

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE EARL CARR, ET AL.,)
)
 Petitioners,)
)
 v.) No. 19-1442
)
 ANDREW M. SAUL, COMMISSIONER OF)
)
 SOCIAL SECURITY,)
)
 Respondent.)
)

JOHN J. DAVIS, ET AL.,)
)
 Petitioners,)
)
 v.) No. 20-105
)
 ANDREW M. SAUL, COMMISSIONER OF)
)
 SOCIAL SECURITY,)
)
 Respondent.)
)

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Washington, D.C.

Wednesday, March 3, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

1 APPEARANCES:

2

3 SARAH M. HARRIS, ESQUIRE, Washington, D.C.;

4 on behalf of the Petitioners.

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6 Department of Justice, Washington, D.C.;

7 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-1442, Carr
5 versus Saul, and the consolidated case.

6 Ms. Harris.

7 ORAL ARGUMENT OF SARAH M. HARRIS

8 ON BEHALF OF THE PETITIONERS

9 MS. HARRIS: Mr. Chief Justice, and
10 may it please the Court:

11 Social Security claimants do not need
12 to challenge the constitutionality of their
13 ALJ's appointment in ALJ proceedings to obtain
14 judicial review of that issue.

15 First, under *Sims versus Apfel*, when
16 an agency holds non-adversarial proceedings and
17 does not depend on parties to identify the
18 issues, courts should not imply an issue
19 exhaustion requirement on their own. *Sims*
20 declined to imply an issue exhaustion
21 requirement for Appeals Council proceedings and
22 invited the SSA to promulgate such a rule, but
23 the agency never did.

24 Twenty years later, Appeals Council
25 and ALJ proceedings are still non-adversarial

1 and informal. Both conduct a plenary review and
2 must develop arguments for and against benefits.
3 Indeed, the Appeals Council must spot even
4 errors the claimants didn't raise to ALJs.

5 Courts should not penalize claimants
6 when the agency itself does not care what
7 claimants raise to ALJs and has never notified
8 them of an issue exhaustion requirement.

9 Second, the government relitigates
10 Sims, which rejected the government's universal
11 default rule of issue exhaustion. Sims also
12 rejected the government's concern that courts
13 would be stymied by applying the Social Security
14 regulations to technical, fact-based questions
15 the agency hasn't considered. Under Sims,
16 courts routinely entertain fact-heavy issues
17 that the agency never passed upon because the
18 error first appeared in the ALJ's decision and
19 the claimant didn't raise it to the Appeals
20 Council.

21 Third, at the very least, this Court
22 should not require claimants to exhaust
23 Appointments Clause challenges. Constitutional
24 questions are beyond the agency's competence,
25 and raising the Appointments Clause was futile.

1 The government knew about the Appointments
2 Clause problem, didn't fix it, and barred ALJs
3 from considering it.

4 I welcome questions.

5 CHIEF JUSTICE ROBERTS: Ms. Harris,
6 under your theory, what would prevent a claimant
7 from arguing before the ALJ that he has a leg
8 injury and then arguing for the first time in
9 district court that he also has a back injury so
10 that he can get a -- you know, a second bite at
11 the apple to recover an award?

12 MS. HARRIS: Well, I think 20 C.F.R.
13 404.1512 would squarely prohibit that because
14 the burden is on the claimant to establish
15 disability, and that includes raising
16 impairments. So, while the ALJ has the duty to
17 develop all the facts, there is a bar on raising
18 new evidence or, you know, a new ground of
19 disability in court for the first time.

20 And I think that's something that just
21 goes to show there are a lot of guardrails
22 already built into the nature of the Social
23 Security judicial review scheme that ensure that
24 courts are not going to be inundated with any
25 sort of technical questions that are beyond

1 their ken that the agency needed to weigh in on
2 first.

3 And other guardrails include things
4 like the 405(g) textual standard that prohibits
5 in general claimants from raising new evidence
6 in court for the first time, the substantial
7 evidence standard under which courts affirm the
8 ALJ if there's more than a mere scintilla of
9 evidence supporting the ALJ's determination, and
10 then also, in addition to the regulation I cited
11 requiring claimants to actually identify their
12 disability, courts can, of course, remand if the
13 agency requests a remand so that the agency
14 could consider those technical questions if
15 there was some sort of issue.

16 And that, again, I think, reflects the
17 current practice as well.

18 CHIEF JUSTICE ROBERTS: Isn't it an
19 important distinction between the Appeals
20 Council and the ALJ hearing, you know, that the
21 ALJ proceeding is the -- is the first step that
22 sort of is when everything gets put on the table
23 and it seems that it might make more sense to
24 require, you know, the waterfront to be covered
25 there even if it isn't at the Appeals Council?

