of enormous practical importance on which the courts of appeals are in conflict. The question is whether a claimant seeking disability benefits or supplemental security income under the Social Security Act must exhaust an Appointments Clause challenge with the administrative law judge (ALJ) whose appointment the claimant is challenging in order to obtain judicial review of that challenge.

Petitioners are Social Security claimants whose applications for disability insurance benefits and supplemental security income were denied shortly before this Court's decision in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), which held that ALJs of the Securities and Exchange Commission are "Officers of the United States" for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, and therefore cannot be appointed by agency staff. While seeking judicial review of the denial of benefits by the Social Security Administration (SSA) in each of their cases, petitioners argued that, in light of *Lucia*, they were entitled to new hearings before properly appointed ALJs. It is undisputed that, under *Lucia*, the ALJs who heard their claims were improperly appointed, and the appropriate remedy is to conduct new hearings before properly appointed ALJs.

The district courts in these cases held that petitioners were barred from making Appointments Clause challenges in federal court because they had not first raised those challenges during their administrative proceedings. The court of appeals affirmed in two separate decisions, acknowledging a circuit conflict on the question. The court of appeals reasoned that imposing an issue-exhaustion requirement protected agency authority and promoted judicial efficiency. The court took the view that raising an Appointments Clause challenge before an ALJ

would not have been futile, even though neither an ALJ nor the SSA Appeals Council could have fixed the defect. The court further declined to exercise its discretion to consider the unexhausted issue under *Freytag* v. *Commissioner*, 501 U.S. 868 (1991).

The decisions below expressly and unambiguously create a circuit conflict on the question presented. Three courts of appeals have already addressed the question this calendar year alone, and many additional cases are currently pending in other circuits. See, *e.g.*, *Probst* v. *Saul*, No. 19-1529 (4th Cir.); *Fortin* v. *Commissioner*, No. 19-1581 (6th Cir.); *Duane* v. *Saul*, No. 20-1855 (7th Cir.); *Perez* v. *Commissioner*, No. 19-11660 (11th Cir.).

The decisions below are incorrect and are at odds with the logic of this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000), with the untenable result that Social Security claimants are subject to an issue-exhaustion requirement not found in any statute or SSA regulation. Unless the Court intervenes, that judge-made rule will deprive hundreds of claimants of the right to have their benefits claims adjudicated by constitutionally appointed ALJs. In addition, because resolution of the question presented may entail determining whether Social Security claimants must exhaust issues before ALJs more generally, a decision in these cases could have implications for the still greater number of claimants who seek judicial review of Social Security benefits determinations each year.

These cases present an ideal vehicle for resolving the circuit conflict on the question presented. By virtue of its multiple petitioners, this petition provides the Court with an opportunity to address claimants who are arguably situated differently with respect to one aspect of the issue-exhaustion inquiry. While the better view is that all four petitioners lacked fair notice of any issue-exhaustion re-

quirement with the ALJs, it could be argued that claimants whose administrative proceedings were still pending in January 2018 had notice of such a requirement by virtue of SSA's initial guidance to its ALJs concerning Appointments Clause challenges following this Court's grant of review in *Lucia*. In these cases, three petitioners' administrative proceedings concluded in 2017, and only one was still pending in January 2018. These cases thus present the Court with the opportunity to address the full range of potential claimants.

In the decisions under review, the court of appeals erroneously adopted the rule that claimants seeking benefits under the Social Security Act must exhaust Appointments Clause challenges. The petition for a writ of certiorari should be granted.

A. Background

The Social Security Act authorizes SSA to provide two primary forms of benefits to eligible individuals. Title II of the Act "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1772 (2019) (citation omitted); see 42 U.S.C. 401-434. Title XVI of the Act "provides supplemental security income benefits to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Smith*, 139 S. Ct. at 1772 (internal quotation marks and citation omitted); see 42 U.S.C. 1381-1383f.

The regulations governing the two programs are materially equivalent, setting out a four-step process through which claimants must generally proceed before they can obtain judicial review. See *Smith*, 139 S. Ct. at 1772. A claimant must seek an initial determination as to eligibility for benefits; seek reconsideration of that initial determination; request a hearing conducted by an ALJ;

and seek review of the ALJ's decision by the Appeals Council. After exhausting each of those administrative remedies, the claimant may seek judicial review of the agency's benefit determination in federal court. See 42 U.S.C. 405(g); *Smith*, 139 S. Ct. at 1772.

The relevant regulations expressly provide that, absent a showing of good cause, a claimant who does not timely invoke each of the four steps in the administrative process "will lose" the "right to judicial review." 20 C.F.R. 404.900(b), 416.1400(b). But the statutes and regulations governing SSA proceedings do not provide that the failure to raise any particular *issue* in the administrative process will preclude a claimant from raising that issue in federal court, even though it is "common" for other agencies' regulations to do so. See *Sims*, 530 U.S. at 108; cf. 15 U.S.C. 77i(a); 29 U.S.C. 160(e); 30 U.S.C. 816(a)(1); 47 U.S.C. 405(a).

