No. 20-1478

In the Supreme Court of the United States

ANDREW SAUL, COMMISSIONER OF SOCIAL SECURITY,
PETITIONER

v.

LISA PROBST AND SHARRON BRADSHAW

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

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
AUSTIN L. RAYNOR
Assistants to the Solicitor General
MARK B. STERN
JOSHUA M. SALZMAN
DANIEL AGUILAR
AMANDA L. MUNDELL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a claimant seeking disability benefits under the Social Security Act, 42 U.S.C. 301 *et seq.*, forfeits an Appointments Clause challenge to the appointment of an administrative law judge by failing to present that challenge during administrative proceedings.

RELATED PROCEEDINGS

United States District Court (E.D.N.C.):

Probst v. *Berryhill*, No. 18-cv-130 (Mar. 22, 2019)

Bradshaw v. *Berryhill*, No. 18-cv-100 (Mar. 26, 2019)

United States Court of Appeals (4th Cir.):

Probst v. *Saul*, No. 19-1529 (Nov. 20, 2020)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 980 F.3d 1015. The order of the district court in *Probst* v. *Berryhill* (App., *infra*, 20a-39a) is reported at 377 F. Supp. 3d 578. The order of the district court in *Bradshaw* v. *Berryhill* (App., *infra*, 40a-66a) is reported at 372 F. Supp. 3d 349.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. Under the Social Security Act, 42 U.S.C. 301 *et seq.*, the Social Security Administration (SSA) administers two federal programs that provide benefits to disabled individuals: Title II and Title XVI. *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1772 (2019). Title II provides disability benefits to insured individuals, regardless of financial need. *Ibid.* Title XVI provides supplemental security income to financially needy individuals who are aged, blind, or disabled, regardless of their insured status. *Ibid.*

SSA regulations establish a four-step administrative process for adjudicating claims for disability benefits and supplemental security income. See *Smith*, 139 S. Ct. at 1772. First, the claimant must seek an initial eligibility determination from the agency. 20 C.F.R. 404.902, 416.1402. Second, if the claimant is dissatisfied with that determination, he may seek reconsideration. 20 C.F.R. 404.908(a), 416.1408(a). Third, if the claimant remains dissatisfied, he may demand a hearing before an administrative law judge (ALJ). 20 C.F.R. 404.929, 416.1429. Finally, the claimant may seek discretionary review of the ALJ's decision from the agency's Appeals Council. 20 C.F.R. 404.967, 416.1467. Once that administrative process ends, the claimant may seek judicial review of the agency's final decision by filing suit in federal district court. See 42 U.S.C. 405(g).

2. This case concerns the selection of SSA's ALJs—the officials who conduct the third step of the multi-step adjudicatory process just described. The Appointments Clause of the Constitution governs the appointment of "Officers of the United States." U.S. Const. Art. II, § 2,

Cl. 2. The Clause requires principal officers to be appointed by the President with the advice and consent of the Senate. *Ibid.* The Clause allows Congress to choose among four methods for appointing inferior officers: appointment by the President with the advice and consent of the Senate, by the President alone, by the Heads of Departments, and by the courts of law. *Ibid.* If a person performing governmental functions qualifies as an employee rather than an officer, however, the Clause does not govern his selection. See *United States* v. *Germaine*, 99 U.S. 508, 510 (1879).

Before 2018, SSA treated its ALJs as employees rather than as officers. See *Bandimere* v. *SEC*, 844 F.3d 1168, 1199 (10th Cir. 2016) (McKay, J., dissenting), cert. denied, 138 S. Ct. 2706 (2018). It selected its ALJs through a merit-selection process administered by the Office of Personnel Management, and did not provide for their appointment in a method prescribed by the Appointments Clause. See *O'Leary* v. *OPM*, 708 Fed. Appx. 669, 670 (Fed. Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 2616 (2018).

In *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), however, this Court held that ALJs appointed by the Securities and Exchange Commission were officers rather than employees, and that the Appointments Clause accordingly governed their appointment. *Id.* at 2049. The Court also held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to a new hearing, and it directed that the new hearing be held before a different, constitutionally appointed officer. *Id.* at 2055 (citation omitted).

B. Proceedings Below

Respondents applied for Social Security disability benefits. App., *infra*, 2a. Those applications were denied, an ALJ upheld the decision to deny benefits, and the Appeals Council also denied relief. *Ibid.* The ALJs that denied respondents' claims had been chosen under the pre-*Lucia* regime, but respondents failed to present any challenge to the ALJs' appointments to the agency at the ALJ level, and again failed to do so at the Appeals Council level. *Id.* at 3a.

Respondents then filed suit in district court, seeking review of the denial of benefits. App., *infra*, 2a. In their briefs, respondents argued for the first time that the ALJs who had denied their claims had been appointed in violation of the Appointments Clause. *Id.* at 3a. In both cases, the district courts held that respondents had not forfeited their Appointments Clause claims by failing to raise them in administrative proceedings, and directed SSA to hold new hearings before different, properly appointed ALJs. *Id.* at 27a-39a, 48a-66a.

The court of appeals affirmed. App., *infra*, 1a-19a. The court observed that the Third and Sixth Circuits had held that a Social Security claimant does not forfeit an Appointments Clause challenge by failing to raise it before the agency, while the Eighth and Tenth Circuits had held that he does. *Id.* at 4a-5a; see *Cirko* v. *Commissioner of Social Security*, 948 F.3d 148 (3d Cir. 2020); *Ramsey* v. *Commissioner of Social Security*, 973 F.3d 537 (6th Cir. 2020), petition for cert. pending, No. 20-1044 (filed Jan. 29, 2021); *Carr* v. *Commissioner of SSA*, 961 F.3d 1267 (10th Cir.), cert. granted, 141 S. Ct. 813 (2020); *Davis* v. *Saul*, 963 F.3d 790 (8th Cir.), cert. granted, 141 S. Ct. 811 (2020). After "[b]alancing the

individual and institutional interests," the court of appeals joined the Third and Sixth Circuits in holding that "a claimant does not forfeit an Appointments Clause challenge by failing to raise it in the course of Social Security proceedings." App., *infra*, 16a.

Judge Richardson concurred in the judgment. App., *infra*, 17a-19a. Judge Richardson believed that SSA's regulations could be read to require claimants to raise Appointments Clause challenges, but observed that SSA had not pressed that interpretation. *Id.* at 17a. He concluded that, "in the absence of a statute or regulation," it would be improper to "impose a judicially created issue-exhaustion requirement." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a claimant may raise an Appointments Clause challenge to the appointment of a Social Security ALJ for the first time in district court after failing to raise it at any point in the administrative proceedings. This Court has granted review in *Carr* v. *Saul*, No. 19-1442 (argued Mar. 3, 2021), and *Davis* v. *Saul*, No. 20-105 (argued Mar. 3, 2021), to decide the same question that is presented here. The Court therefore should hold this petition for a writ of certiorari pending its decision in *Carr* and *Davis*, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

This Court should hold the petition for a writ of certiorari in this case pending its decision in *Carr* v. *Saul* (No. 19-1442), and *Davis* v. *Saul* (No. 20-105), and then dispose of the petition as appropriate in light of its decision in those cases.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
AUSTIN L. RAYNOR
Assistants to the Solicitor General
MARK B. STERN
JOSHUA M. SALZMAN
DANIEL AGUILAR
AMANDA L. MUNDELL
Attorneys

APRIL 2021

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1529

LISA PROBST, PLAINTIFF-APPELLEE

v.

ANDREW SAUL, COMMISSIONER OF SOCIAL SECURITY,
DEFENDANT-APPELLANT

No. 19-1531

SHARRON BRADSHAW, PLAINTIFF-APPELLEE

v.

ANDREW SAUL, COMMISSIONER OF SOCIAL SECURITY,
DEFENDANT-APPELLANT

Argued: Sept. 10, 2020
Decided: Nov. 20, 2020

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
James E. Gates and Robert T. Numbers II, Magistrate
Judges. (5:18-cv-00130-JG; 5:18-cv-00100-RN)

Before: KEENAN, WYNN, and RICHARDSON, Circuit Judges.

WYNN, Circuit Judge:

Plaintiffs-Appellees Lisa Probst and Sharron Bradshaw unsuccessfully applied for Social Security disability benefits. After pursuing administrative appeals within the Social Security Administration, they sought judicial review in federal district court.

While their cases were pending, the Supreme Court issued its opinion in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018). *Lucia* elucidated a possible constitutional objection to administrative proceedings pursuant to the Appointments Clause. But neither Probst nor Bradshaw had raised that objection before the Social Security Administration.

In this appeal, we are tasked with determining whether Probst and Bradshaw may raise an Appointments Clause challenge in federal court that they did not preserve before the agency. We agree with the courts below that claimants for Social Security disability benefits do not forfeit Appointments Clause challenges by failing to raise them during their administrative proceedings. Accordingly, we affirm.

I.

Bradshaw and Probst commenced their applications for Social Security disability benefits before the Social Security Administration ("SSA") in 2013 and 2014, respectively. State disability agencies denied their claims, Administrative Law Judges ("ALJs") upheld the denials, and the SSA's Appeals Council declined to reconsider the decisions. At that point, in March 2018, Probst and Bradshaw each turned to federal district courts.

Three months later, however, the Supreme Court held that ALJs employed by the Securities and Exchange Commission were "inferior" "Officers of the United States"—not "simply employees of the Federal Government"—for purposes of the Appointments Clause of the Constitution. *Lucia*, 138 S. Ct. at 2051 & n.3, 2055. The Appointments Clause mandates that such "Officers" be appointed by the President, or if permitted by Congress, by a court or a department head. U.S. Const. art. II, § 2, cl. 2; *see Lucia*, 138 S. Ct. at 2051 n.3 (describing the distinction between "principal" and "inferior" officers). Because the ALJ in *Lucia* had not been so appointed, the Court concluded that the petitioner there was entitled to a new hearing before a different, validly appointed ALJ. *Lucia*, 138 S. Ct. at 2055.

Following *Lucia*, Probst and Bradshaw argued—for the first time—that they, too, deserved new hearings because the ALJs who reviewed their claims were also improperly appointed. The Commissioner of Social Security [1] objected on exhaustion grounds, arguing that Probst and Bradshaw had forfeited their Appointments Clause challenges by failing to raise them during their agency proceedings—even though those proceedings concluded before the Supreme Court issued its opinion in *Lucia*.[2]

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[1] Acting Commissioner of Social Security Nancy Berryhill was the original named defendant in these cases. She has since been replaced by Commissioner Andrew Saul, who represents the agency here. For present purposes, we use the shorthand "Commissioner" to refer to both.

[2] The Commissioner does not dispute that, at the time of Probst and Bradshaw's administrative proceedings, the SSA's ALJs needed

The district courts rejected the Commissioner's argument and declined to require exhaustion. Accordingly, the courts granted judgments on the pleadings to Probst and Bradshaw and, in line with *Lucia*, remanded their cases to the SSA for new hearings before different, properly appointed ALJs. The Commissioner timely appealed.

II.

"In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court." *Sims v. Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring in part and concurring in the judgment). And for good reason. Among other virtues, issue-exhaustion requirements preserve agency autonomy and foster judicial economy. *See McCarthy v. Madigan*, 503 U.S. 140, 144-46 (1992); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297-98 (D.C. Cir. 2004). But there are circumstances under which this general rule need not apply, "even where administrative and judicial interests would counsel otherwise." *McCarthy*, 503 U.S. at 146. We hold that this is one such case.

We are not alone in reaching this conclusion. Four Courts of Appeals have considered the specific question before us: whether Social Security applicants must administratively exhaust Appointments Clause challenges to the authority of the very ALJs assessing their claims. The Third and Sixth Circuits have declined to require exhaustion in this context. *See Ramsey v. Comm'r of Soc. Sec.*, 973 F.3d 537 (6th Cir. 2020); *Cirko ex rel.*

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to be—but were not—appointed consistent with the Appointments Clause. *See* Opening Br. at 12 n.2.