1 MS. HARRIS: Well, I disagree with
2 that assessment. I mean, the ALJ is the third
3 step out of four in the remedy exhaustion
4 process. And the ALJ proceedings by regulation
5 reassure claimants that the ALJ is going to be
6 issue-spotting throughout the process,
7 developing the record. That is why the agency
8 charges the ALJ with being an investigator and
9 not just being an adjudicator.

10 And I think it's even clearer,
11 actually, that there is no expectation or need
12 for the ALJ to rely on claimants to relay --
13 raise issues at that stage because, after the
14 ALJ phase ends, the Appeals Council then issues
15 spots de novo and is taking up and taking a look
16 at issues even if claimants didn't raise them to
17 the ALJ.

18 So I think that that is a -- that that
19 difference actually cuts in favor of making it
20 clearer that there is no requirement for
21 claimants to raise issues before the ALJ.

22 And, again, I think --

23 CHIEF JUSTICE ROBERTS: Thank you. Go
24 ahead.

25 MS. HARRIS: I was through.

1 CHIEF JUSTICE ROBERTS: Oh.

2 Justice Thomas.

3 JUSTICE THOMAS: Thank you, Mr. Chief
4 Justice.

5 Ms. Harris, I understand your argument
6 or your answer to the Chief's question about
7 sandbagging on the back injury versus the leg
8 injury. But let's apply that to a choice of the
9 ALJ, that -- that the claimant does not like the
10 first ALJ, doesn't object to that ALJ, and then
11 later on, at the Council level or at the court
12 -- the district court level or the federal court
13 level, then objects to the ALJ.

14 And doesn't -- aren't -- isn't --
15 shouldn't there be some concern about that level
16 of sandbagging?

17 MS. HARRIS: Well, I don't think so
18 for two reasons. First of all, if you are -- if
19 -- if there's some sort of concern about the
20 run-of-the-mill disqualification concern for
21 bias or prejudice, there is -- it -- it seems
22 quite clear that the Appeals Council actually
23 does consider any objections that are raised to
24 the bias of the adjudicator de novo at the
25 Appeals Council stage under Ruling 13-1(p),

1 which is specific to that. And so I don't think
2 there is that kind of sandbagging concern.

3 The other reason is that if you did
4 try to raise a new fact of bias, like that the
5 ALJ had a personal stake in the case, for the
6 first time in court, that would still fall under
7 the new evidence bar of 405(g). You'd be trying
8 to present new evidence. Unless it were both
9 material and something you couldn't have
10 presented before, you wouldn't be able to do
11 that.

12 And I also think that actually
13 heightens the contrast with the Appointments
14 Clause. So unlike perhaps a question of bias or
15 disqualification, the Appointments Clause is
16 something that is not within the agency's
17 jurisdiction for its adjudicators and is
18 something that this Court in Free Enterprise and
19 other cases has said is really beyond the
20 agency's competence.

21 So I think, for the Appointments
22 Clause in particular, that's all the more reason
23 to not be concerned about some sort of
24 sandbagging issue. The agency hasn't given --
25 isn't able to give claimants a fair chance to

1 raise that before agency adjudication, and so
2 there is no concern with raising that for the
3 first time in court.

4 JUSTICE THOMAS: So there are quite a
5 few of these -- there's a possibility there
6 could be quite a few of these cases, Appointment
7 Clause cases. Why don't -- why don't we
8 resurrect the de facto officer doc -- doctrine
9 in order to be able to manage that?

10 MS. HARRIS: Well, two reasons. First
11 of all, I think Ryder quite appropriately
12 treated the common law history of the de facto
13 officer doctrine as not covering the
14 Appointments Clause because of the structural
15 constitutional challenge where -- and I -- and I
16 think the government agreed with this in its
17 Aurelius briefing -- if you have no remedy for
18 raising an Appointments Clause challenge and the
19 answer is simply the adjudicator was operating
20 sort of under color of law, there is never going
21 to be any remedy for Appointments Clause
22 violations.

23 And I think the second reason is,
24 here, we're talking about a closed universe of a
25 few hundred cases, and there is no indication

1 that the agency will struggle in any way in
2 giving claimants -- simply giving claimants new
3 hearings in these settings.

4 JUSTICE THOMAS: Thank you.

5 MS. HARRIS: So --

6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer.

8 JUSTICE BREYER: Well, I'll give you
9 two questions that are related. One is: What
10 ground would we choose among several that you
11 advance to say that you don't have to raise it?

12 If the ground is the structure of the
13 Social Security Administration, I do share the
14 Chief Justice's suggestion that not necessarily
15 new evidence but lawyers are very imaginative.
16 They're very good. You sit in your office and
17 you think up excellent arguments that people
18 actually have never raised before and you bring
19 them all to the district judges.

20 Now why isn't that a problem? You may
21 not want to say anything extra that you haven't
22 already said. If you go on the ground that,
23 well, they couldn't consider this, the ALJs, it
24 was futile because the agency told them they
25 couldn't, didn't the agency tell them that after

1 your clients were involved in their cases?