That absence comports with the nature of SSA proceedings. Unlike many administrative proceedings, SSA proceedings are not adversarial, but rather informal and "inquisitorial." See *Sims*, 530 U.S. at 111 (plurality opinion); 20 C.F.R. 404.900(b), 416.1400(b). A claimant requests a hearing before an ALJ (and subsequent review by the Appeals Council) by filling out a one-page form that provides only a few lines to summarize why the claimant disagrees with the benefits determination and why further review is warranted. Neither form states that the failure to raise a particular issue could preclude the claimant from raising the issue during subsequent judicial review. See SSA, Form No. HA-501-U5, Request for Hearing by Administrative Law Judge (Jan. 2015) <tinyurl.com/ssaform501>; SSA, Form No. HA-520-U5, Request for Review of Hearing Decision/Order (Jan. 2016) <tinyurl.com/ssaform520>.

Both the ALJ and the Appeals Council have a "duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims*, 530 U.S. at 111 (plurality opinion). A claimant need not provide briefing or oral argument before the ALJ—or make any appearance at all unless the ALJ deems it necessary. The Commissioner of Social Security does not act as an opposing litigant in proceedings before the ALJ or the Council. See *ibid.* And the ALJ has wide latitude to consider issues never raised by the claimant. Where a claimant appears in person, the ALJ "typically conducts questioning of the claimant and all witnesses," regardless of whether the claimant is represented by counsel. Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1303 (1997); see 20 C.F.R. 404.939, 404.946, 404.949, 404.950, 416.1446, 416.1449, 416.1450.

B. Facts And Procedural History

1. Petitioners are four individuals—John Davis, Thomas Hilliard, Kimberly Iwan, and Destiny Thurman—who applied for Social Security benefits between 2013 and 2015. Petitioners Davis, Hilliard, and Iwan sought both disability benefits under Title II and supplemental security income under Title XVI; petitioner Thurman sought only supplemental security income under Title XVI. After SSA denied all four applications and then denied reconsideration, each petitioner requested and received an ALJ hearing. An ALJ denied each application. The Appeals Council denied review of Thurman's application in February 2017; Davis's application in June 2017; Iwan's application in July 2017; and Hilliard's application in March 2018. App., *infra*, 2a, 10a, 15a, 20a, 40a, 62a, 84a, 106a-109a, 133a-135a; *Hilliard* Gov't C.A. Br. 12.

2. On January 12, 2018—after the Appeals Council had denied review as to three of the four petitioners—this Court granted the petition for a writ of certiorari in *Lucia*, *supra*, on the question whether the ALJs of the Securities and Exchange Commission (SEC) are "Officers of the United States" who must be appointed consistent with the requirements of the Appointments Clause. On January 30, 2018, in light of that grant, SSA's Office of General Counsel issued an "emergency message" directed at ALJs, the Appeals Council, and their staff. That message instructed ALJs to note on the record any Appointments Clause challenges made by claimants but not to "discuss or make any findings related to the Appointments Clause issue," on the ground that SSA "lack[ed] the authority to finally decide constitutional issues such as these." SSA, EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (2018).

At the time, ALJs were appointed by SSA staff members with no involvement by the Commissioner. See *Bandimere* v. *SEC*, 844 F.3d 1168, 1199 (10th Cir. 2016) (McKay, J., dissenting); *O'Leary* v. *OPM*, 708 Fed. Appx. 669, 670 (Fed. Cir. 2017). ALJs were selected through a merit-selection process administered by the Office of Personnel Management (OPM), which classified ALJs as "competitive service" jobs—*i.e.*, executive-branch jobs filled through "open, competitive examinations." 5 U.S.C. 1104(a)(2), 2102(a), 3304(a)(1); see 5 C.F.R. 930.201(b); *Bandimere*, 844 F.3d at 1176. ALJs who were ultimately appointed were required to be selected either with OPM's prior approval or from a list of eligible candidates prepared by OPM. See 5 C.F.R. 930.204(a).

On June 21, 2018, this Court decided *Lucia*, holding that ALJs of the SEC were "Officers of the United States" who must be appointed by the President, a court

of law, or a head of a department. See 138 S. Ct. at 2055. Because SEC ALJs had been appointed by SEC staff members, the Court ordered a "new hearing before a properly appointed official," different from the improperly appointed ALJ who originally presided over the proceeding. *Id.* at 2055 (internal quotation marks and citation omitted).