Cirko v. Comm'r of Soc. Sec., 948 F.3d 148 (3d Cir. 2020). The Eighth and Tenth Circuits have held the opposite. *See Davis v. Saul*, 963 F.3d 790 (8th Cir. 2020); *Carr v. Comm'r, SSA*, 961 F.3d 1267 (10th Cir. 2020). We join the Third and Sixth Circuits in concluding that imposing an exhaustion requirement here would be inappropriate.

Issue-exhaustion requirements are "largely creatures of statute." *Sims*, 530 U.S. at 107. Where Congress has codified an exhaustion requirement—such as in 15 U.S.C. § 78y(c)(1), which provides that "[n]o objection to an order or rule of the [Securities and Exchange] Commission . . . may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so"—courts generally defer to that choice. *See, e.g.*, *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *Washington Ass'n for Television & Child. v. FCC*, 712 F.2d 677, 681-82 & n.6 (D.C. Cir. 1983). Likewise, where an agency has adopted an issue-exhaustion requirement in the regulations governing its internal review process, courts customarily "ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Sims*, 530 U.S. at 108; *see also Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 747 (6th Cir. 2019). However, when neither a statute nor a regulation speaks to exhaustion in the relevant context, the decision of whether to impose such a requirement is left to "sound judicial discretion." *See McCarthy*, 503 U.S. at 144.

The Commissioner concedes that there are no statutes or regulations requiring issue exhaustion in Social Security proceedings. *See* Oral Arg. at 8:43, 9:24;

Opening Br. at 19; Reply Br. at 7. Nor have we located any such authority.[3]

The question, then, is whether to imply and enforce an exhaustion requirement that neither Congress nor the SSA itself has seen fit to impose. For guidance, we look to the Supreme Court's framework outlined in *McCarthy v. Madigan*, which instructs us to balance "the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." 503 U.S. at 146. This balancing is meant to be "intensely practical," and we are to give special attention to "the nature of the claim presented" and "the characteristics of the particular administrative procedure provided." *Id.* We conclude that the balance tips against requiring exhaustion of Appointments Clause challenges in the Social Security context.[4]

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[3] The strongest candidates are 20 C.F.R. §§ 404.939 and 404.940, but they fall short. Section 404.939 requires claimants to "notify the administrative law judge . . . at the earliest possible opportunity" if they "object to the issues to be decided at [their] hearing[s]." 20 C.F.R. § 404.939. However, "the issues" referenced therein are those that the SSA has already determined will be heard, *see id.* § 404.938(b)(1), and there is no suggestion that a claimant's failure to raise a *new* issue will lead to forfeiture down the road. Section 404.940 provides that a claimant who "object[s] to the administrative law judge who will conduct [her] hearing . . . must notify the administrative law judge at [her] earliest opportunity." *See id.* § 404.940. Theoretically, that language could encompass Appointments Clause challenges. But, read in context, the regulation clearly strikes at allegations of bias or special interest, rather than an ALJ's constitutional status.

[4] We note that we are unconvinced by the Commissioner's argument that *Lucia* itself imposed a general exhaustion requirement for

A.

We begin our balancing analysis by examining the "nature of [Probst and Bradshaw's] claim[s]." *Id.* The ordinary concerns favoring exhaustion "apply with particular force" when the claim at issue implicates the agency's "special expertise" or "discretionary power." *Id.* at 145. Indeed, the Commissioner directs us to several Social Security cases in which courts have enforced implied exhaustion requirements for claims that were clearly within the agency's competency to resolve. For example, in *Anderson v. Barnhart*, a claimant argued that the ALJ hearing his case erred by failing to consider whether his morbid obesity posed a physical impairment. 344 F.3d 809, 814 (8th Cir. 2003). Because the claimant never raised this argument during agency

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Appointments Clause challenges. In *Lucia*, the Supreme Court explained that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)). The petitioner there "made just such a timely challenge" by first contesting the validity of his ALJ's appointment before the SEC. *Id.* The Commissioner argues that this language imposes "an important limitation" on Appointments Clause challenges—specifically, that *only* those challenges raised before the agency itself may be considered "timely." *See, e.g.*, Opening Br. at 12-13. But we decline to read a categorical exhaustion requirement into what appears to be nothing more than the Supreme Court's stating the obvious. Where issue exhaustion *is* required—whether by statute, by regulation, or by judicial imposition—then a claimant who fails to raise her argument before the agency generally will be out of luck. Such a requirement existed in *Lucia*, as exhaustion before the SEC is mandated by statute. *See* 15 U.S.C. § 78y(c)(1). By contrast, where issue exhaustion is *not* required, an objection raised in judicial proceedings in the first instance cannot be said to be untimely.

proceedings, however, the Eighth Circuit held that he had forfeited it. *Id.* Similarly, in *Shaibi v. Berryhill*, the Ninth Circuit held that a represented claimant may not challenge the accuracy of a vocational expert's testimony for the first time in federal court. 883 F.3d 1102, 1109 (9th Cir. 2017).

But the claim presented in this case is of a fundamentally different nature. An Appointments Clause challenge, at bottom, is a "structural," separation-of-powers objection. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878-79 (1991). The judiciary is at least as equipped to evaluate such a claim as the SSA is.[5] Thus, permitting judicial review in the first instance may be appropriate. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010) ("Petitioners' constitutional claims are also outside the [Securities and Exchange] Commission's competence and expertise."); *cf. UC Health v. NLRB*, 803 F.3d 669, 672-73 (D.C. Cir. 2015) (allowing "challenges to the composition of an agency [to] be raised [in the first instance] on review").

Additionally, there was little "discretionary power" to exercise here. *McCarthy*, 503 U.S. at 145. At the

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[5] In a passing citation to our decision in *Nationsbank Corp. v. Herman*, 174 F.3d 424 (4th Cir. 1999), the Commissioner suggests that this Court categorically requires "litigants . . . to raise constitutional challenges in agency proceedings if they wish to preserve those claims for judicial review." Reply Br. at 12. But the Commissioner mischaracterizes our statement there, and, in doing so, misses the point. *Nationsbank* simply reiterated that "under our consistent and unambiguous line of cases," constitutional claims are not *per se* exempt from exhaustion requirements. *See* 174 F.3d at 429 (collecting cases).

time of Probst and Bradshaw's ALJ hearings, *every* SSA ALJ was equally constitutionally invalid. No individual ALJ could have opted to recuse him- or herself to resolve the issue.[6]

Thus, neither the agency's expertise nor its discretion is implicated here, which dampens the impact of the traditional pro-exhaustion rationales. And on the other side of the scale—actively counseling against requiring exhaustion—is the important role the Appointments Clause plays in "preserving liberty" within our system of government. *NLRB v. Noel Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring); *see Cirko*, 948 F.3d at 153-54. We conclude that the "nature of the claim presented" here does not favor exhaustion.

B.

McCarthy also asks us to consider the "characteristics of the particular administrative procedure provided." 503 U.S. at 146. The Supreme Court's latest treatment of issue exhaustion in the Social Security context is *Sims v. Apfel*, 530 U.S. at 103.

In a fractured vote, the *Sims* Court declined to require issue exhaustion before the SSA's Appeals Council. Five Justices agreed with the broad proposition that, absent a statute or regulation requiring otherwise, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the

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[6] We will return to the question of whether a claimant's decision to raise an Appointments Clause challenge under these circumstances would have, nevertheless, facilitated systemic change within the agency as a whole. As pertains to the nature of Probst and Bradshaw's claims, however, we note that the agency was without real discretion to address them.

analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109 (plurality opinion); *see also id.* at 113 (O'Connor, J., joining Parts I and II-A of plurality opinion and concurring in the judgment). The Court explained that the rationale undergirding exhaustion is strongest in traditional, adversarial proceedings, where "contestants" before the agency are expected to "develop fully all issues." *Id.* at 109-10 (plurality opinion) (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952)). But "[w]here, by contrast, an administrative proceeding is *not* adversarial, . . . the reasons for a court to require issue exhaustion are *much weaker*." *Id.* at 110 (emphasis added).

Writing only for a plurality, Justice Thomas went on to conclude that the non-adversarial nature of Social Security proceedings is "quite clear" and that, therefore, requiring issue exhaustion before the Appeals Council "ma[de] little sense." *Id.* at 111-12 (plurality opinion).

Justice O'Connor wrote separately because, in her view, "the agency's failure to notify claimants of an issue exhaustion requirement in this context [was] a sufficient basis for [the] decision." *Id.* at 113 (O'Connor, J., concurring in part and concurring in the judgment). Moreover, the SSA's regulations and procedures "affirmatively suggest[ed] that specific issues need not be raised before the Appeals Council"—for example, by telling claimants that "that [they] could request review by . . . filling out a 1-page form that should take 10 minutes to complete." *Id.* at 113-14. To impose an issue-exhaustion requirement against claimants who "did everything that the agency asked" would, in Justice

O'Connor's view, be both "inappropriate" and unfair. *See id.*

Justice O'Connor's analysis provides the narrowest grounds for the Court's holding and, therefore, controls. *See Marks v. United States*, 430 U.S. 188, 193-94 (1977). The upshot of *Sims*, then, is that requiring issue exhaustion before the Appeals Council would have been improper because: (1) the non-adversarial nature of Social Security proceedings made the case for exhaustion "much weaker," as five Justices held; and (2) the SSA gave no notice to claimants that they might forfeit an issue by failing to raise it, as Justice O'Connor concluded was determinative.

While *Sims* only considered a narrow question—whether a claimant must exhaust issues before the SSA's Appeals Council—and was careful to state that the present inquiry—"[w]hether a claimant must exhaust issues before [an] ALJ"—was not before it, the Court's reasoning nonetheless applies with considerable force to the question at hand. *Sims*, 530 U.S. at 107.

First, our Court has determined that the SSA "administrative hearing process is not an adversarial one." *Pearson v. Colvin*, 810 F.3d 204, 210 (4th Cir. 2015). By regulation, SSA ALJs bear a primary and independent responsibility to develop the facts and issues in a non-adversarial fashion. *See, e.g.*, 20 C.F.R. §§ 404.944, 416.1400(b). That automatically makes the argument for exhaustion "much weaker." *Sims*, 530 U.S. at 110.

Second, several aspects of the ALJ review process could actually "mislead the Social Security claimant to believe issue exhaustion is not required." *Id.* at 114

(O'Connor, J., concurring) (quotations omitted). For example, on the standard ALJ hearing-request form, claimants are given a meager four lines to explain why they "disagree" with their initial benefits determination.[7] *See* Form HA-501-U5, https://www.ssa.gov/forms/ha-501.pdf. And at the hearing itself, a claimant "may" state her case in person or in writing—but she isn't required to. *See* 20 C.F.R. § 404.949. This "failure to notify claimants of an issue exhaustion requirement" is "sufficient" to preclude enforcement of such a requirement. *Sims*, 530 U.S. at 113 (O'Connor, J., concurring).

In sum, given the substantial overlap in the administrative schemes governing ALJ hearings and Appeals Council review, *Sims* strongly cautions against requiring exhaustion of Appointments Clause challenges here.

C.

Finally, to the extent there are individual and institutional interests we have not yet considered, we weigh them here. *McCarthy*, 503 U.S. at 146. Social Security claimants have a lot riding on their applications; modest as they are, disability payments often Comprise most of a beneficiary's income.[8] Accordingly, the indi-

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[7] Justice O'Connor found significant that Form HA-520, which claimants use to request Appeals-Council review, similarly provides "roughly two inches" for claimants to state their issues. *Sims*, 530 U.S. at 113.

[8] See Michelle Stegman Bailey & Jeffrey Hemmeter, *Characteristics of Noninstitutionalized DI and SSI Program Participants, 2013 Update*, tbls. 2, 4 (2015), https://www.ssa.gov/policy/docs/rsnotes/rsn2015-02.html.

vidual interest in the fair-hearing protections guaranteed by the Appointments Clause is high. And though we might wonder whether a successful challenge will produce a different outcome on remand, a claimant's "difficulty [in] show[ing] direct harm" or prejudice "does not diminish the important individual liberty safeguarded by the Appointments Clause." *Cirko*, 948 F.3d at 154.