2 Do you want to say anything about
3 those -- further about those two problems?

4 MS. HARRIS: Sure. So two points.
5 First, taking the nature of a Social Security
6 proceeding, I do think Sims actually resolved a
7 lot of the concerns with respect to whether
8 courts are going to be facing sort of new
9 evidence, new arguments, and have problems with
10 them because most errors that are being raised
11 in court are things that arose in the -- in the
12 ALJ decision.

13 Sims already held that you don't need
14 to raise those issues to the Appeals Council.
15 And so lots of questions, like whether a
16 consultative expert should have been called or
17 how the ALJ conducted questioning, are already
18 in district court for the first time, and there
19 is -- doesn't seem to be any problem, and the
20 agency hasn't created a rule since Sims
21 suggesting there isn't a problem.

22 With respect to the futility issue, I
23 don't take the government to be suggesting at
24 any point in time that the agency would have
25 ever been competent to adjudicate Appointments

1 Clause challenges.

2 Now they made that collusive in
3 January 2018 when they told ALJs specifically to
4 say they had no power to entertain such claims,
5 but I don't think that was in question before
6 then, and cases like Free Enterprise, as well as
7 Eldridge and Califano in the Social Security
8 context, underscore that such constitutional
9 questions seem well beyond the agency's
10 competence to adjudicate.

11 JUSTICE BREYER: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Alito.

13 JUSTICE ALITO: Ms. Harris, was your
14 client -- was your client hurt by the manner in
15 which the ALJ was appointed?

16 MS. HARRIS: Yes. There is a personal
17 interest in the Appointments Clause in having a
18 constitutionally appointed ALJ because the
19 Appointments Clause is a guarantee of
20 transparency and accountability.

21 I don't think that we would even need
22 to show that because an Appointments Clause
23 violation is structural, but the Court's cases,
24 I -- I think, have -- have long emphasized that
25 the Appointments Clause is not just a structural

1 constitutional guarantee but --

2 JUSTICE ALITO: Well, is that -- is
3 that realistic in this case? The -- the ALJ was
4 appointed by a lower-level official and now has
5 been reappointed along with all the others by
6 the acting commissioner. So is -- is this ALJ
7 now smarter than he or she was at the time of
8 your hearing? More inclined to be favorable to
9 client -- to applicants like your client? Can
10 you say that, that that's realistic?

11 MS. HARRIS: I can't say that the ALJ
12 is different on the merits, but, as Lucia
13 recognized, it's not that there is some sort of
14 necessary guarantee that there would be a
15 different outcome. It is that the ALJ is
16 accountable. And transparency is incredibly
17 important to guaranteeing that when someone is
18 making an incredibly significant decision under
19 the laws of the United States, that person is
20 actually accountable and there's some way of
21 figuring out who appointed them.

22 JUSTICE ALITO: So why not --

23 MS. HARRIS: And, here, it may not --

24 JUSTICE ALITO: -- why not just say in
25 all of these cases they must be reconsidered by

1 the ALJ who heard them initially? The ALJ who
2 heard them initially takes another look at the
3 record, asks himself or herself, you know, given
4 my new position, having been appointed by the
5 acting commissioner, do I see this any
6 differently? If I don't, then the original
7 decision stands.

8 Why isn't that sufficient?

9 MS. HARRIS: Well, because I think, as
10 Lucia recognized, it's hard for someone who's
11 already seen the merits to take another look
12 without being clouded by that. And I think, as
13 the Court recognized in Seila Law last term --
14 last term, Appointments Clause and other
15 separation-of-powers violations are insidious
16 because it's very difficult to unscramble the
17 egg once -- once you have the process conducted
18 in an unconstitutional manner.

19 And so I think, to give a proper
20 remedy, Lucia did recognize that the new hearing
21 before a different adjudicator would be an
22 essential part of the remedy.

23 JUSTICE ALITO: This seems like an
24 enormous waste of time and money. How -- how do
25 you -- how can you account to the taxpayers and

1 other claimants for this? If these ALJs are
2 going to be busy rehearing cases, other
3 claimants who've never had a shot are going to
4 have to wait. A lot of time is going to be
5 wasted. And I don't really see what is
6 accomplished.

7 MS. HARRIS: Well, two -- two points
8 on that, Justice Alito. First of all, the ALJs
9 collectively conduct 760,000 hearings a year.
10 They take about 30 minutes per hearing. And so
11 I don't think it's realistic that conducting
12 several hundred new hearings is going to impose
13 any kind of burden or delay on the agency.

14 JUSTICE ALITO: Thank you.

15 MS. HARRIS: And second of all --

16 JUSTICE ALITO: I'm sorry. Yeah, my
17 time is up. Sorry.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor.

20 JUSTICE SOTOMAYOR: Counsel, the Court
21 in Lucia did not have to address forfeiture
22 because the claimant raised the objection before
23 the agency. Nevertheless, at the remedy stage,
24 this Court noted that the relief of a new
25 hearing is usually reserved for someone who

1 makes a timely challenge.