On June 25, 2018, SSA reiterated its instruction that ALJs should note but not address any Appointments Clause challenges raised by claimants. See SSA, EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process – UPDATE (June 25, 2018). On July 10, 2018, the President issued an executive order that removed all ALJs from the competitive service, ending OPM's hiring control over them. See Executive Order 13843, *Excepting Administrative Law Judges From the Competitive Service*, 83 Fed. Reg. 32,755, 32,756 (July 10, 2018). And on July 16, 2018, the Acting Commissioner "ratified" the appointment of ALJs and Appeals Council judges and "approved those appointments as her own." See Social Security Ruling 19-1p, *Titles II and XVI: Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) on Cases Pending at the Appeals Council*, 84 Fed. Reg. 9,582, 9,583 (March 15, 2019).

Accordingly, on August 6, 2018, SSA revised its emergency instruction to ALJs to address the ratification; consistent with the earlier instructions, it ordered ALJs merely to note any Appointments Clause challenges raised before the ratification date of July 16, 2018. See SSA, EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process – UPDATE (Aug. 6, 2018) <tinyurl.com/emaug2018>.

On March 15, 2019, SSA instituted a policy for addressing Appointments Clause challenges to decisions that ALJs issued before the Acting Commissioner's ratification. That policy applied only to claimants who timely requested Appeals Council review of ALJ decisions issued before the date of ratification. As to cases pending before the Appeals Council in which the claimant had raised an Appointments Clause challenge before the ALJ, SSA ordered the Appeals Council to vacate the ALJ's decision and order new proceedings before a different, properly appointed ALJ (or conduct a new rehearing itself), regardless of whether the claimant had also pressed the issue before the Appeals Council. A claimant who had failed to raise an Appointments Clause challenge before the ALJ but did raise the challenge before the Appeals Council also received new proceedings. See Social Security Ruling 19-1p, 84 Fed. Reg. 9,582, 9,583 (2019).

3. Before this Court's decision in *Lucia*, each petitioner filed a complaint in federal court, three in the United States District Court for the Northern District of Iowa and one in the United States District Court for the Southern District of Iowa, seeking judicial review of SSA's decision to deny benefits under 42 U.S.C. 405(g). In three of the cases, magistrate judges recommended that the district court affirm the denial of benefits.

Then, following *Lucia*, each petitioner filed a brief to address the intervening change in law, arguing that he or she was entitled to a new hearing before a new, properly appointed ALJ because the presiding ALJ had not been properly appointed. In each case, the government did not dispute that the ALJ was improperly appointed. Yet in each case, the district court affirmed the ALJ's benefits determination, expressly rejecting the Appointments Clause challenge on the ground that it had been forfeited because it had not been raised before the ALJ or Appeals

Council. App., *infra*, 4a, 17a, 37a-38a, 59a-60a, 80a-81a; D. Ct. Dkt. 7, at 30-32, *Hilliard* v. *Berryhill*, Civ. No. 18-156 (S.D. Iowa Nov. 14, 2018).

4. The court of appeals affirmed in two separate judgments, holding that Social Security claimants must exhaust Appointments Clause challenges before their ALJs. App., *infra*, 1a-9a, 10a-14a.

a. In *Davis*, which involved petitioners Davis, Iwan, and Thurman, the court of appeals began by recognizing that other courts "have disagreed on whether exhaustion of the issue before the agency is required." App., *infra*, 4a (citing *Carr* v. *Commissioner*, 961 F.3d 1267 (10th Cir. 2020), and *Cirko* v. *Commissioner*, 948 F.3d 148 (3d Cir. 2020)).

The court of appeals acknowledged that this Court had held in *Sims* v. *Apfel*, 530 U.S. 103 (2000), that Social Security claimants need not raise issues before the Appeals Council in order to preserve them for judicial review. App., *infra*, 5a. But the court of appeals distinguished *Sims* on the ground that it applied only to issue exhaustion before the Appeals Council, not before ALJs, noting that the deciding vote in *Sims* "turned on" the fact that, when SSA had instructed the claimant on how to seek Appeals Council review, it had told her that "only failing to request Appeals Council review would preclude judicial review." App., *infra*, 5a. Having thus distinguished *Sims*, the court of appeals concluded that there was an issue-exhaustion requirement as to ALJs, reasoning that such a requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Id.* at 6a (citation omitted).