The Commissioner highlights two countervailing institutional interests, neither of which is compelling under the circumstances. First is the agency's interest in self-correction. The current litigation could have been avoided, the Commissioner argues, if individual claimants like Probst and Bradshaw had raised Appointments Clause challenges during their agency proceedings. That would have allowed the SSA to recognize the mounting litigation risk posed by its ALJs' constitutional infirmity sooner, prompting reform. *Cf. L. A. Tucker*, 344 U.S. at 37. As a practical matter, however, that proposition is far fetched. As the Supreme Court has observed,"[i]t is unrealistic to expect that the [Commissioner] would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976).

So, while "an agency ought to have an opportunity to correct its own mistakes . . . before it is haled into federal court," *McCarthy*, 503 U.S. at 145, that courtesy only extends so far. And here, the SSA's own actions demonstrate that the agency was aware of its looming Appointments Clause problem months before Probst and Bradshaw sought review in district court. In a January 2018 Emergency Message, the SSA instructed its ALJs to acknowledge—but not otherwise discuss or

decide—Appointments Clause challenges raised by claimants. *See* SSA, Emergency Message EM-18003 (Jan. 30, 2018). That directive cited two 2016 Court of Appeals decisions dealing with the constitutional status of the SEC's ALJs—that in *Lucia* itself, 832 F.3d 277 (D.C. Cir. 2016), and *Bandimere v. Securities & Exchange Commission*, 844 F.3d 1168 (10th Cir. 2016)—and further noted that "[t]he Department of Justice ha[d] taken the position . . . that the SEC's ALJs are inferior officers" subject to the Appointments Clause. SSA EM-18003. However, the SSA took no further action until the Supreme Court issued its opinion in *Lucia* that summer, at which point the Commissioner ratified the appointments of all the agency's ALJs, thereby validating their constitutional status. *See* 84 Fed. Reg. 9582-02, 9583 (Mar. 15, 2019) ("To address any Appointments Clause questions involving Social Security claims, and consistent with guidance from the Department of Justice, on July 16, 2018 the Acting Commissioner of Social Security ratified the appointments of [the SSA's] ALJs and approved those appointments as her own.").

All this is to say that the SSA was in a far better position than individual claimants to recognize "the accumulating risk of wholesale reversals being incurred by its persistence," *L. A. Tucker*, 344 U.S. at 37; did, in fact, recognize that risk; and yet waited to take corrective action.[9] It is hard to imagine that the SSA would have

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[9] Although Probst and Bradshaw were represented by counsel at their ALJ hearings, a sizeable number of Social Security claimants proceed *pro se*, or with non-attorney representation. *See* Social Security Administration (SSA) Annual Data for Representation at Social Security Hearings, Soc. Sec. Admin. (May 23, 2018), https://www.ssa.gov/open/data/representation-at-ssa-hearings.html. Whether

behaved any differently if more claimants like Probst and Bradshaw had raised their Appointments Clause claims before the ALJs.

The second institutional interest relates to the impact of any remanded cases on the broader Social Security system. The Commissioner warns that, unless we require exhaustion, the result will be "severe disruption" as a torrent of claimants choose to pursue "a do-over before a new ALJ." Opening Br. at 28; *see also Carr*, 961 F.3d at 1274 (noting that "the agency is flooded with claimants"); *Davis*, 963 F.3d at 794 (discussing the impact of "hundreds if not thousands of social security claimants" seeking new hearings). The Commissioner does not provide specific numbers, but represents that the "many hundreds of cases" already presenting this issue in federal courts are only "the tip of the iceberg." Opening Br. at 28.

Had this case come before us in July 2018, when the number of potential *Lucia* claimants was at its peak, the volume of probable remands might have weighed more heavily on our analysis. *See McCarthy*, 503 U.S. at 146 ("Application of [exhaustion] balancing . . . is 'intensely practical.'"). But now that the Commissioner has ratified the appointments of all ALJs as her own, there are no new Appointments Clause challenges brewing in SSA cases. And because Social Security claimants have only a sixty-day window to appeal an Appeals Council decision to a district court, all claimants whose

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ALJs are "Officers of the United States" subject to the Appointments Clause is not exactly the stuff of dinner-table conversation; we would not expect most lay applicants to be aware of lurking Appointments Clause issues, let alone raise them before the ALJs presiding over their hearings.

benefits were denied before the Commissioner's July 2018 ratification of the SSA's ALJs have "long since either filed an appeal in district court or become time-barred from doing so." *Cirko*, 948 F.3d at 159 (citing 42 U.S.C. § 405(g)). In other words, even if the Commissioner is correct that there are "many hundreds of [these] cases in federal district courts," those cases represent *all* such claims, not the "tip of the iceberg." Opening Br. at 28; *see Cirko*, 948 F.3d at 159 ("The effect of our decision today, then, is limited to the hundreds (not hundreds of thousands) of claimants whose cases are already pending in the district courts[.]"); *Ramsey*, 973 F.3d at 547 n.5 (same). Our decision thus poses only a minor inconvenience for an agency whose ALJs "hear approximately 650,000 cases" annually. *See* Reply Br. at 2; *see Cirko*, 948 F.3d at 159 (referring to the pending Appointments Clause cases as "a drop in the bucket" for the SSA).

III.

Balancing the individual and institutional interests at play, including considering the nature of the claim presented and the characteristics of the ALJ proceedings, we decline to impose an exhaustion requirement. We therefore hold that a claimant does not forfeit an Appointments Clause challenge by failing to raise it in the course of Social Security proceedings. Accordingly, we affirm the judgments of the district courts remanding these cases for new administrative hearings before different, constitutionally appointed ALJs.

AFFIRMED

RICHARDSON, Circuit Judge, concurring in the judgment:

I agree with my good colleagues that the district court properly found that Lisa Probst and Shannon Bradshaw did not forfeit their Appointments Clause challenges by failing to raise them during their respective administrative proceedings. And while I agree with much that my colleagues have to say, my path differs. For that reason, I write separately.

Issue exhaustion is "largely [a] creature[] of statute" or regulation. *Sims v. Apfel*, 530 U.S. 103, 107-08 (2000). Thus, we must first look at the relevant statutes and regulations to determine whether such a requirement exists. But the Government never argued before this Court that a statute or regulation imposes an applicable issue-exhaustion requirement. Appellant Br. 12-17; Reply Br. 4-12. In doing so, the Government waived the most interesting question in this case: Do the Social Security regulations create—and thus provide notice of—an issue-exhaustion requirement?[1]

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[1] Without resolving the question, a little background should help an interested reader consider whether the existing regulations require the claimant to raise any "issue" before the administrative law judge (ALJ) or whether the regulations specifically require the claimant to raise any objection to the assigned ALJ.

Several regulations discuss what "issues" are before the ALJ. If the agency denies benefits, then a claimant may request review by an ALJ. 20 C.F.R. § 404.929. The regulations provide that when requesting review, the claimant "should include . . . [t]he reasons [the claimant] disagree[s] with the previous determination or decision." § 404.933(a). The ALJ then must provide notice about "[t]he *specific issues* to be decided in [the claimant's] case." § 404.938(b) (emphasis added). If, however, the claimant "object[s]

Respecting the importance of raising an issue before the proper tribunal, I would hold the Government to their own waiver. Although interesting, I would not reach out to decide whether the regulations in fact create an issue-exhaustion requirement. The majority acknowledges and accepts the Government's waiver. *See* Majority Op. 7. But the majority then presses forward to decide—on the merits, without briefing, and in a footnote—that the agency regulations cannot be interpreted to create an issue-exhaustion requirement. *Id.* at 7, n.3; *cf. Robert A. Johnston Co. v. Southland Dairy Distrib. Co.*, 368 F.2d 993, 995 (4th Cir. 1966) (noting that discussing issues without the benefit of briefing can lead to "precipitous" and ill-considered decisions).

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to *the issues* to be decided at the hearing, [the claimant] *must* notify the" ALJ with reasons for the objections "at the earliest possible opportunity, but no later than" five days before the hearing. § 404.939 (emphasis added). And at the hearing, the issues before the ALJ "include *all the issues* brought out in the initial, reconsidered or revised determination that were not decided entirely in [the claimant's] favor," although the ALJ may raise and consider new issues if the claimant is notified. § 404.946(a), (b)(1). The claimant also "may raise a new issue," and this new issue "may be raised even though it arose after the request for a hearing and even though it has not been considered in an initial or reconsidered determination." § 404.946(b)(1).

Another regulation deals directly with objections to the assigned ALJ. Section 404.940 explains that if the claimant "object[s] to the administrative law judge who will conduct the hearing, [the claimant] *must* notify the administrative law judge at [her] earliest opportunity." § 404.940 (emphasis added); *see also id.* (noting that if the ALJ does not withdraw, then the claimant may present her objection to the Appeals Council). *But see* Majority Op. 7 n.3 (concluding the "language [of § 404.940] could encompass Appointment Clause challenges" but deciding the "context" limits the "language" to "allegations of bias or special interest").

That seems unwise, particularly when the answer is less clear than the majority's footnote lets on.

After accepting the Government's waiver, I would move to the Government's argument that even in the absence of a statute or regulation, we should impose a judicially created issue-exhaustion requirement. Appellant Br. at 20; *see also Sims*, 530 U.S. at 108; *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). I agree with my colleagues that we may not. But I reach that conclusion because the controlling opinion in *Sims* instructs that the Social Security Administration must "notify claimants of an issue exhaustion requirement" before the judiciary can impose one. 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the opinion).[2] And the Government's refusal to rely, at least in this Court, on its own regulations waives the only plausible source for providing that notice.

For these reasons, I concur in the judgment.

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[2] *Sims* cautioned that its decision was limited to a Social Security claimant who failed to present an issue to the Appeals Council after an adverse decision from an ALJ. 530 U.S. at 110-12 (plurality); *id.* at 112-14 (O'Connor, J., concurring in part and concurring in the opinion); *see also id.* at 107 (making clear that whether "a claimant must exhaust issues before the ALJ is not before us"). But despite the potential reasons for considering issue exhaustion differently during different stages of the Social Security process, I read Justice O'Connor's controlling opinion as categorically requiring notice for issue exhaustion to apply in Social Security proceedings. That notice may come from the regulations or administrative materials but, at least before this Court, the Government has not argued that anything provides the requisite notice.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:18-CV-130-JG

LISA PROBST, PLAINTIFF

v.

NANCY BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Mar. 22, 2019

ORDER

In this action, plaintiff Lisa Probst ("plaintiff" or, in context, "claimant") challenges the final decision of defendant Acting Commissioner of Social Security Nancy Berryhill ("Commissioner") denying her application for a period of disability and disability insurance benefits ("DIB") on the grounds that she is not disabled. The case is before the court on the parties' motions for judgment on the pleadings. D.E. 14, 16. Both filed memoranda in support of their respective motions (D.E. 15, 17) and plaintiff filed a reply (D.E. 18). With the consent of the parties, the case was reassigned to the undersigned magistrate judge for disposition pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. *See* D.E. 12, 13; 13 June 2018 Text Ord. For the reasons set forth

below, plaintiff's motion will be allowed, the Commissioner's motion will be denied, and this case will be remanded.

BACKGROUND

I. CASE HISTORY

Plaintiff filed an application for DIB on 26 March 2014, alleging a disability onset date of 17 February 2014. Transcript of Proceedings ("Tr.") 12. The application was denied initially and upon reconsideration, and a request for a hearing was timely filed. Tr. 12. On 27 March 2017, a hearing was held before an administrative law judge ("ALJ") at which plaintiff, who was represented by counsel, testified. Tr. 24-53. On 1 May 2017, the ALJ issued a decision denying plaintiff's application. Tr. 12-19.

Plaintiff timely requested review by the Appeals Council, and on 16 February 2018, the Appeals Council denied the request for review. Tr. 1-5. At that time, the ALJ's decision became the final decision of the Commissioner. 20 C.F.R. § 404.981.[1] On 29 March 2018, plaintiff commenced this proceeding for judicial review of the ALJ's decision, pursuant to 42 U.S.C. § 405(g). *See* Compl. (D.E. 1).