2 If we rule in your favor and remand,
3 would the -- may the courts below still deny
4 your relief on that ground? Not an exhaustion
5 ground but on -- on simply that it's not
6 equitable?

7 MS. HARRIS: I don't think so, and I'm
8 not -- I'm not sure where -- where that power
9 would really come from, because I think Lucia
10 does establish -- you know, the question of
11 whether there's a timely objection is whether
12 you are able to state the Appointments Clause
13 challenge on the merits.

14 And I'm not sure I would look at the
15 sort of timeliness as playing into the relief.
16 If there is an Appointments Clause violation
17 that a court can entertain, which is -- should
18 be the case here, the proper remedy for that is
19 a new hearing before a -- a -- a new -- a new
20 adjudicator. And to deprive someone of that
21 remedy on equitable grounds, I mean, especially
22 claimants who had no notice of -- that they were
23 supposed to raise the Appointments Clause, would
24 seem actually grossly inequitable even if there
25 were some sort of -- some sort of power to

1 tailor remedies in that fashion, which I'm,
2 again, not sure where that would come from.

3 JUSTICE SOTOMAYOR: Well, I'm thinking
4 of Justice Alito's question, and it seems to me
5 that whether the same ALJ decides the case or a
6 different one does, that that's more a new -- a
7 due process argument, isn't it, rather than an
8 Appointments Clause argument?

9 MS. HARRIS: Well, I think you could
10 say that it's both. I mean, I think Lucia is
11 recognizing that when the Appointments Clause
12 affects the proceeding, it would in some way --
13 you -- you risk perhaps replicating of the -- if
14 you simply replicate the same process that
15 someone has already followed, it -- it doesn't
16 seem like much of a remedy, even -- even -- you
17 know, simply because a person's already
18 considered the case. And so it just isn't
19 realistic to think that someone would -- would
20 look at it differently.

21 But regardless if you put that under
22 due process or the nature of the Appointments
23 Clause, I think that is a clearly established
24 remedy in this context. It would be important
25 for Social Security claimants in particular

1 because there is a very high reversal rate in
2 these kinds of cases in district court, and it
3 can be very close. And so just another look at
4 them to see if --

5 JUSTICE SOTOMAYOR: Counsel, I have
6 one last question. Just remind me, was this
7 Petitioner represented by counsel before the
8 agency?

9 MS. HARRIS: So all the Petitioners
10 were represented by counsel in ALJ hearings.
11 Not all of them were represented by counsel at
12 other stages of the ALJ process, for instance,
13 the request for review. And some of them were
14 not represented by counsel in Appeals Council
15 proceedings either. They had non-attorney
16 representatives, who can be people like friends
17 or social workers or other types of non-lawyers.

18 And so we don't think that there
19 should be some sort of special rule simply for
20 represented claimants. That would raise,
21 actually, a lot of really tough policy questions
22 that seem best suited for rulemaking, which,
23 again, is something the agency could have done
24 at any point since Sims.

25 JUSTICE SOTOMAYOR: Thank you,

1 counsel.

2 CHIEF JUSTICE ROBERTS: Justice Kagan.

3 JUSTICE KAGAN: Ms. Harris, could I
4 take you back to the conversation that you were
5 having with Justice Breyer? Because I wasn't
6 quite sure I -- I understood your answers to
7 him. I mean, imagine that the claim that your
8 clients failed to raise was not this sort of
9 legal/constitutional claim but really was
10 related to the fact-finding that the ALJ had
11 done, so, for example, a question about the
12 proper conclusion to draw from certain medical
13 evidence in a case, something like that.

14 So would you still say there is --
15 there's -- there's no exhaustion requirement in
16 a -- in a case of that kind?

17 MS. HARRIS: I would because I think
18 your hypothetical is actually squarely
19 controlled by Sims. The two questions in Sims
20 that were not exhausted, one of them was about
21 the ALJ's potentially improper questioning of
22 one of the witnesses, and the other was whether
23 the ALJ had weighed the evidence correctly to
24 determine whether to call a consultative expert.

25 And so the question in your

1 hypothetical too is something that would only be
2 apparent from the ALJ's decision. And that is
3 something that, under Sims, already does not
4 need to be exhausted to the Appeals Council and
5 that courts are already entertaining for the
6 first time.

7 JUSTICE KAGAN: So, of course --

8 MS. HARRIS: And --

9 JUSTICE KAGAN: I'm sorry. Of course,
10 Sims was -- was a plurality opinion, and the --
11 the fifth vote is Justice O'Connor's opinion,
12 which really relies only on the short form
13 that's applicable -- that was applicable in the
14 Appeals Council, which Justice O'Connor was
15 worried had given claimants the wrong impression
16 and that they would rely on it to their
17 detriment. So can you really just rely on Sims
18 for the kinds of points you're making?