The court of appeals noted that it had previously required issue exhaustion in *Anderson* v. *Barnhart*, 344 F.3d 809 (8th Cir. 2003). App., *infra*, 6a. That an Appoint-

ments Clause challenge presented a constitutional question did not alter the analysis, in the court's view, because even "important" and "fundamental" constitutional challenges "can be forfeited." *Id.* at 7a (citation omitted). The court of appeals acknowledged that "a claimant need not litigate certain constitutional questions in order to satisfy the *jurisdictional* requirement of the judicial review statute" and that it was "unrealistic to expect" that the Commissioner would have "consider[ed] substantial changes in the current administrative review system at the behest of the single aid recipient raising a constitutional challenge in an adjudicatory context." *Id.* at 7a-8a (citation omitted). But the court concluded that "those observations" did not show that raising the challenge before an ALJ "would have been futile." *Id.* at 8a. According to the court, if the "hundreds of claimants" who could have raised Appointments Clause challenges before their ALJs had done so, SSA would have been "alerted to the issue" and "taken steps through ratification or new appointments to address [it]." *Ibid.*

The court of appeals also rejected petitioners' argument that it should at a minimum exercise its discretion to consider the unexhausted Appointments Clause challenges because they implicated "the strong interest in the judiciary in maintaining the constitutional plan of separation of powers." *Freytag* v. *Commissioner*, 501 U.S. 868, 879 (1991) (Scalia, J., concurring) (citation omitted). That interest, the court reasoned, was outweighed by the "practicalities of potentially upsetting numerous administrative decisions" in which Appointments Clause challenges had not been made. App., *infra*, 9a. The court added that "allowing claimants to litigate benefits before an ALJ without objection" and still obtain remands might create "perverse incentives" for SSA claimants. *Ibid.*

b. In *Hilliard*, the court of appeals summarily refused to consider petitioner Hilliard's unexhausted Appointments Clause challenge, citing its decision in *Davis*. App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

These cases present the Court with the opportunity to resolve an acknowledged circuit conflict on an important question: whether a Social Security claimant must exhaust an Appointments Clause challenge before an ALJ as a prerequisite to obtaining judicial review of that challenge. That conflict creates intolerable discord on an important issue that plainly will not be resolved without the Court's intervention. The decision below is incorrect and at odds with the logic of this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000), with the untenable result that Social Security claimants are subject to an issue-exhaustion requirement not established by statute or SSA regulations.

If allowed to stand, the decisions below will deprive numerous claimants of their right to have their benefits claims adjudicated by constitutionally appointed inferior officers. There is no valid basis for a judge-made issue-exhaustion requirement that precludes judicial review of such a fundamental structural defect in administrative proceedings. Because these cases present an ideal vehicle for resolving the conflict on an important question of federal law, the petition for a writ of certiorari should be granted.

A. The Decisions Below Create A Conflict Among The Courts Of Appeals

As the court of appeals recognized, the decisions below establish an unambiguous circuit conflict on the question whether judicial review of a claimant's Appointments

Clause challenge to an SSA ALJ requires that the claimant exhausted that issue with the ALJ. That conflict warrants the Court's immediate resolution.

1. In *Cirko* v. *Commissioner*, 948 F.3d 148 (2020), the Third Circuit held that claimants who had failed to raise Appointments Clause challenges before SSA ALJs could still obtain judicial review of those challenges. See *id.* at 159. The Third Circuit remanded to SSA for "new hearings before constitutionally appointed ALJs other than those who presided over [the claimants'] first hearings." *Id.* at 159-160.

In so holding, the Third Circuit reasoned that, in the absence of a statutory or regulatory exhaustion requirement, this Court's decision in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), instructs courts to assess the "nature of the claim presented," the "characteristics of the particular administrative procedure provided," and the proper "balance" between the individual interests and governmental interests at stake. *Id.* at 153. Each of those factors, the Third Circuit concluded, weighed against requiring issue exhaustion of Appointments Clause challenges before SSA ALJs.

As to the nature of the claim, the Third Circuit reasoned that it is "generally inappropriate" to impose an issue-exhaustion requirement on Appointments Clause challenges because they "implicate both individual constitutional rights and the structural imperative of separation of powers." *Cirko*, 948 F.3d at 153. The court noted that the Appointment Clause "safeguard[s]" an "important individual liberty" and that an individual litigant "need not show direct harm or prejudice caused by an Appointments Clause violation." *Id.* at 154.

As to the particular administrative process at issue, the Third Circuit observed that this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000), seemed to disfavor any

issue-exhaustion requirement in the SSA context. See *Cirko*, 948 F.3d at 155-156. While it acknowledged that the holding of *Sims* involved issue exhaustion only before the Appeals Council, the Third Circuit explained that the "rationales" of that case "generally apply to ALJs no less than [the Appeals Council]." *Id.* at 156. In both contexts, an issue-exhaustion requirement "would penalize claimants who did 'everything that the agency asked.'" *Id.* at 155 (quoting *Sims*, 530 U.S. at 114) (O'Connor, J., concurring in part and concurring in the judgment)). And in both contexts, the proceedings are "inquisitorial and driven by the agency rather than the claimant." *Id.* at 156.