II. STANDARDS FOR DISABILITY

The Social Security Act ("Act") defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in

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[1] The versions of the regulations and Social Security Rulings cited by the undersigned herein are those applicable to this appeal of the ALJ' s decision.

death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(l)(A); *Pass v. Chater*, 65 F.3d 1200, 1203 (4th Cir. 1995). "An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A). The Act defines a physical or mental impairment as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." *Id.* § 423(d)(3).

The disability regulations under the Act ("Regulations") provide a five-step analysis that the ALJ must follow when determining whether a claimant is disabled:

> To summarize, the ALJ asks at step one whether the claimant has been working; at step two, whether the claimant's medical impairments meet the [R]egulations' severity and duration requirements; at step three, whether the medical impairments meet or equal an impairment listed in the [R]egulations; at step four, whether the claimant can perform her past work given the limitations caused by her medical impairments; and at step five, whether the claimant can perform other work.
>
> The first four steps create a series of hurdles for claimants to meet. If the ALJ finds that the claimant has been working (step one) or that the claimant's medical impairments do not meet the severity and duration requirements of the [R]egulations (step

two), the process ends with a finding of" not disabled." At step three, the ALJ either finds that the claimant is disabled because her impairments match a listed impairment [*i.e.*, a listing in 20 C.F.R. pt. 404, subpt. P, app. 1 ("the Listings")] or continues the analysis. The ALJ cannot deny benefits at this step. If the first three steps do not lead to a conclusive determination, the ALJ then assesses the claimant's residual functional capacity ["RFC"], which is "the most" the claimant "can still do despite" physical and mental limitations that affect her ability to work. [20 C.F.R.] § 416.945(a)(1).[2] To make this assessment, the ALJ must "consider all of [the claimant's] medically determinable impairments of which [the ALJ is] aware," including those not labeled severe at step two. *Id.* § 416.945(a)(2).[3]

The ALJ then moves on to step four, where the ALJ can find the claimant not disabled because she is able to perform her past work. Or, if the exertion required for the claimant's past work exceeds her [RFC], the ALJ goes on to step five.

At step five, the burden shifts to the Commissioner to prove, by a preponderance of the evidence, that the

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[2] *See also* 20 C.F.R. § 404.1545(a)(1). This regulation is the counterpart for DIB to the above-cited regulation, which relates to Supplemental Security Income ("SSI"). The statutes and regulations applicable to disability determinations for DIB and SSI are in most respects the same. The provisions relating to DIB are found in 42 U.S.C. subch. II, §§ 401, *et seq.* and 20 C.F.R. pt. 404, and those relating to SSI in 42 U.S.C. subch. XVI, §§ 1381, *et seq.* and 20 C.F.R. pt. 416.

[3] *See also* 20 C.F.R. § 404.1545(a)(2).

> claimant can perform other work that "exists in significant numbers in the national economy," considering the claimant's [RFC], age, education, and work experience. *Id.* §§ 416.920(a)(4)(v); 416.960(c)(2); 416.1429.[4] The Commissioner typically offers this evidence through the testimony of a vocational expert responding to a hypothetical that incorporates the claimant's limitations. If the Commissioner meets her burden, the ALJ finds the claimant not disabled and denies the application for benefits.

Mascio v. Colvin, 780 F.3d 632, 634-35 (4th Cir. 2015).

III. ALJ'S FINDINGS

Plaintiff was 39 years old on the alleged onset date, 42 years old on the date of the hearing, and 43 years old on the date of issuance of the ALJ's decision. *See, e.g.,* Tr. 18 ¶ 7; 29. The ALJ found that she had at least a high school education (Tr. 18 ¶ 8) and past relevant work as a data entry clerk (Tr. 17 ¶ 6).

Applying the five-step analysis of 20 C.F.R. § 404.1520(a)(4), the ALJ found at step one that plaintiff had not engaged in substantial gainful activity since 17 February 2014, the alleged disability onset date. Tr. 14 ¶ 2. At step two, the ALJ found that plaintiff had the following medically determinable impairments that were severe within the meaning of the Regulations: degenerative disc disease, migraines, and dysfunction of a major joint. Tr. 14 ¶ 3. At step three, the ALJ found that plaintiff did not have an impairment or combination of impairments that meets or medically equals any of the Listings. Tr. 14 ¶ 4.

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[4] *See also* 20 C.F.R. §§ 404.1520(a)(4)(v); 404.1560(c)(2); 404.929.

The ALJ next determined that plaintiff had the RFC to perform a limited range of sedentary work as follows:

> After careful consideration of the entire record, the undersigned finds that the claimant has the [RFC] to perform sedentary work as defined in 20 CFR 404.1567(a),[5] except she may use an assisted devices for prolonged ambulation and walking on uneven terrain. The claimant can climb ramps and stairs occasionally, never climb ladders, ropes, or scaffolds, balance occasionally, stoop occasionally, kneel occasionally, crouch occasionally, and crawl occasionally. The claimant can never work at unprotected heights or with moving mechanical parts.

Tr. 15 ¶ 5.

Based on his determination of plaintiff's RFC, the ALJ found at step four that plaintiff was unable to perform her past relevant work. Tr. 17 ¶ 6. At step five, the ALJ found that there were jobs existing in significant numbers in the national economy that plaintiff could perform, including jobs in the occupations of order clerk, charge account clerk, and document preparer. Tr. 18-19 ¶ 10. The ALJ therefore concluded that

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[5] This regulation describes sedentary work as "involv[ing] lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools." 20 C.F.R. § 404.1567(a); *see also* Dictionary of Occupational Titles (U.S. Dep't of Labor 4th ed. rev. 1991) ("DOT"), app. C § IV, def. of "S-Sedentary Work," 1991 WL 688702. "Sedentary work" and the other terms for exertional level as used in the Regulations have the same meaning as in the DOT. *See* 20 C.F.R. § 404.1567.

plaintiff was not disabled from the alleged disability onset date, 17 February 2014, through the date of his decision, 1 May 2017. Tr. 19 ¶ 11.

IV. STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), judicial review of the final decision of the Commissioner is limited to considering whether the Commissioner's decision is supported by substantial evidence in the record and whether the appropriate legal standards were applied. *See Richardson v. Perales,* 402 U.S. 389, 390, 401 (1971); *Hays v. Sullivan,* 907 F.2d 1453, 1456 (4th Cir. 1990). Unless the court finds that the Commissioner's decision is not supported by substantial evidence or that the wrong legal standard was applied, the Commissioner's decision must be upheld. *See Smith v. Schweiker,* 795 F.2d 343, 345 (4th Cir. 1986); *Blalock v. Richardson,* 483 F.2d 773, 775 (4th Cir. 1972). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Perales,* 402 U.S. at 401 (quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). It is more than a scintilla of evidence, but somewhat less than a preponderance. *Id.*

The court may not substitute its judgment for that of the Commissioner as long as the decision is supported by substantial evidence. *Hunter v. Sullivan,* 993 F.2d 31, 34 (4th Cir. 1992). In addition, the court may not make findings of fact, revisit inconsistent evidence, or make determinations of credibility. *See Craig v. Chater,* 76 F.3d 585, 589 (4th Cir. 1996); *King v. Califano,* 599 F.2d 597, 599 (4th Cir. 1979). A Commissioner's decision based on substantial evidence must be affirmed, even if the reviewing court would have reached a different conclusion. *Blalock,* 483 F.2d at 775.

Before a court can determine whether a decision is supported by substantial evidence, it must ascertain whether the Commissioner has considered all relevant evidence and sufficiently explained the weight given to probative evidence. *See Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 439-40 (4th Cir. 1997). "Judicial review of an administrative decision is impossible without an adequate explanation of that decision by the administrator." *DeLoatche v. Heckler,* 715 F.2d 148, 150 (4th Cir. 1983); *see also Radford v. Colvin,* 734 F.3d 288, 295 (4th Cir. 2013).

DISCUSSION

I. OVERVIEW OF PLAINTIFF'S CONTENTIONS

Plaintiff contends that this case should be remanded for a new hearing on the grounds that the ALJ erred in failing to conduct a function-by-function analysis and because at the time his decision was issued, the ALJ's appointment did not comply with the Appointments Clause of the United States Constitution. Because the issue of the ALJ's appointment is dispositive of this appeal, the court's analysis will focus on it.

II. NON-COMPLIANCE WITH THE APPOINTMENTS CLAUSE

The Appointments Clause of the Constitution requires the President to "appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. It further provides that "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." *Id.*

The Supreme Court in *Lucia v. Sec. & Exch. Comm'n*, __ U.S. __, 138 S. Ct. 2044 (2018), decided that ALJs of the Securities and Exchange Commission ("SEC") qualify as "Officers of the United States" subject to the Appointments Clause. 138 S. Ct. at 2049. Specifically, in *Lucia*, the plaintiff argued that an SEC administrative proceeding against him was invalid because the ALJ had not been constitutionally appointed and could not be considered a "mere employee" who did not require special appointment. *Id.* at 2050. The Supreme Court agreed and held that because the SEC's ALJs hold a continuing office established by law, exercise significant discretion in carrying out important functions, and issue decisions at the close of the proceedings, they are deemed officers subject to constitutional appointment. *Id.* at 2052-54.

The Court went on to conclude that "'one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Id.* at 2055 (quoting *Ryder v. U.S.*, 515 U.S. 177, 182-83 (1995)) (emphasis added). The Supreme Court found that plaintiff in *Lucia* had made a timely challenge because he contested the ALJ's appointment when he was before the SEC and pursued the claim before the Court of Appeals and the Supreme Court. *Id.* As a result, the Court remanded plaintiff's claim and directed that he be given a hearing with a different ALJ who was properly appointed. *Id.*

Here, plaintiff contends that the ALJ who heard plaintiff's case was subject to the Appointments Clause, but was not appointed by the President, courts of law, or the Commissioner, as required, at the time the decision was issued on 1 May 2017. The Commissioner does not

dispute this contention for purposes of this appeal. *See* Cmm'r's Mem. 6 n.2. In fact, following issuance of the *Lucia* decision, the Social Security Administration addressed the issue of challenges to its ALJ appointments by the Commissioner's express ratification of the appointments. *See* Soc. Sec. 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. 9582-02, 2019 WL 1202036, at *9583 (15 Mar. 2019) ("To address any Appointments Clause questions involving Social Security claims, and consistent with guidance from the Department of Justice, on July 16, 2018 the Acting Commissioner of Social Security ratified the appointments of our ALJs and approved those appointments as her own. On the same day, the Acting Commissioner took the same actions with respect to the administrative appeals judges (AAJ s) who work at the Appeals Council.").

Nonetheless, the Commissioner still opposes any relief for plaintiff based on violation of the Appointments Clause. She does so on the grounds that plaintiff has forfeited any claim concerning the ALJ's appointment by not presenting it at the administrative level.

The Fourth Circuit has not addressed the question of whether issue exhaustion at the administrative level in a Social Security case is required in order to preserve the matters for review by a federal court. However, the majority of lower court decisions, within the Fourth Circuit and beyond, addressing this question have held that *Lucia* directs a finding that a plaintiff who fails to raise a challenge pursuant to the Appointments Clause at the administrative level is precluded from doing

so later on judicial review. *See, e.g., Burgin v. Berryhill*, No. 1:17-CV-346-FDW, 2019 WL 1139500, at *6 (W.D.N.C. 12 Mar. 2019) ("To the extent *Lucia* may apply to Social Security ALJs, Plaintiff has forfeited the issue by failing to raise it during her administrative proceedings."); *Stewart v. Berryhill*, No 5:18-CV-85-RJ, 2019 WL 772334, at *8 (E.D.N.C. 20 Feb. 2019) ("Claimant's failure to timely challenge the ALJ's appointment before the SSA [*i.e.,* Social Security Administration] is a bar to this court's review of the issue on appeal from the Commissioner's decision."); *Bennett v. Berryhill*, No. 2:17-CV-520, 2019 WL 1104186, at *10 (E.D. Va. 15 Feb. 2019) ("All of these factors lead the Court to conclude that, to preserve Plaintiff's Appointment Clause challenge for judicial review, Plaintiff was required to raise that claim before the Social Security Administration."); *Higgs v. Berryhill*, No. 4:18-CV-22-FL, 2019 WL 848730, at *8 (E.D.N.C. 10 Jan. 2019) ("Here, there is no evidence in the record that Claimant challenged the ALJ's appointment in the administrative proceeding before the SSA. Claimant raised this issue for the first time before the court, and, and therefore his challenge is untimely."), *rep. & recomm. adopted*, 2019 WL 845406, at *1 (21 Feb. 2019).