19 MS. HARRIS: Well, yes, I think Sims,
20 first of all, does have a majority. I mean,
21 five justices agreed that the default rule is
22 that if an agency does have non-adversarial
23 proceedings that don't depend on the parties to
24 develop issues and doesn't provide notice,
25 courts don't read in an issue exhaustion rule.

1 And Justice O'Connor's opinion did not
2 just depend on the short form for the request,
3 which, by the way, is materially identical for
4 ALJ proceedings. She also noted that the agency
5 had in no way provided notice of an issue
6 exhaustion requirement at any stage and also
7 that the Appeals Council would conduct plenary
8 review of the issues. Again, the exact same
9 thing is true with respect to ALJs.

10 So I think no matter how you slice and
11 dice the Sims opinion, you do reach the same
12 result, which is that the holding is that you do
13 not need to present issues to the Appeals
14 Council if they arise from -- there are errors
15 from -- that arise from the ALJ decision, and
16 that whether you focus on the notice dimension
17 or the non-adversarial nature of Social Security
18 proceedings, both of them kind of lead to the
19 same result, which is that it is very strange
20 for courts to imply or read in some sort of
21 issue exhaustion requirement that is in serious
22 tension with the nature of the proceedings that
23 the agency itself has chosen to employ, which do
24 not depend on claimants to raise issues and,
25 instead, have the agency shouldering that burden

1 on its own.

2 JUSTICE KAGAN: Thanks, Ms. Harris.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Good morning,
6 Ms. Harris. I just have a quick factual
7 question. That January 30, 2018, emergency
8 message to ALJs telling them not to discuss
9 Appointment Clause issues if they're raised in
10 front of them, was that public, or was that --
11 how did you come to find that?

12 MS. HARRIS: So it was very difficult
13 to come by because emergency messages in general
14 are made -- directed at ALJs. The agency
15 appears to have eventually made it public on
16 sort of websites that people track Social
17 Security emergency messages and post them. But
18 it does not seem like the kind of thing that --
19 that your average claimant, for instance, might
20 have been able to see --

21 JUSTICE GORSUCH: Yeah. I --

22 MS. HARRIS: -- let alone other
23 people.

24 JUSTICE GORSUCH: -- I just want to
25 scratch at that a little bit further and

1 understand, is there a process for publishing
2 them, or is this just like somebody slapped it
3 up on the website and nobody knows pursuant to
4 what rule or -- or how?

5 MS. HARRIS: I'm not sure, and I don't
6 even know that it's the agency that is
7 publishing these on its website.

8 JUSTICE GORSUCH: Mm-hmm.

9 MS. HARRIS: It -- it's something
10 that, again, is in an internal message that goes
11 out just to ALJs, and so it is not public. It
12 is instructing ALJs how to do their jobs --

13 JUSTICE GORSUCH: Right.

14 MS. HARRIS: -- according to the
15 agency's messaging.

16 JUSTICE GORSUCH: Okay. And then I
17 was curious about how it related to your
18 particular clients, whose proceedings I -- I had
19 thought finished before the ALJs before this
20 message. But perhaps I'm -- I'm mistaken about
21 that.

22 MS. HARRIS: That is correct. So the
23 -- all claimants, all Petitioners did complete
24 their proceedings before then. But the January
25 2018 message is something that confirms what had

1 been evident beforehand, which is that I don't
2 think there's ever been a point beforehand where
3 the Social Security Administration thought that
4 it did have jurisdiction over Appointments
5 Clause challenges.

6 I think what the emergency message
7 also illustrates is that the agency was very,
8 very aware of the Appointments Clause problem.
9 And so it's not like the claimants were needed
10 to sort of draw the agency's attention to the
11 fact that its ALJs were likely
12 unconstitutionally appointed. The agency knew
13 that and, in keeping with the sort of
14 fundamental nature of its adjudicatory process,
15 told ALJs you -- you can't actually deal with
16 the Appointments Clause, so don't do anything
17 about it.

18 And all of that, I think, builds up to
19 a clear case of futility under this Court's
20 precedents because not only did the adjudicators
21 not have jurisdiction over the Appointments
22 Clause question, but they certainly had no power
23 to remedy it. They can't reappoint themselves,
24 of course.

25 JUSTICE GORSUCH: My -- my -- my

1 recollection is that the memo went a little bit
2 further than that even and said not -- don't
3 just not rule on it, but don't discuss it; you
4 know, mum's the word.

5 MS. HARRIS: Yes, that is correct,
6 Justice Gorsuch. They said you're barred from
7 discussing it. So even if you hypothetically
8 wanted to, as the ALJ or Appeals Council, you
9 knew it was a problem and you wanted to tip
10 claimants off, you couldn't have done that
11 either.