As to the balance between individual and governmental interests, the Third Circuit reasoned that claimants' interest in judicial review was significantly greater than the government's interest in requiring issue exhaustion. See *Cirko*, 948 F.3d at 156-160. The court noted that an issue-exhaustion requirement "would impose an unprecedented burden on SSA claimants"—many of whom lack legal representation—by forcing them to "root out a constitutional claim" in an "informal, non-adversarial" process in which the ALJ ordinarily "plays [the] starring role" in identifying and developing the issues. *Id.* at 156-157. By contrast, the court deemed the government's interest "negligible at best," because constitutional questions are outside SSA's expertise and neither the ALJ nor the Appeals Council can cure the constitutionality of their own appointments. *Id.* at 157-159.

2. In the decisions below, by contrast, the Eighth Circuit squarely held that claimants who had failed to raise Appointments Clause challenges before SSA ALJs were barred from obtaining judicial review of those challenges.

a. In *Davis*, the Eighth Circuit reasoned that an issue-exhaustion requirement "serves the twin purposes of

protecting administrative agency authority and promoting judicial efficiency." App., *infra*, 6a (citation omitted). The court also noted that even "important" and "fundamental" constitutional challenges "can be forfeited" in the context of SSA proceedings. *Id.* at 7a (citation omitted). And it rejected the argument that raising the Appointments Clause challenge with an ALJ would have been futile because neither an ALJ nor the Appeals Council could have fixed the defect. See *id.* at 8a. In the court's view, if the "hundreds of claimants" who could have raised Appointments Clause challenges with their ALJs had done so, SSA would have been "alerted to the issue" and "could have taken steps through ratification or new appointments to address [it]." *Ibid.*

The Eighth Circuit also declined to exercise its discretion to consider the unexhausted issue under *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), concluding that any interest in guarding the separation of powers gave way to the "practicalities of potentially upsetting numerous administrative decisions" in which an Appointments Clause challenge had not been made. App., *infra*, 9a.

b. In *Hilliard*, the Eighth Circuit applied the categorical rule it had announced in *Davis* without any further discussion. App., *infra*, 14a. In so doing, the Eighth Circuit made clear that it would not entertain any Appointments Clause challenge that had not been raised before an SSA ALJ.

3. In addition to the clear conflict between the Third Circuit and the Eighth Circuit, there is an apparent intracircuit conflict in the Tenth Circuit.

a. In *Carr* v. *Commissioner*, 961 F.3d 1267 (2020), petition for cert. pending, No. 19-1442 (filed July 1, 2020), the Tenth Circuit held that claimants who had failed to raise Appointments Clause challenges before SSA ALJs could not seek judicial review. See *id.* at 1276. The court

reasoned that the failure to exhaust had "deprived the SSA of its interest in internal error-correction," and it concluded that, while an SSA ALJ "typically develops issues regarding benefits," a claimant "must object to an ALJ's authority." *Id.* at 1273, 1275. The court added that its decision comported with decisions of other courts that "have imposed an exhaustion requirement" more categorically in the SSA ALJ context. *Id.* at 1273 n.3 (citing *Shaibi* v. *Berryhill*, 883 F.3d 1102 (9th Cir. 2017); *Anderson* v. *Barnhart*, 344 F.3d 809 (8th Cir. 2003); and *Mills* v. *Apfel*, 244 F.3d 1 (1st Cir. 2001)).

b. But in *Hackett* v. *Barnhart*, 395 F.3d 1168 (2005), the Tenth Circuit had categorically held that "a plaintiff challenging a denial of disability benefits * * * need *not* preserve issues in the proceedings before the Commissioner or her delegates"—even though it resulted in an "unfortunate" remand "almost four years after the [initial ALJ] hearing." *Id.* at 1176 (citing *Sims*, 530 U.S. at 103) (emphasis added). Applying that categorical rule, the court reversed an ALJ decision on the basis of an unexhausted, non-constitutional argument that the ALJ had failed to reconcile a vocational expert's testimony with the Dictionary of Occupational Titles. See *ibid.*

Although the Tenth Circuit adopted a categorical rule that issue exhaustion was not required in *Hackett*, it made no mention of that rule in its subsequent decision in *Carr*; indeed, the *Carr* panel does not appear to have even been aware of it. There is therefore uncertainty about the Tenth Circuit's current position on the question presented. Cf. *Hiller* v. *Oklahoma ex rel. Used Motor Vehicle & Parts Commission*, 327 F.3d 1247, 1251 (10th Cir. 2003) (holding that, in the event of an intracircuit conflict, the earlier panel decision governs).