Courts relying on *Lucia* to find waiver in the Social Security context seemingly read the decision to create a baseline requirement that a claim arising under the Appointments Clause will only be timely when a party raises it at the administrative level, as the plaintiff did in *Lucia*.[6] *See, e.g., Audrey MH v. Berryhill*, No.

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[6] *Lucia* was decided on 21 June 2018, after the administrative proceedings in this case had been completed and this appeal had been

17-CV-4975 (ECW), 2019 WL 635584, at *12 (D. Minn. 14 Feb. 2019) ("*Lucia* made it clear that, with regard to Appointments Clause challenges, only 'one who makes a timely challenge' to the administrative body is entitled to relief." (quoting *Lucia*, 138 S. Ct. at 2055)). But the Supreme Court in *Lucia* did not expressly resolve or address whether any claim not raised at the administrative level before *any* agency would necessarily be barred, and this court will not read such a requirement into the opinion. *See Bizarre v. Berryhill*, __ F. Supp. 3d __, No. 1:18-CV-48, 2019 WL 1014194, at *2 (M.D. Pa. 4 Mar. 2019) ("The [*Lucia*] majority's statement as to timeliness was not a bright-line demarcation of how and when such a claim must be brought; it simply confirmed the obvious timeliness of the fully preserved and exhausted claim as presented." (*citing Associated Mortg. Bankers, Inc. v. Carson*, No. 17-75, 2019 WL 108882, at *5 (D.D.C. 4 Jan. 2019) ("*Lucia* did not define the scope of what constitutes a timely challenge, as there was no claim in Lucia that the challenge . . . was not timely raised."))). Importantly, no statute or regulation has been identified that would dictate a finding that

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filed. Given the other grounds upon which it resolves plaintiff's Appointments Clause claim, it need not address whether this chronology bears on the timeliness of plaintiff's assertion of her claim. Similarly, the court need not rule on plaintiff's argument that assertion of her Appointments Clause claim before the ALJ would have been futile, and her non-assertion of it therefore did not affect its waiver, by virtue of the Commissioner's own issuance of an Emergency Message EM-18003 (30 Jan. 2018) providing that ALJs lack the authority to rule on Appointments Clause claims and instructing them not to do so. *See also* EM-18003 REV (26 Dec. 2018) (replacing EM-18003); EM-18003 REV 2 (6 Feb. 2019) (replacing EM-18003 REV).

matters not raised at the administrative level are procedurally barred in Social Security proceedings.[7] *Bizarre,* 2019 WL 1014194, at *3 (noting the absence of statutory, regulatory, or judicial directives establishing an explicit issue exhaustion requirement in Social Security cases). Conversely, SEC regulations do contain such a requirement, further diluting any argument that the timeliness discussion in *Lucia* applied a bright-line rule to be applied across the board to all agencies. *See* 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the [SEC], for which review is sought under this section, may be considered by the court unless it was urged before the [SEC] or there was reasonable ground for failure to do so.").

The Supreme Court's decision in *Sims v. Apfel,* 530 U.S. 103 (2000), is instructive on the differences between Social Security proceedings and other administrative agencies and provides justification for a conclusion that any bright-line rule applying to all agencies would be inappropriate. In *Sims,* the Supreme Court held that a Social Security claimant denied benefits by an ALJ at the hearing level did not waive judicial review of issues that he did not present to the Appeals Council. 530 U.S. at 105. The Commissioner in that case had argued

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[7] Social Security regulations do provide that objections to issues to be decided at the hearing should be identified "at the earliest possible opportunity," 20 C.F.R. § 404.939. There is also a regulation providing for expedited appeals in certain instances, including a challenge on constitutional grounds. *Id.* § 404.924(d). No regulation has been identified that expressly requires a claimant to present an issue at the administrative level or face forfeiture of that claim.

that "a Social Security claimant, to obtain judicial review of an issue, not only must obtain a final decision on his claim for benefits, but also must specify that issue in his request for review by the Council." *Id.* at 107. The Supreme Court disagreed, noting that "SSA regulations do not require issue exhaustion" and that while in some cases, courts may impose an issue-exhaustion requirement, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 108-09, 110 ("Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker.").

As to the non-adversarial nature of Social Security proceedings, the Supreme Court stated:

> The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although "I'm [m]any agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking," 2 K. Davis & R. Pierce, Administrative Law Treatise § 9.10, p. 103 (3d ed. 1994), the SSA is "[p]erhaps the best example of an agency" that is not, B. Schwartz, Administrative Law 469-470 (4th ed. 1994). *See id.*, at 470 ("The most important of [the SSA's modifications of the judicial model] is the replacement of normal adversary procedure by . . . the 'investigatory model'" (quoting Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1290 (1975))). Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting

> benefits, *see Richardson v. Perales*, 402 U.S. 389, 400-401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971), and the Council's review is similarly broad. The Commissioner has no representative before the ALJ to oppose the claim for benefits, and we have found no indication that he opposes claimants before the Council.

Id. at 110-11. The Court accordingly held that issue exhaustion by the Appeals Council was not required. *Id.* at 112.

Importantly, though, for purposes of the instant analysis, the question of whether a claimant is required to exhaust issues before the ALJ at the hearing level was specifically not before or addressed by the Court in *Sims*. *Id.* at 107. Nevertheless, the court finds the reasoning in *Sims*, which addressed and considered the nature of Social Security proceedings before both an ALJ and the Appeals Council, to provide persuasive support for the conclusion that a claimant in the Social Security context is not required to raise a challenge to the ALJ's appointment at the hearing level to avoid forfeiture of the claim. *See Fortin v. Comm'r of Soc. Sec.*, No. 18-10187, 2019 WL 421071, at *4 (E.D. Mich. 1 Feb. 2019) (rep. & recomm. pending rev.) ("[I]t is hard to reconcile *Sims's* reasoning that Social Security proceedings before an ALJ are non-adversarial and thus profoundly dissimilar to court litigation with a finding that a judicially-created issue-exhaustion requirement is compatible with *Sims's* holding.").

In the instant case, the ALJ made a statement at the outset of the hearing about its nature and consequences, essentially establishing the ground rules for the hearing. The ALJ began by telling plaintiff that "[t]his is

just an informal fact-finding process." Tr. 27. He went on to say:

> The way I explain it to people, it's no worse than if you and me were just sitting in your living room talking about your life. This isn't Law and Order. This isn't some kind of show that you're watching where every one is getting cross-examined. It's real low key, no big deal.

Tr. 28. The ALJ's statement certainly indicates the non-adversarial nature of the hearing. But it goes well beyond that in its benign characterization of the proceeding. The ALJ equates the hearing to a casual conversation in plaintiff's home with no legal consequences at all. The ALJ's statement thereby reinforces the propriety of not applying the exhaustion requirement in this case.

Even if the exhaustion requirement were deemed to apply, the principles espoused in *Freytag v. Cmm'r of Internal Revenue,* 501 U.S. 868 (1991) would support the court's exercising its discretion to find that no waiver occurred. In *Freytag,* the court heard a challenge to the appointment of special trial judges in the United States Tax Courts. 501 U.S. at 880-81. The Supreme Court determined that the special trial judges were inferior officers and analyzed whether plaintiff had forfeited a challenge to the appointment of the judge handling his case by objecting to it for the first time to the Fifth Circuit. *Id.* at 878. The Supreme Court held that the courts retained discretion to hear such claims in the "rare cases" where a constitutional challenge was "neither frivolous nor disingenuous" and goes "to the validity of the Tax Court proceeding that is the basis for this litigation." *Id.* at 879 ("We conclude that this is

one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge.").

The Supreme Court's reasoning in *Freytag* applies equally in this case. The challenge here to the ALJ's appointment is neither frivolous nor disingenuous and goes to the validity of the proceeding itself. Therefore, even if issue exhaustion were deemed to apply, the court would have the discretion to consider the Appointments Clause issue. *See Cirko o/b/o Cirko v. Berryhill,* No. 1:17-CV-680, 2019 WL 1014195, at *1 (M.D. Pa. 4 Mar. 2019) (relying on its reasoning in *Bizarre* to hold that "there exists no clear statutory, regulatory, or judicial authority requiring claimants to exhaust an Appointments Clause challenge before the Social Security Administration or warning that failure to do so will forfeit judicial review of that claim" and that even if such did exist, "the circumstances warrant an exercise of the court's discretion under *Freytag"* because the challenge was "neither frivolous nor disingenuous").

The court finds that this is one of the "rare cases" contemplated by *Freytag* in which it should exercise its discretion to find that no waiver occurred, again, assuming the exhaustion requirement applied. The ALJ's statement to plaintiff about the nature and significance of the hearing he was about to conduct helps establish this case as among the "rare ones" and bolsters the appropriateness of finding that she did not waive her Appointments Clause claim. While it is not unusual for an ALJ to make an opening statement at a hearing, particularly to help put the claimant at ease, the statement by the ALJ here was extreme and starkly atypical in its characterization of the hearing as a benign proceeding

devoid of legal consequence—that is, akin to a casual conversation in plaintiff's home about her life. The statement effectively encouraged plaintiff not to be vigilant in protecting her rights and interests during the hearing. The court declines to indulge in the presumption —which would be to the ALJ's and Commissioner's benefit-that plaintiff's counsel's handling of the hearing and the Appointments Clause claim in particular were not affected by the ALJ's statement. Under the specific circumstances presented, it would be manifestly unfair to find waiver by plaintiff of her Appointments Clause claim.

In sum, the court concludes that the exhaustion requirement did not apply to plaintiff's Appointments Clause claim pursuant to *Sims* based on the non-adversarial nature of the Social Security disability process. Alternatively, if the exhaustion requirement is deemed to apply, the court exercises its discretion under *Freytag* to find that no waiver occurred.

Turning then to the merits of plaintiff's Appointments Clause claim, the court, in accordance with the uncontested contention of plaintiff, concludes that the ALJ who decided plaintiff's case was appointed in violation of the Appointments Clause. Particularly in light of the Social Security Administration having since corrected the appointment process, remand for a new hearing before a different ALJ is the appropriate remedy for this violation. *See Lucia*, 138 S. Ct. at 2055; Soc. Sec. Ruling 19-1p, 2019 WL 1202036, at *9583 (outlining process in cases where claimant makes a appointments clause challenge at the administrative level and directing that a "new and independent review of the claims file" be conducted and the case remanded "to an ALJ

other than the ALJ who issued the decision under review, or [for the Appeals Council] to issue its own new decision about the claim covering the period before the date of the ALJ's decision."); *Bizarre*, 2019 WL 1014194, at *7 (deeming Appointments Clause claim timely and remanding "for rehearing before a constitutionally appointed ALJ").