12 JUSTICE GORSUCH: Despite your
13 affirmative duty to help parties before you?

14 MS. HARRIS: Yes, despite that duty of
15 helping issue-spot both before the ALJs and the
16 Appeals Council. And I think that also
17 underscores why the Social Security policy,
18 19-1(p), that the government points to is such a
19 half-a-loaf remedy.

20 It's not giving -- it is essentially
21 requiring people -- long after the time passed
22 when anyone would be able to do anything
23 differently, it's penalizing them for not
24 objecting in these ALJ and Appeals Council
25 proceedings for what would --

1 JUSTICE GORSUCH: Thank -- thank you,
2 Ms. Harris. I'm afraid my time's expired.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you, Chief
6 Justice.

7 Good morning, Ms. Harris. The
8 government, of course, relies heavily on the
9 background rule that it says largely controls
10 from L.A. Tucker. If we were to rule in your
11 favor in this case, exactly what would you have
12 us write in our opinion about L.A. Tucker?

13 MS. HARRIS: I think you could write
14 exactly what Sims wrote, which is that L.A.
15 Tucker is a rule that applies in adversarial
16 proceedings and is confined to that context
17 because what it says is that the general rule is
18 that you do not vacate agency decisions if the
19 -- unless the agency had a chance to correct its
20 error against the objection made at the time
21 appropriate under its proceedings, which, again,
22 just begs the question of whether there was a
23 time appropriate to object under the particular
24 agency proceedings.

25 And in non-adversarial proceedings,

1 like the Social Security Administration, there
2 is no such time. So I think Sims's treatment in
3 the majority portion of the opinion of L.A.
4 Tucker would in and of itself be sufficient
5 because Sims treated L.A. Tucker as very much
6 consistent with the Court's approach to
7 distinguishing between adversarial and
8 non-adversarial proceedings.

9 JUSTICE KAVANAUGH: Thank you, Ms.
10 Harris.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: Good morning, Ms.
14 Harris. So one of the best -- I mean, Sims is
15 obviously your best argument and its discussion
16 of the distinction between adversarial and
17 non-adversarial proceedings.

18 I'm wondering how unique the Social
19 Security Administration is. I mean, so you
20 point out that it's non-adversarial, it's
21 informal. You know, Sims made those points too.

22 If we were to rule your way, would we
23 be, you know, saying that there are other
24 agencies in which this exhaustion of issues
25 requirement did not apply?

1 MS. HARRIS: Well, I don't think
2 that's a -- a big concern because the two most
3 non -- sort of second-most non-adversarial
4 agencies I can think of are the Veterans
5 Administration and the Railroad Retirement
6 Board, and both of them actually have dealt with
7 those issues. The VA has an issue exhaustion
8 rule; it is flexible in keeping with the
9 non-adversarial nature of those proceedings.

10 And the Railroad Retirement Board has
11 an issue exhaustion rule only for very specific
12 type of arguments. And so I think that just
13 goes to show that this is an area where agencies
14 are very capable of responding to this Court's
15 opinions or exercising their own authority and
16 imposing an issue exhaustion requirement if that
17 is appropriate and reflects, you know, what they
18 want to do.

19 They can calibrate them, they can make
20 the sort of hard policy choices of deciding
21 whether they want issue exhaustion to apply to
22 some proceedings, some types of issues, some
23 types of claimants, some types of arguments, and
24 that is exactly what the rulemaking process
25 seems design -- designed to accomplish by

1 letting different stakeholders weigh in and
2 figure out the pros and cons of doing that.

3 JUSTICE BARRETT: So, in both of those
4 other agency contexts, the issue exhaustion
5 rules are imposed by regulation?

6 MS. HARRIS: Yes.

7 JUSTICE BARRETT: One other question
8 about the Social Security Administration. So,
9 you know, Justice O'Connor's opinion, which was
10 the narrowest and so controlling under Marx,
11 focused on lack of notice. And, you know,
12 I'm -- I'm just wondering whether -- you know,
13 how -- how common it is in proceedings before an
14 ALJ for a Social Security claimant to raise a
15 constitutional issue or some sort of legal
16 challenge that's unrelated to the facts of the
17 disability claim.

18 MS. HARRIS: Well, my understanding is
19 that it would be very uncommon. We certainly
20 know with respect to the Appointments Clause
21 that zero claimants, according to the
22 government, raised an Appointments Clause
23 challenge before Lucia. Only a handful did so
24 afterwards.

25 And it seems like it would be quite

1 unusual for that kind of constitutional claim to
2 be raised to an ALJ because it does not appear
3 that ALJs have any competence to address those
4 questions.

5 JUSTICE BARRETT: Thank you, Ms.
6 Harris.

7 MS. HARRIS: And so --

8 JUSTICE BARRETT: Sorry, finish,
9 please.

10 MS. HARRIS: Oh, no, no. So, I mean,
11 it seems like the ALJ would just be passing the
12 buck along and waiting for a court to -- that is
13 competent to address those questions to do so.