4. Additional appeals on the question presented are currently pending in several other circuits. See, *e.g.*,

Probst v. *Saul*, No. 19-1529 (4th Cir.); *Fortin* v. *Commissioner*, No. 19-1581 (6th Cir.); *Duane* v. *Saul*, No. 20-1855 (7th Cir.); *Perez* v. *Commissioner*, No. 19-11660 (11th Cir.). And countless district courts have divided on the question. Compare, e.g., *Little* v. *Saul*, Civ. No. 19-5, 2020 WL 3964723, at *3 (E.D. Ky. July 13, 2020); *Vazquez* v. *Commissioner*, Civ. No. 19-1613, 2020 WL 3868787, at *10 (E.D.N.Y. July 8, 2020); *Kavanaugh* v. *Commissioner*, Civ. No. 19-4771, 2020 WL 3118691, at *6 (D. Ariz. June 12, 2020); *Baglio* v *Saul*, Civ. No. 18-4294, 2020 WL 2733919, at *12 (N.D. Cal. May 26, 2020); *Wilson* v. *Saul*, Civ. No. 19-511, 2020 WL 1969538, at *8 (D.N.H. Apr. 24, 2020); *Akner* v. *Commissioner*, Civ. No. 18-13974, 2020 WL 1445734, at *9 (E.D. Mich. Mar. 25, 2020); *Ortiz* v. *Saul*, Civ. No. 19-942, 2020 WL 1150213, at *8 (S.D.N.Y. Mar. 10, 2020) (requiring issue exhaustion), with, *e.g.*, *McCary-Banister* v. *Saul*, Civ. No. 19-782, 2020 WL 3410919, at *8 (W.D. Tex. June 19, 2020); *Rosario Mercado* v. *Saul*, Civ. No. 19-11172, 2020 WL 2735980, at *7-*8 (D. Mass. May 26, 2020); *Morris W.* v. *Saul*, Civ. No. 19-320, 2020 WL 2316598, at *3 (N.D. Ind. May 11, 2020), appeal pending, No. 20-2248 (7th Cir.); *Jenny R.* v. *Commissioner*, Civ. No. 18-1451, 2020 WL 1282482, at *5 (N.D.N.Y. Mar. 12, 2020); *Morse-Lewis* v. *Saul*, Civ. No. 18-48, 2020 WL 1228678, at *4 (E.D.N.C. Mar. 12, 2020); *Suarez* v. *Saul*, Civ. No. 19-173, 2020 WL 913809, at *4 (D. Conn. Feb. 26, 2020) (not requiring issue exhaustion).

B. The Decisions Below Are Incorrect

The court of appeals erred by holding that the failure to raise Appointments Clause challenges before SSA ALJs barred claimants from obtaining judicial review of those challenges. That holding is at odds with the logic of this Court's decision in *Sims* and with the principle that

constitutional claims need not be exhausted in SSA proceedings. This Court should grant review and reverse the court of appeals' judgments.

1. The decisions below cannot be reconciled with the reasoning of this Court's decision in *Sims*.

a. In *Sims*, the Court declined to require claimants to exhaust issues before the SSA Appeals Council, emphasizing that SSA's statutes and regulations, unlike those of most agencies, did not require issue exhaustion. See 530 U.S. at 108. Because of the absence of an express requirement, the Court reasoned, any judicially created exhaustion requirement would depend on an analogy to a forfeiture rule in appellate litigation. See *id.* at 108-109. While a judicially created exhaustion requirement may be appropriate for adversarial administrative proceedings, the Court concluded, the rationale for such a rule is "much weaker" where the "administrative proceeding is not adversarial." *Id.* at 110.

On that basis, a majority of the Court concluded that there was no issue-exhaustion requirement for Appeals Council proceedings. In an opinion written by Justice Thomas, a four-Justice plurality did not fault claimants for failing to "identify issues for review," because the Appeals Council did "not depend much, if at all," on claimants' doing so given the "inquisitorial" nature of the proceedings. 530 U.S. at 110-111, 112. And in a concurring opinion, Justice O'Connor rejected an issue-exhaustion requirement for the simple reason that the agency had "fail[ed] to notify claimants" of such a requirement, noting that the claimant had done "everything that the agency asked of her" in its instructions. *Id.* at 113-114 (opinion concurring in part and concurring in the judgment).

To be sure, the Court expressly refrained from reaching the question "[w]hether a claimant must exhaust is-

sues before the ALJ." 530 U.S. at 107. But the ALJ process is the same as the Appeals Council process in every material respect. Just like Appeals Council judges, ALJs "investigate the facts and develop the arguments both for and against granting benefits" in an inquisitorial process, *id.* at 111, "look[ing] fully into the issues" and "decid[ing] when the evidence will be presented and when the issues will be discussed," 20 C.F.R. 404.944. Claimants need not present briefing or oral argument. And while claimants must exhaust administrative *remedies*, no statute or regulation requires them to exhaust individual *issues*—unlike the "common" practice of many other agencies. See *Sims*, 530 U.S. at 108; cf. 15 U.S.C. 77i(a); 29 U.S.C. 160(e); 30 U.S.C. 816(a)(1); 47 U.S.C. 405(a). To the contrary, the regulations expressly contemplate that ALJs will raise issues *sua sponte*. See p. 7, *supra*.