The court emphasizes that the issue presented by plaintiff's Appointments Clause claim is overwhelmingly a legal one and that the claim is not a matter that falls within the scope of an ALJ's usual fact-finding duties, if it is within the scope of an ALJ's authority at all. *See infra* n.6. Therefore, nothing in this Order shall be interpreted as excusing a claimant from the burden of presenting evidence and otherwise showing at the administrative level that he or she is disabled pursuant to the Regulations and other applicable provisions of law. *See, e.g.*, 20 C.F.R. § 404.1512(a)(1); *Cooke v. Colvin*, No. 1:17CV841, 2018 WL 3999636, at *6 (M.D.N.C. 21 Aug. 2018) ("Plaintiff abandoned his request for IQ testing while his claim remained pending before the ALJ. Plaintiff cannot now complain that the ALJ failed to rule on Plaintiff's request for IQ testing (or failed to order such testing) when he had two different opportunities to raise those matters before the ALJ but failed to do so."), *mem. & recomm. adopted sub nom. Cooke v. Berryhill*, 2018 WL 4688318, at *1 (28 Sept. 2018), *appeal docketed*, No. 18-2274 (4th Cir. 26 Oct. 2018); *Bagliere v. Colvin*, No. 1:16CV109, 2017 WL 318834, at *8 (M.D.N.C. 23 Jan. 2017) (holding that by failing to challenge VE's testimony at the hearing, plaintiff waived a challenge to the ALJ's omission of additional restrictions in plaintiff's RFC), *mem. & recomm. adopted*, Ord. & J. (D.E. 20) (23

Feb. 2017); *Bunton v. Colvin,* No. 1:10CV786, 2014 WL 639618, at *5 (M.D.N.C. 18 Feb. 2014) (finding plaintiff waived a challenge to his ability to perform jobs identified by the vocational expert when no opposition or alternative hypotheticals were posited at the hearing before the ALJ), *mem. & recomm. adopted,* J. (D.E. 22) (10 Mar. 2014); *Tolliver v. Astrue,* No. 3:09CV372-HEH, 2010 WL 3463989, at *6 (E.D. Va. 3 Sept. 2010) (holding that requirement that plaintiff present issues relevant to his disability claim to the ALJ is not the equivalent of issue-exhaustion).

CONCLUSION

For the foregoing reasons, IT IS ORDERED that plaintiff's motion (D.E. 14) for judgment on the pleadings be ALLOWED, the Commissioner's motion (D.E. 16) for judgment on the pleadings be DENIED, and this case be REMANDED to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) for a new hearing before an ALJ different from the one who issued the decision at issue in this appeal. In making this ruling, the court expresses no opinion on the weight that should be accorded any piece of evidence or the outcome of this case, matters that are for the Commissioner to resolve. The Clerk is DIRECTED to close this case.

This 22nd day of Mar. 2019.

/s/ JAMES E. GATES
JAMES E. GATES
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:18-CV-00100-RN

SHARRON BRADSHAW, PLAINTIFF

v.

NANCY BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Mar. 26, 2019

ORDER

Plaintiff Sharon Bradshaw asks the court to vacate the decision denying her claim for disability benefits because the appointment of the Administrative Law Judge who issued the decision violated the Constitution's Appointments Clause. Acting Commissioner of Social Security Nancy Berryhill does not take much issue with Bradshaw's conclusion about the validity of the ALJ's appointment but claims that Bradshaw waived this argument by not raising it before the ALJ.

This controversy arises from the Supreme Court's decision in *Lucia* v. *Securities and Exchange Commission*, 138 S. Ct. 2044 (2018). In *Lucia*, the Supreme Court determined that the SEC's ALJs were officers of the United States instead of merely employees of the federal government. *Id.* at 2054. As a result, the

Constitution required that the President, a court of law, or a head of a department appoint them to their position. *Id.* at 2050 (citing U.S. Const. Art. II, § 2, cl. 2.). Because the SEC had not appointed the ALJ who ruled against Lucia as required by the Appointments Clause, the Supreme Court held that he was entitled to a new hearing before a properly appointed official. *Id.* at 2055.

Particularly relevant to this dispute is the Supreme Court's statement that Lucia was entitled to a new hearing because he made "a timely challenge" to the constitutionality of the ALJ's appointment. *Id.* at 2055. The Court explained that Lucia "contested the validity of [the ALJ's] appointment before the Commission, and continued to press that claim in the Court of Appeals and this Court." *Id.* at 2056.

The Acting Commissioner claims that Bradshaw did not make a timely challenge because she did not raise the Appointments Clause issue before the ALJ. But neither the statutes nor the regulations that govern Social Security proceedings required Bradshaw to do so. And the court will not impose an issue-exhaustion requirement because both precedent and constitutional concerns counsel against it. Thus, Bradshaw's Appointments Clause challenge is timely and the court will address it.

After considering the merits of this matter, the court concludes that the appointment of the ALJ who issued the decision below did not comply with the Appointments Clause. The ALJ was an inferior officer of the United States and she was not appointed by the President, a court of law, or the head of a department. Thus, the court vacates the decision below and remands the

matter to the SSA for proceedings before a validly appointed ALJ.

I. Background

In December 2013, Bradshaw filed a claim for disability insurance benefits with the Social Security Administration. Admin. Tr. at 16, D.E. 10. After the SSA denied her initial claim and her request for reconsideration, Bradshaw filed a written request for a hearing before an ALJ. *Id.* at 99-102, 104-07, 108. In her request, the only reason provided for her appeal was that she was disabled and could not work. *Id.* at 108.

At that time, representatives of both the Office of Personnel Management and the Social Security Administration evaluated applicants who wished to become ALJs. Gehlken Dec. ¶¶ 3-10, D.E. 28-1. Ultimately, the Social Security Administration's Director for the Center for Personnel Policy and Staffing was responsible for appointing ALJs. *Id.* ¶ 11.

In early December 2015, an ALJ held a hearing to review Bradshaw's claim. Admin. Tr. at 38. Ultimately, the ALJ decided in March 2017 that Bradshaw was not disabled. *Id.* at 16-32. Bradshaw then unsuccessfully sought review before the Appeals Counsel. *Id.* at 1-3.

Bradshaw filed a civil action in March 2018 seeking review of the ALJ's decision. Compl. *passim*, D.E. 5. Both parties moved for a judgment on the pleadings in their favor. D.E. 15, 18. As part of her motion, Bradshaw urged the court to vacate the decision because the ALJ's appointment did not comply with the Appointments Clause. Pl.'s Mem. in Supp. of Mot. for J. on the

Pleadings at 23-26, D.E. 16. In response, the Government claimed that Bradshaw waived this issue by not raising it before the ALJ. Def's Resp. to Pl.'s Mot. at 12-21, D.E. 19. The court[1] held a hearing on the Appointments Clause issue in December 2018.

II. Analysis

As noted at the outset, this case presents two issues. The court must first address whether Bradshaw's Appointments Clause challenge is timely. If it is, then the court must turn to whether the SSA violated the Appointments Clause when it appointed the ALJ who issued the ruling under review here. Bradshaw prevails on the timeliness issue because there is no requirement that claimants raise constitutional issues before an ALJ to preserve them for federal court review. And she also prevails on the merits of her claim because the ALJ was an inferior officer who was not appointed by the President, a court of law, or the head of a department. Thus, the court will remand this matter for further proceedings before a validly appointed ALJ.

a. Was Bradshaw required to raise the Appointments Clause issue to the ALJ?

The Government relies heavily on the statement in *Lucia* that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." 138 S. Ct. at 2055. (quoting *Ryder* v. *United States*, 515 U.S. 117, 182-83 (1995)). While this language makes clear that a timely challenge is a prerequisite to the relief

[1] The parties consented to having a United States Magistrate Judge conduct all proceedings under 28 U.S.C. § 636(c). D.E. 13.

Bradshaw seeks, it provides no guidance—no matter how many times the Acting Commissioner invokes it—about what constitutes a timely challenge in the Social Security context.

But the Supreme Court's decision in *Sims* v. *Apfel* does. *Sims* considered "whether a Social Security claimant waives judicial review of an issue if he fails to exhaust that issue by presenting it to the Appeals Council in his request for review." 530 U.S. 103, 106 (2000). Although *Sims* dealt with issue exhaustion at the Appeals Counsel level, it provides a roadmap for the court's analysis of whether issue exhaustion is required at the ALJ level.

The Supreme Court began by noting that a claimant may only seek review in federal court of a final decision of the Commissioner of Social Security. *Id.* at 106 (citing 42 U.S.C. § 405(g)). To properly obtain a final decision, the Court explained, the claimant must ask for review of an ALJ's decision from the Appeals Counsel. *Id.* at 106-07. If a claimant does not seek Appeals Counsel review, there is no final decision and thus no right to "judicial review because he has failed to exhaust administrative remedies." *Id.*

Sims sought review from the Appeals Counsel, and had thus exhausted her administrative remedies. *Id.* at 107. But when she sued in the district court, she relied on an argument that she had not presented to the Appeals Counsel. *Id.* at 106. So what happens when a claimant obtains a final decision from the Commissioner and then raises an issue before a federal court they did not raise to the Appeals Counsel? In other words, does

the Social Security Act's administrative exhaustion requirement also require issue exhaustion at the Appeals Counsel level?

In answering this question, the Supreme Court noted that "requirements of administrative issue exhaustion are largely creatures of statute." *Id.* at 107. And "it is common for an agency's regulations to require issue exhaustion in administrative appeals." *Id.* at 108. But, the Supreme Court explained, neither a statute nor "SSA regulations . . . require issue exhaustion." *Id.*

Even without a statute or regulation requiring issue exhaustion, a court can still impose one based on the analogous provision "that appellate courts will not consider arguments not raised before trial courts." *Id.* at 108-09. But whether it is desirable to do so "depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. If "an administrative proceeding is not adversarial . . . the reasons for a court to require issue exhaustion are much weaker." *Id.* at 110. In considering whether to apply an issue-exhaustion requirement, courts should caution against "reflexively 'assimilat[ing] the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts.'" *Id.* (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940)).

After setting out these principles, a majority of the Court determined that there was no issue-exhaustion requirement at the Appeals Counsel level. But there majority was divided about the reason behind this outcome.

A four-justice plurality began by noting that "[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Id.* at 110. In fact, "the SSA is '[p]erhaps the best example of an agency' that is not" based on "the judicial model of decisionmaking[.]" *Id.*

There were factors that, according to the plurality, showed Social Security proceedings were "inquisitorial rather than adversarial." *Id.* To begin with, the SSA's regulations provide that the process was to proceed "'in an informal, nonadversary manner.'" *Id.* (quoting 20 C.F.R. § 404.976(a)). But beyond that, there were other indicia that Social Security proceedings are nonadversarial. For example:

- ALS must investigate facts and develop arguments before and against the claimant. *Id.*
- The Commissioner does not appear before ALJs and does not oppose claimants. *Id.*
- The Appeals Council does not require briefing. *Id.*
- The Appeals Council's review is plenary. *Id.*
- The Appeals Council must review the entire record and new factual evidence when determining whether to review an ALJ's opinion. *Id.*
- The Agency informs Claimants that the Counsel will consider the entirety of an ALJ's decision, even if the claimant agrees with the decision or does not request review. *Id.*
- The paperwork used to begin a review by the appeals counsel was short and "strongly suggests

> that the Council does not depend much, if at all, on claimants to identify issues for review." *Id.* at 112.

Considering these factors, the plurality determined that "[t]he adversarial development of issues by the parties" at the core of the analogy between administrative and judicial proceedings "simply does not exist" in Social Security proceedings. *Id.* at 112. The "responsibility for identifying and developing the issues" rested mainly with "[t]he Council, not the claimant." Thus, it made "little sense" to impose a judicially crated issue-exhaustion requirement.

Justice O'Connor, writing for herself, concurred with the judgment, but did so on different grounds. In her view, it was inappropriate to require issue exhaustion because the agency did not notify claimants that they needed to raise particular issues to preserve them for review by the district court. *Id.* at 113 (O'Connor, J. concurring in part and concurring in judgment). In fact, "the relevant regulations and procedures indicate that issue exhaustion before the Appeals Council is *not* required." *Id.* (emphasis in original). Justice O'Connor also focused on the brief form used to request review by the Appeals Council, the plenary nature of the Council's review, and its ability to review the entire record even if the claimant did not seek review of a particular aspect of the ALJ's decision. *Id.* at 113-14. Based on these factors, Justice O'Connor found that the claimant "did everything that the agency asked of her" and did not believe it appropriate to impose additional requirements, such as an issue-exhaustion requirement, on her. *Id.* at 113.

Sims definitively resolved whether Social Security claimants must raise issues to the Appeals Council before bringing them to federal court. But the Court explicitly noted that it was not addressing whether parties needed to raise issues before the ALJ to preserve them for later review by a district court. *Id.* at 107. That is the question, in the context of constitutional challenges, that presents itself to this court for resolution.

i. Is there an issue-exhaustion requirement for constitutional questions at the ALJ level?