14 JUSTICE BARRETT: Thank you, Ms.
15 Harris.

16 CHIEF JUSTICE ROBERTS: A minute to
17 wrap up, Ms. Harris.

18 MS. HARRIS: Sims invited the Social
19 Security Administration to adopt an issue
20 exhaustion rule. Instead, the agency still
21 encourages claimants to rely on ALJs and the
22 Appeals Council to issue-spot.

23 If the agency needs an issue
24 exhaustion rule to function, one wonders why it
25 hasn't engaged in rulemaking and at least let

1 stakeholders weigh in.

2 The government's appeals to equity do
3 not add up. An exhaustion rule would
4 disadvantage hundreds of thousands of
5 unrepresented claimants. The government never
6 explains why people in dire need of assistance
7 would hold back arguments just to sandbag the
8 government.

9 And the government acknowledges
10 agencies lack special expertise in
11 constitutional questions like the Appointments
12 Clause. The government knew of the Appointments
13 Clause problem but kept holding unconstitutional
14 proceedings.

15 And that conceded constitutional
16 violation is easily fixed. Giving a few hundred
17 claimants new ALJ hearings is a drop in the
18 bucket for the agency.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Raynor.

22 ORAL ARGUMENT OF AUSTIN RAYNOR
23 ON BEHALF OF THE RESPONDENT

24 MR. RAYNOR: Thank you. Mr. Chief
25 Justice, and may it please the Court:

1 To resolve this case, the Court need
2 only apply either of two well-established rules.
3 The first is the 100-year-old rule that a party
4 challenging agency action forfeit issues not
5 raised during agency proceedings. The courts of
6 appeals have consistently applied that rule in
7 the specific context of Social Security ALJ
8 proceedings for decades. Petitioners suggest
9 that the government is asking the Court to
10 change the rules of the game, but the reality is
11 the exact opposite.

12 The second rule is that a party
13 forfeits an Appointments Clause challenge by
14 failing to raise it before the agency itself.
15 Under the traditional de facto officer doctrine,
16 a private party could contest the legitimacy of
17 an official's appointment only in a direct suit
18 against the official himself. That doctrine
19 prevented the enormously destabilizing
20 consequences that could otherwise result.

21 Although the Court has since loosened
22 the doctrine, it has critically limited
23 disruption by requiring a timely challenge
24 before the agency. Enforcement of that rule is
25 particularly appropriate here, where Petitioners

1 do not identify any prejudice resulting from the
2 allegedly invalid appointment.

3 Petitioners' primary response is to
4 point to this Court's decision in *Sims*, but
5 Justice O'Connor's controlling opinion rested on
6 her conclusion that the agency effectively
7 misled claimants about the need to raise issues.

8 This case is different. The
9 regulations governing ALJ proceedings do not
10 lull claimants into thinking they may forego
11 raising issues. And the consequences of
12 excusing forfeiture here would be far more
13 dramatic. Whereas *Sims* involved a requirement
14 to raise an issue before a particular
15 adjudicator, Petitioners contend that claimants
16 may decline to raise an issue before the agency
17 at all.

18 The Court should reject Petitioners'
19 request to work intervals of change in the law
20 and affirm the judgments below.

21 CHIEF JUSTICE ROBERTS: Counsel, a
22 number of amici quoted an ALJ saying that a
23 hearing is no worse than if you and me were just
24 sitting in your living room talking about your
25 life.

1 You -- you began by saying the
2 Appointments Clause is -- concerns are -- are
3 well -- well-established, but I don't think
4 they're very well-known.

5 You know, it's hard to imagine people
6 sitting in the living room talking about their
7 lives and saying how -- what important a role
8 the Appointments Clause has played, you know,
9 when they were -- were -- were growing up.

10 Isn't the expectation that a claimant
11 would raise an issue under the Appointments
12 Clause, which however important to -- you know,
13 to us lawyers, it's pretty obscure, in such a
14 setting, where the ALJs themselves view it as a
15 very informal and casual setting?

16 MR. RAYNOR: I don't think so, Your
17 Honor. The -- the regulations here are
18 materially distinct from those in Sims, and --
19 and they make clear that the claimant has to be
20 an active participant, including objecting to
21 prejudice on the part of the ALJ.

22 And in other contexts, we require pro
23 se claimants to abide by procedural
24 requirements. In Woodford, for example, this
25 Court rejected arguments that unrepresented

1 prisoners shouldn't have to exhaust properly to
2 satisfy the PLRA exhaustion requirement. And so
3 I don't think requiring claimants to raise this
4 type of issue here is in any way unusual.