Just like Appeals Council judges, therefore, ALJs "do[] not depend much, if at all, on claimants to identify issues for review." 530 U.S. at 112 (plurality opinion); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1303, 1325 (1997). And as with Appeals Council proceedings, the statutes and regulations governing ALJ proceedings "fail[] to notify claimants" of any issue-exhaustion requirement. *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment); see 20 C.F.R. 404.900(b), 404.946, 404.949.

b. The decisions below contravene the logic of *Sims*. While the court of appeals paid lip service to *Sims*, it did not come to grips with the plurality's rationale. Instead, it focused exclusively on Justice O'Connor's "deciding vote," which it characterized as "turn[ing] on" the fact that, when SSA had instructed the particular claimant on how to seek Appeals Council review, it had told her that

"only failing to request Appeals Council review would preclude judicial review." App., *infra*, 5a. The court then cabined *Sims* to its facts—issue exhaustion before the Appeals Council—and it held that claimants are required to exhaust issues before ALJs on the ground that such a requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Id.* at 6a (citation omitted).

Contrary to the court of appeals' suggestion, however, Justice O'Connor's deciding vote was based on the lack of notice by SSA of an issue-exhaustion requirement—not any considerations specific to the Appeals Council. Notice is lacking here, just as it was in *Sims*, because there is no "statute or regulation requiring issue exhaustion" and the agency did not otherwise "notify claimants of an issue exhaustion requirement." 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment).

2. The court of appeals erred by concluding that the nature of the challenge in these cases—a structural constitutional challenge to the ALJ's appointment under the Appointments Clause—did not demand a different result.

a. This Court has repeatedly allowed Social Security claimants to raise constitutional issues for the first time in federal court. See, *e.g.*, *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977); *Mathews* v. *Eldridge*, 424 U.S. 319, 329 n.10 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 767 (1975); *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). The Court has explained that judicial review of constitutional challenges is permissible even without exhaustion because those challenges "obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential." *Sanders*, 430 U.S. at 108-109. Appointments Clause challenges, in particular, "implicate" the "structural imperative of separation of powers" and "safeguard[]" an "important individual liberty."

Cirko, 948 F.3d at 153-154; cf. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2202 (2020).

Raising Appointments Clause challenges before ALJs would also be affirmatively futile, because ALJs lack jurisdiction to make decisions about their own constitutionality. The jurisdiction of those ALJs is limited to making benefits determinations under the Social Security Act "on the basis of evidence adduced at [a] hearing." 42 U.S.C. 405(b)(1); see 42 U.S.C. 405(*l*); 20 C.F.R. 404.900(a)(6).

This Court has long held that litigants need not exhaust particular issues with a decisionmaker who "lack[s] authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148; see, *e.g.*, *McNeese* v. *Board of Education for Community United School District 187*, 373 U.S. 668, 675 (1963). Neither an ALJ nor the Appeals Council could have fixed the Appointments Clause problem by granting the proper relief—namely, by reassigning the matter to a different ALJ properly appointed by the Commissioner. See *Lucia*, 138 S. Ct. at 2055 & nn. 5-6. Indeed, even before *Lucia* was decided, the Acting Commissioner, through SSA's Office of General Counsel, instructed ALJs not to "discuss or make any findings related to the Appointments Clause issue" precisely because "SSA lacks the authority to finally decide constitutional issues such as these." SSA, EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (2018); see p. 8, *supra*.

b. In the decisions below, the court of appeals violated those principles. The court concluded that SSA claimants can "forfeit[]" even "important" and "fundamental" constitutional challenges, misconstruing this Court's earlier SSA decisions as applying only to constitutional questions regarding whether "the *jurisdictional*

requirement of the judicial review statute" was satisfied. App., *infra*, 7a.

As to futility, the court of appeals acknowledged that it was "unrealistic to expect" that the Commissioner would have "consider[ed] substantial changes in the current administrative review system" if a single claimant had raised an Appointments Clause challenge. App., *infra*, 7a-8a (citation omitted). But the court reasoned that, if the "hundreds of claimants" who could have raised an Appointments Clause challenge before ALJs had done so, SSA would have been "alerted to the issue" and "could have taken steps through ratification or new appointments to address [it]." *Id.* at 8a.

That blinks reality. Both before and after *Lucia*, SSA showed awareness that its ALJ appointments might be unconstitutional, but instructed ALJs simply to note any Appointments Clause challenges made. In any event, even a more "alert" Commissioner could not have fixed the appointments problem until July 10, 2018, when the President issued an executive order removing SSA ALJs from the "competitive services" classification. Executive Order 13843, *Excepting Administrative Law Judges From the Competitive Service*, 83 Fed. Reg. 32,755, 32,756 (July 10, 2018). Until that date, ALJ appointments were subject to OPM approval. See pp. 8-9, *supra*.[*]

In short, the court of appeals' rule requiring issue exhaustion of Appointments Clause challenges to SSA ALJs

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[*] At a minimum, the court of appeals should have exercised its discretion to consider the unexhausted Appointments Clause challenge on the ground that such challenges implicate "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Freytag* v. *Commissioner*, 501 U.S. 868, 879 (1991) (Scalia, J., concurring) (citation omitted). The court of appeals gave no valid reason for its refusal to do so—particularly given the reality that many claimants are not represented by counsel.

is inequitable and cannot be defended. This Court should grant review in these cases and reject that rule.