Based on *Sims*, the court will consider whether there is a statute or regulation that requires claimants to raise constitutional questions before an ALJ to preserve them for review in a federal court. If not, the court will turn to whether the nature of the proceedings before the ALJ justifies judicially imposing one.

The Acting Commissioner conceded at oral argument that there is no explicit issue-exhaustion requirement in the SSA's organic statute or its regulations. Hr. Tr. at 20:21-24, D.E. 27. Instead, she relies on the overall content of its regulations to support her position. *Id.* at 23-24. Alternatively, the Acting Commissioner argues that efficiency considerations justify the court imposing an issue-exhaustion requirement at the ALJ level. Resp. to Pl.'s Mot. for J. on the Pleadings at 20. The court will consider each argument in turn.

1. Is there a statute or regulation that requires claimants to raise constitutional questions before Social Security ALJs?

Given the Supreme Court's reasoning in *Sims*, this court's assessment of the timeliness of Bradshaw's Appointments Clause challenge begins with a review of the

applicable statutes and regulations.[2] The court can resolve the statutory question easily enough because the Acting Commissioner concedes that no statute imposes an issue-exhaustion requirement on Social Security claimants. Hr. Tr. at 20:21-22 ("No, Your Honor. We do not have a statute to that effect[.]").

But the court's examination of the SSA's regulations is more complicated. To begin with, the court notes that in *Sims*, the Supreme Court found that "SSA regulations do not require issue exhaustion." 530 U.S. at 108. Despite this statement (or perhaps because *Sims* dealt with matters before the Appeals Counsel), the Acting Commissioner claims that several "regulations require a claimant to raise all issues—including constitutional issues—to the agency at the earliest possible juncture." Resp. to Pl.'s Mot. for J. on the Pleadings at 16, D.E. 19.

Yet at the hearing on this matter, the Acting Commissioner conceded that no regulation explicitly required Bradshaw to raise the Appointments Clause issue with the ALJ. Hr. Tr. at 26:21-24 ("[O]ur argument is not, per se, that there is a specific regulation

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[2] The Acting Commissioner cites many cases in her memorandum to the court that do not involve the SSA. Resp. to Pl.'s Mot. for J. on the Pleadings at 12-14. She claims that these cases support its contention that, in general parties must make Appointments Clause challenges during administrative agency proceedings before a federal court may review the issue. *Id.* But *Sims* requires courts to assess an agency's organic statute and regulations when determining whether issue exhaustion is required at any given agency. So cases involving the statutes and regulations of other agencies are irrelevant to the court's analysis of whether Bradshaw had to raise her Appointments Clause challenge to the SSA ALJ before raising it in this court.

that says you, claimant, must raise an appointment challenge . . . with the ALJ."), 27:6-12 ("I don't know that there's a regulation directly on point, Your Honor."). Instead, the Acting Commissioner maintained that the language of the Administration's regulations are "consistent with the theory that such a challenge should be brought to the ALJ's attention." *Id.* at 26:24-25. Thus, the court must consider what type of regulatory language courts have determined establish an issue-exhaustion-requirement and whether the court can find similar language in the SSA's regulations.

In *Sims*, the Supreme Court noted that "it is common for an agency's regulations to require issue exhaustion in administrative appeals." 530 U.S. at 108. As an example, it cited a Department of Labor regulation that provided that "the petitioner shall submit a petition for review to the Board which . . . lists the specific issues to be considered on appeal." *Id.* (citing 20 C.F.R. § 802.211(a) (1999)). Other courts considering this issue have found that a regulation requiring a party to identify the specific issues it wishes to raise on appeal creates an issue-exhaustion requirement. *See Scott* v. *McDonald*, 789 F.3d 1375, 1378-79 (Fed. Cir. 2015) (applying an issue-exhaustion requirement when regulations required an appealing party to state "that all issues in the statement of the case are being appealed or by specifically identifying the issue being appealed" (citing 38 C.F.R. § 20.202)); *Environmentel, LLC* v. *FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011) (finding that FCC regulations required issue exhaustion because they required a party to "concisely and plainly state the questions presented for review" (citing 47 C.F.R. § 1.115(b)(1))).

But on the other hand, if regulations do not require a party to specifically identify issues for appeal, courts have been reluctant to find an issue-exhaustion requirement. For example, in *Mahon* v. *United States Department of Agriculture*, 485 F.3d 1247 (11th Cir. 2007), the Eleventh Circuit found that regulations adopted by the Department of Agriculture's National Appeals Division did not require issue exhaustion. Although the court noted that "the regulations require the claimants to state the reasons why the adverse decision was incorrect[,]" this language did not create an issue-exhaustion requirement because "there is no express requirement in the regulations that a party must list the specific issues the reviewing court will consider." *Id.* at 1255-56.

With these cases in mind, the court will turn to its consideration of the regulations relied on by the Acting Commissioner to support her position.

The SSA's regulations explain the process that a claimant must go through to obtain review by an ALJ and the process for reviewing a denied claim. To begin with, the SSA's regulations limit the scope of the issues a claimant may raise before the ALJ. They explain that a party may only request a hearing before an ALJ if they are "dissatisfied with one of the determinations or decisions listed in § 404.930." 20 C.F.R. § 404.929. The matters listed in § 404.930 focus on initial, revised, and reconsidered decisions made by the Administration, and do not mention constitutional issues.

The regulations also set out a limited scope of review for ALJs. They explain that "[t]he issues before the administrative law judge include all the issues brought out in the initial, reconsidered or revised determination that were not decided entirely in your favor." 20 C.F.R.

§ 404.946(a). The ALJ may also consider the basis for a fully-favorable decision if the evidence requires it. *Id.* But there is no indication in the regulation that the claimant must present constitutional issues to the ALJ.

The regulations then specify the scope of the argument a claimant should raise before the ALJ. The claimant must submit a written request which "should include" several items, including "[t]he reasons you disagree with the previous determination or decision." 20 C.F.R. § 404.933(a) & (a)(2). Given that an ALJ's appointment has no connection to initial determination or a reconsideration of a claim for benefits, this language does not require claimants to raise a constitutional challenge to the ALJ's appointment at the ALJ level.

Furthermore, an examination of the form the SSA developed to help claimants request review by an ALJ reinforces this conclusion about scope of issues a claimant may raise on appeal to the ALJ. The form provides three lines for the claimant to explain why they "disagree with the determination" below. *See* Form HA-501, https://www.ssa.gov/forms/ha-501.pdf. The agency estimates "that it will take about 10 minutes to read the instructions, gather the facts, and answer the questions" included on the form. *Id.* The Supreme Court noted in *Sims* that identical language on the Appeals Counsel form "strongly suggest[ed] that the Council does not depend much, if at all, on claimants to identify issues for review." *Sims*, 530 U.S. at 112. Thus, this form bolsters Bradshaw's position that there is no-issue exhaustion requirement for constitutional issues.

Other regulations also show the minimal role that claimants have in setting the issues for an ALJ's review. The regulations explain that the SSA will mail a notice

of hearing to the claimant that "will tell" the claimant "[t]he specific issues to be decided in [the] case." 20 C.F.R. § 404.938(b) & (b)(1). Claimants must object if they disagree with the issues the ALJ lists, 20 C.F.R. § 404.939, but there is no indication that the ALJ is under any obligation to address issues the claimant raises or that failure to raise an issue will lead to a wavier of that issue. And given that the issues under consideration are limited to issues decided before the ALJ's involvement, there would be no reason for a claimant to believe that they needed to object to an ALJ's failure to include an Appointments Clause challenge among the issues the ALJ will consider at a hearing.

There is also no indication in the regulations or the notice of hearings that failure to raise a constitutional issue in an objection will lead to the waiver of that issue in future proceedings. The notice of hearing form explains that "[i]f you disagree with the issue or remarks listed above, you must tell [the ALJ] in writing why you disagree." Admin. Tr. at 124. Rather than alert the claimant that they will forfeit unraised issues, the form explains that "[t]o prevent delays, you must tell [the ALJ] as soon as possible." *Id.* Again, the language in the Administration's own forms provide little to no support for the existence of an issue-exhaustion requirement for constitutional issues.

The regulations do provide a mechanism to seek the disqualification of an ALJ. If a claimant "object[s] to the administrative law judge who will conduct the hearing, [claimants] must notify the administrative law judge at [their] earliest opportunity." 20 C.F.R. § 404.940. But that regulation focuses on circumstances where the ALJ "is prejudiced or partial with respect to any party

or has any interest in the matter pending for decision." *Id.* There is no indication that this regulation requires parties to raise constitutional concerns with the ALJ's appointment.

And when the SSA wants to encourage claimants to raise constitutional issues, it knows how to do so. The regulations provide for an expedited appeal process that a claimant "may" use if the claimant argues and the SSA agrees "that the only factor preventing a favorable determination or decision is a provision in the law that you believe is unconstitutional." 20 C.F.R. § 404.924(d). Ignoring the language making the expedited appeals procedure optional, the regulation still would not require Bradshaw to raise her Appointments Clause challenge before the ALJ because it does not affect the merits of her claim for benefits. Instead, it only impacts whether the ALJ can address her claim.

It is also worth noting that the SSA's regulations provide a mechanism for a claimant to raise issues before the Appeals Counsel that they did not raise to the ALJ. 20 C.F.R. § 404.970(b). This suggests that the SSA does not consider there to be an issue-exhaustion requirement at the ALJ level for all types of issues.

Perhaps the most compelling evidence of the Administration's approach to constitutional challenges is how it handled the very type of challenge that Bradshaw raises. In an emergency message issued in early 2018, the Administration told ALJs that if a claimant challenged the constitutionality of the ALJ's appointment, they were only to acknowledge that the claimant had raised the issue and note that neither the agency nor the ALJ had authority to resolve constitutional issues. Pl.

Mot. for J. on the Pleadings at 25 (quoting Social Security Administration EM-18003, Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process).

The SSA's regulations provide no support for the Acting Commissioner's position. There is nothing in the SSA's regulations that explicitly require a claimant to raise constitutional issues before an ALJ. And the language the SSA uses in its regulations is similar to language courts have found to be inconsistent with the existence of an issue exhaustion requirement. *See* 20 C.F.R. § 404.933(a) & (a)(2). After considering the text of the SSA's regulations, the court concludes that there is no requirement that claimants raise constitutional questions before the ALJ to preserve them for review in a federal court.

2. Should the court impose an issue-exhaustion requirement on Social Security proceedings before ALJs?

Without a statute or regulation requiring issue exhaustion, the court still can impose an issue-exhaustion requirement. But, as the Supreme Court noted in *Sims*, the "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims*, 530 U.S. at 109.

Fourth Circuit precedent controls the court's resolution of this question. In *Pearson* v. *Colvin*, the Court of Appeals explained that "the administrative hearing process is not an adversarial one[.]" 810 F.3d 204, 210

(4th Cir. 2015). The court's independent review of the procedures involved in proceedings before an ALJ bolster the conclusion that it is an inquisitorial process and not an adversarial one. Thus, it would not be appropriate to impose an issue-exhaustion requirement for constitutional claims here.

3. Other Cases Addressing this Issue

The Acting Commissioner also points out, correctly, that most courts to address this question have found that claimants waive their Appointments Clause challenges by not raising them before the ALJs. Despite the number of cases that have addressed this issue in the Acting Commissioner's favor, two factors limit the strength of this argument. First, none of the cited cases are binding on this court because the Fourth Circuit has not yet addressed this issue. And, second, most of the cases cited by the Acting Commissioner only address issue exhaustion in passing, which limits their persuasive authority.

When pressed on which cases the Acting Commissioner believed most strongly supported her position, she pointed the court to *Mills* v. *Apfel*, 244 F.3d 1 (1st Cir. 2001), and *Shaibi* v. *Berryhill*, 883 F.3d 1102 (9th Cir. 2017). Hr. Tr. 32:7-15. But upon consideration, neither case provides much support for the Acting Commissioner's position here.

In *Mills*, the First Circuit considered, in the immediate aftermath of *Sims*, whether a party could raise an issue in the district court that it had not raised before a Social Security ALJ. 244 F.3d at 8. Without assessing the applicable statutes, regulations, or precedent the

court of appeals declared that it had "no intention of extending" the reasoning of *Sims* to the ALJ level. *Id.* The court explained that doing so "could cause havoc, severely undermining the administrative process." *Id.* Because the court's rationale in *Mills* is not based on Supreme Court precedent, statutes, or regulations, it is unpersuasive.

Just as *Mills* is unpersuasive, so is *Shaibi*. In *Shaibi*, the Ninth Circuit considered whether a claimant could argue for the first time at the district court that a vocational expert relied on inappropriate sources to determine the number of jobs available to the claimant in the national economy. 883 F.3d at 1108. In determining that the claimant had waived this argument by not raising it before the ALJ, the Court of Appeals relied on its own pre-*Sims* precedent that required represented parties to raise issues before an ALJ to preserve them for later review. *Id.* at 1109 (citing *Meanel* v. *Apfel*, 172 F.3d 1111 (9th Cir. 1999), *as amended* (June 22, 1999)). Because the decision in *Shaibi* was compelled by circuit precedent it provides no guidance for a court outside the Ninth Circuit addressing the issue after *Sims*.

4. Efficiency Considerations

As a final argument, the Acting Commissioner argues that the court should surrender its ability to address Bradshaw's constitutional claim in the first instance because of efficiency concerns. She claims that a decision in Bradshaw's favor would lead to "thousands" of cases being remanded to the agency for reconsideration. This result, the Acting Commissioner claims, "would further burden an already-stressed system and add even more months to the wait times for first time

claimants." Resp. to Pl.'s Mot. for J. on the Pleadings at 17.

The Acting Commissioner points to two cases in support of this proposition: *Lucia* and *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). The *Lucia* citation directs the court to the portion of the opinion that says a timely objection is necessary to receive relief on an Appointments Clause challenge. As the court noted at the outset, this is true, but it does not explain what constitutes a timely objection in a Social Security proceeding. Reliance on *L.A. Tucker* presents a similar problem. There, the Supreme Court explained that a party must make an objection "at the time appropriate under [the administrative body's] practice." 344 U.S. at 37. As noted above, the SSA's regulations for practice before an ALJ do not require issue exhaustion. Thus these cases do not compel or persuade the court to give up its ability to address Bradshaw's constitutional challenge.

The court is also not persuaded by the parade of horribles that the SSA claims will result from a ruling in Bradshaw's favor. To begin with, the Acting Commissioner has provided no concrete facts in support of her claims. And any inefficiencies or extended wait times resulting from a ruling in Bradshaw's favor are problems of the SSA's own making. Nearly two decades have passed since the Supreme Court noted that the SSA's regulations did not include an issue-exhaustion requirement, but that it was "likely that the Commissioner could adopt a regulation that did require issue exhaustion." *Sims*, 520 U.S. at 108. The SSA could have addressed this issue at any time but did not do so. The complications arising from its failure to act do not

justify judicial imposition of an issue-exhaustion requirement.

Even assuming the SSA's efficiency argument was compelling, the separation of powers concerns arising from its position outweigh efficiency considerations.

The SSA is asking the judicial branch to voluntarily cede its authority to address constitutional questions unless and until an administrative agency first addresses the issue. And it makes this request without a statutory or regulatory basis and outside the traditional circumstances that justify a court imposing an issue-exhaustion requirement. The SSA's position, if adopted, would have serious implications for the allocation of power between the three branches of our Government.

If the judicial branch were to impose an issue-exhaustion requirement when the legislative and executive branches have declined to do so, the courts risk usurping the authority of these other branches. As the Supreme Court noted in *Sims*, issue-exhaustion requirements are principally creatures of statute or regulation. 530 U.S. at 107. And courts should respect the decisions that

Congress and agencies have made on these issues when considering whether exhaustion is required. *See McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992) ("[A]ppropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.").

Congress has not required parties to raise constitutional issues before the SSA. And while the SSA has encouraged parties to raise constitutional issues that

preclude a decision in their favor, 20 C.F.R. § 404.924, it has not required parties to raise all constitutional issues that could be present.

Adopting the Acting Commissioner's position would effectively require the court to act where Congress has chosen not to and to strengthen and expand the scope of a regulation enacted by the agency. In other contexts, the Supreme Court has cautioned courts against "impos[ing] additional exhaustion requirements beyond those provided by Congress or the agency[.]" *Darby* v. *Cisneros*, 509 U.S. 137, 146-47 (1993) (discussing whether courts could expand the scope of an exhaustion requirement in the Administrative Procedure Act). That is exactly what the Acting Commissioner suggests the court do here, and it will decline the invitation to do so.

Even if it were appropriate for the judicial branch to design an issue-exhaustion requirement for Social Security proceedings, the courts are poorly equipped to do so in a way that adequately accounts for the interests of both the Administration and claimants. For example, should the issue-exhaustion requirement apply to issues as that term is defined in the regulations; all issues that a claimant could conceivably present to an ALJ; or should there be, as the Supreme Court has hinted, an exception for constitutional issues? *See Matthews* v. *Eldridge*, 424 U.S. 319, 329 n.10 (1976) ("If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court."). And if claimants must raise constitutional issues before the Administration, do they have to raise any conceivable constitutional issue, or should the court follow the SSA's lead and only require claimants

to raise constitutional issues that would prevent the claimant from prevailing before the ALJ? *See* 20 C.F.R. § 404.924(d).

Similarly, it is difficult to discern who should be subject to this issue-exhaustion. Should it apply to all claimants or should it apply, as the Ninth Circuit has held, to only claimants represented by attorneys? *See Shaibi*, 883 F.3d at 1109.

And how strictly should the issue-exhaustion requirement be applied? Should failure to raise an issue before the ALJ be an absolute bar to raising it before a district court or should there be exceptions for newly discovered issues, as there are before the ALJ and the Appeals Counsel? *See* 20 C.F.R. § 404.970(b).

The answers to each question affect both the SSA's operations and rights of every claimant who has or will appear before it. The balancing of these interests and the weighing of the resulting costs is much more well-suited for rigors of bicameralism and presentment, or at least notice and comment rulemaking. In those venues all interested stakeholders may have a say, instead of only two parties engaged in litigation.

Who can blame the SSA for asking the judiciary to abdicate its ability to address constitutional questions in the first instance? Over time the judicial branch has shown itself willing to yield various aspects of its decision-making ability to administrative agencies. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005); *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, (1945). And each instance represents a diminution of the judicial

branch's authority. *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J. concurring).

But constitutional questions are often treated differently. As noted above, the Supreme Court has suggested, in passing, that parties need not raise constitutional issues before the Social Security Administration to preserve them so long as they otherwise exhaust their administrative remedies. *See Matthews*, 424 U.S. 319, 319 n.10. And there are many other instances of courts being reluctant to apply the traditional exhaustion requirements to constitutional questions. 4 Charles H. Koch, Jr., *Admin. Law & Practice* § 12:21 n.46 (3d ed. 2018) (citing cases).

Courts should hesitate before allowing administrative agencies to exercise dominion over questions of constitutional law. Whatever expertise agencies have that make it appropriate to give weight to their assessments on other matters, they generally lack the authority and institutional competence to address constitutional issues. *See Matthews* v. *Diaz*, 426 U.S. 67, 76 (1976) ("[T]his constitutional question is beyond the Secretary's competence.").

On the other hand, as the Constitution explains, "the judicial Power" extends "to all Cases . . . arising under this Constitution[.]" U.S. Const. Art. III, § 2. To paraphrase the late Justice Scalia, this does not mean some of the judicial power, but all of the judicial power. *See Morrison* v. *Olson*, 487 U.S. 645, 705 (1988) (Scalia, J. dissenting). Thus, deciding questions of constitutional law and assessing whether the branches are complying with the Constitution's requirements are at the core of the judicial power. The courts should vigorously defend its ability to address these types of issues,

not voluntarily concede it to another branch of government.

The court does not doubt the sincerity of the SSA's concerns over efficiency. But the Constitution does not exist to guarantee efficiency; it exists to guarantee individual liberty. *See INS* v. *Chadha*, 462 U.S. 919, 945 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."). And it does so by separating governmental powers among the three branches and entrusting that each branch will resist attempts by the other branches to expand their authority. *See* The Federalist No. 51 (James Madison) ("But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."). Courts voluntarily relinquishing their ability to consider constitutional questions in the first instance might lead to increased efficiency for the SSA, but it would lead to reduced protection for individual liberty. *See Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1255 (2015) (Thomas, J. concurring) ("The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects."). The court cannot approve of this tradeoff and will not impose an issue-exhaustion requirement for constitutional questions.

5. Conclusion

After applying the framework set out by the Supreme Court in *Sims*, the court cannot find that Bradshaw needed to raise her Appointments Clause challenge before the ALJ to preserve it for review in federal court. No statute or regulation requires a claimant to raise constitutional issues before an ALJ. Because Bradshaw has complied with the SSA's regulations, there is no reason to bar her from raising her Appointments Clause challenge in this court. And given that proceedings before the ALJ are non-adversarial and the attendant constitutional concerns present here, it would be inappropriate for the court to impose an issue-exhaustion requirement for constitutional issues. Thus, the court concludes that Bradshaw has raised her Appointments Clause challenge in a timely manner and it is appropriate for the court to consider its merits.

b. Did the appointment process for the ALJ who decided Bradshaw's case comply with the Appointments Clause?

The Constitution provides two methods for appointing officers of the United States. To begin with, the President may, with the advice and consent of the Senate, appoint "ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not . . . provided for" in the Constitution. U.S. Const. art. II § 2. And the Constitution also allows Congress to "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." *Id.* Thus,

when it comes to the appointment of officers, the Constitution allows two methods (and only two methods) for those appointments to take place.

The court must initially determine whether SSA ALJs are inferior officers of the United States or federal government employees.[3] In reaching its decision in *Lucia* that SEC ALJs were inferior officers, the Supreme Court applied the "significant authority" test. *Lucia*, 138 S. Ct. at 2051-52 (citing *Freytag* v. *Comm'r*, 501 U.S. 868 (1991)). Justice Thomas noted in his concurring opinion that it would be more appropriate to apply a standard based on the Appointments Clause's original public meaning, which would focus on whether the official "perform[ed] an ongoing, statutory duty—no matter how important or significant the duty." *Id.* at 2056 (Thomas, J. concurring) (citing Jennifer Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 564 (2018)). But the court need not spend much time on determining the appropriate standard because the SSA does not dispute Bradshaw's contention that SSA ALJs are inferior officers. Def.'s Resp. to Pl.'s Mot. at 13 n.1. Given that the Acting Commissioner has conceded this issue, the court will find that SSA ALJs are inferior officers for Appointments Clause purposes.

Since SSA ALJs are inferior officers, the Appointments Clause requires that the President, a court of law, or the head of a department appoint them. The SSA has not challenged Bradshaw's contention that the SSA improperly appointed the ALJ who issued the decision

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[3] There is no contention here that SSA ALJs are principal officers of the United States.

below and the SSA's post-hearing submission confirms this fact. Gehlken Dec. ¶¶ 3-10, D.E. 28-1. Thus the court finds that the appointment of the ALJ who issued the decision below violated the Appointments Clause. Bradshaw is entitled to have the court remand this matter to the SSA for consideration by a validly appointed ALJ.

III. Conclusion

For the reasons discussed above, the court finds that Bradshaw's Appointments Clause challenge is both timely and meritorious. The court thus grants Bradshaw's Motion for Judgment on the Pleadings (D.E. 15), denies the Acting Commissioner's Motion for Judgment on the Pleadings (D.E. 18), and remands this matter to the SSA for consideration by a validly appointed ALJ.

Dated: Mar. 26, 2019

/s/ ROBERT T. NUMBERS, II
ROBERT T. NUMBERS, II
United States Magistrate Judge