C. The Question Presented Is Exceptionally Important And Warrants Review In These Cases

The question presented in these cases is a frequently recurring one of substantial legal and practical importance. These cases, which cleanly present the question, constitute an optimal vehicle for the Court's review.

1. Resolution of the question presented has significant practical and legal implications for numerous SSA claimants. SSA has approximately 1,600 ALJs, the vast majority of whom were unconstitutionally appointed until July 16, 2018. See SSA, *FY 2021 Congressional Justification* 187 (2020) <tinyurl.com/ssafy2021>; pp. 8-9, *supra*. As a result, the question presented affects at least the "hundreds" of claimants "whose cases are already pending in the district courts" as of that date, with potentially more cases still in the pipeline to come. *Cirko*, 948 F.3d at 159. Early this year, the government represented that there were already more than fifty *appeals* pending on this question in various circuits. See Gov't Pet. for Reh'g at 2 & n.1, *Cirko*, *supra*, No. 19-1772 (Mar. 9, 2020). Since then, the numbers have only grown. See, *e.g.*, *Petty* v. *Saul*, No. 20-1573 (4th Cir.); *Duane* v. *Saul*, No. 20-1855 (7th Cir.); *Gagliardi* v. *Social Security Administration*, No. 20-10858 (11th Cir.).

Because the courts of appeals have taken divergent views on the question presented, the outcome for particular claimants will dramatically differ, depending on where they happen to litigate. That disparity cannot be tolerated in the context of Social Security benefits, which "provide[] a crucial lifeline for some of the nation's most vulnerable citizens," accounting for the majority of family in-

come for nearly half of their recipients. Melissa M. Favreault et al., Urban Institute, *How Important Is Social Security Disability Insurance to U.S. Workers?* 1 (June 2013) <tinyurl.com/importsocsec>. And an opportunity to have claims heard by properly appointed ALJs could significantly benefit many of the claimants affected by the question presented. Indeed, in the aggregate, SSA ALJs overseeing second hearings reverse earlier determinations and grant benefits more than half of the time. See GAO, *Social Security Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions*, GAO-18-37 at 14 (Dec. 7, 2017) <tinyurl.com/ssameasures>.

This Court's resolution of the question presented may also have longstanding effects that reach far beyond the Appointments Clause challenge at issue here. The underlying question whether the reasoning of *Sims* applies to ALJ proceedings affects nearly all of the approximately 18,000 claimants who seek judicial review of SSA administrative determinations each year. See SSA, Hearing and Appeals: Court Remands as a Percentage of New Court Cases Filed (2020) <tinyurl.com/ssahearingandappeals>.

2. Among the many cases currently pending in the lower courts, these cases constitute an unusually attractive vehicle in which to resolve the question presented. Not only is resolution of that question outcome-determinative with respect to all four petitioners, but these cases present the Court with an opportunity to address claimants who are arguably situated somewhat differently with respect to the fair-notice concerns articulated by Justice O'Connor in her concurring opinion in *Sims*. While the better view is that all four petitioners lacked fair notice of any issue-exhaustion requirement before the ALJs, it

could be argued that claimants whose administrative proceedings were still pending in January 2018 had notice of an issue-exhaustion requirement by virtue of SSA's initial guidance to its ALJs following this Court's grant of review in *Lucia*. See pp. 8, 21, *supra*. Here, such an argument would be relevant only to petitioner Hilliard, whose administrative proceedings concluded in March 2018; the other three petitioners' administrative proceedings concluded in 2017. See p. 7, *supra*. As a result, these cases present the Court with an unusual opportunity to address the whole range of potential claimants.

Because the arguments on both sides of the question presented have already been fully ventilated in the opinions of well-respected judges, there would be no material benefit from additional percolation in the courts of appeals. To the contrary, there would be a very real cost: numerous claimants who have been denied benefits will be precluded from receiving what the Constitution demands—adjudication by a properly appointed ALJ.

* * * * *

There is an intractable conflict among the court of appeals on the question whether a Social Security claimant must exhaust an Appointments Clause challenge before an ALJ as a prerequisite to obtaining judicial review of that challenge. Because the question presented is of extraordinary legal and practical importance, and because these cases constitute an ideal vehicle for the Court's review, the Court should grant the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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