5 And on top of that, there have been
6 some suggestions that an ALJ has an affirmative
7 duty to raise the Appointments Clause argument
8 for the claimant. But that's just not correct.
9 The ALJ has the duty to investigate issues that
10 were raised by the reconsideration decision,
11 but, of course, the Appointments Clause issue
12 wouldn't have been raised by a reconsideration
13 decision, and then has the discretion to raise
14 additional issues.

15 But there's certainly no duty on the
16 part of the ALJ to raise an Appointments Clause
17 challenge against himself.

18 CHIEF JUSTICE ROBERTS: In one minute,
19 give me your best shot on Sims.

20 MR. RAYNOR: Yes, Your Honor. I think
21 Sims is distinct in two respects. First, the
22 regulations, as I mentioned, are different.
23 They -- the regulations here require claimants
24 to note the reasons they disagree with the
25 reconsideration decision, to object to the list

1 of issues, to object to the ALJ's prejudice at
2 the earliest opportunity. None of those
3 requirements exist at the Appeals Council stage.

4 You also have an entitlement to an ALJ
5 hearing. You do not have an entitlement at the
6 Appeals Council stage.

7 Then, second, I think there's the
8 structural point which was touched on in
9 questions earlier, which is that the ALJ stage
10 is the main stage. That is basically the trial.
11 That's where all the evidence is put forth.
12 That's where the most fulsome arguments are
13 developed.

14 The Appeals Council stage, in
15 contrast, you don't have an entitlement to a
16 hearing, and the Appeals Council declines to
17 review 85 percent of cases. So the consequences
18 of abandoning the forfeiture requirement here
19 would be far more dramatic than in Sims.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas.

23 JUSTICE THOMAS: Thank you, Mr. Chief
24 Justice.

25 Mr. Raynor, I understand your argument

1 differentiating -- distinguishing Sims and this
2 case, but one suggestion we made in Sims was
3 that perhaps the agency could adopt a regulation
4 on exhaustion. And I understand the -- the
5 provisions you just talked about, but is there a
6 regulation on exhaustion?

7 MR. RAYNOR: No. We -- we are not
8 advancing the argument that any particular
9 regulation requires issue exhaustion here. And
10 there's obviously change costs to adopting a
11 regulation of that kind, and I think the agency
12 hasn't felt the need to undergo those costs
13 given the well-established background rule.

14 I think it's important not to lose
15 sight of the fact that the courts of appeals
16 have virtually uniformly applied issue
17 exhaustion requirements to ALJ proceedings for
18 decades. And apart from the three circuits in
19 the circuit under -- the circuit split under
20 review that have sided with Petitioners,
21 Petitioners have not identified a single court
22 of appeals in history that has rejected issue
23 exhaustion at the ALJ stage for Social Security
24 proceedings.

25 JUSTICE THOMAS: What is that

1 exhaustion based on, Mr. Raynor?

2 MR. RAYNOR: So --

3 JUSTICE THOMAS: It's not statutory
4 and it's not regulatory. What is it based on?

5 MR. RAYNOR: Justice Thomas, it's a
6 common law rule, as this Court recognized in
7 Sims and in L.A. Tucker. And I don't think
8 there's anything unusual about that because it
9 goes to the types of arguments that the courts
10 themselves will consider.

11 And, obviously, those are anodyne.
12 You know, our legal system is littered with
13 those sorts of rules, for example, the rule that
14 a court will typically only consider things that
15 were pressed or passed on below or the rule that
16 a court won't consider arguments raised for the
17 first time in a reply brief. Those are all
18 common law rules.

19 We acknowledge, because this is a
20 common law rule rather than a regulatory rule,
21 that it is subject to common law exceptions,
22 such as futility and so forth.

23 JUSTICE THOMAS: The Petitioner makes
24 quite a bit of the distinction between
25 adversarial hearings and inquisitorial hearings.

1 Could you address that or respond to that
2 briefly?

3 MR. RAYNOR: Yes, Justice Thomas.
4 Obviously, in -- in Sims, the Court did
5 recognize that as a relevant consideration, but
6 we -- we agree with Justice Barrett that Justice
7 O'Connor's opinion in Sims was controlling, and
8 she was only willing to dispense with the
9 forfeiture rule because, on her reading, the
10 Social Security Administration had effectively
11 misled claimants.

12 And I don't think there's any
13 plausible claim here, given the regulations I've
14 cited and given other aspects of the proceeding,
15 that the agency has misled claimants, so the
16 non-adversarial aspect of the proceedings would
17 not alone be enough.

18 And I just want to note that L.A.
19 Tucker, of course, is not the only basis on
20 which this Court could rule in our favor, as
21 Ryder and Lucia and the de facto officer
22 doctrine are an analytically independent basis
23 for ruling for the government, and the rule in
24 those cases doesn't depend on the
25 non-adversarial quality of the agency

1 proceedings.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: Good morning. I
6 thought you said, which you did, that this is
7 basically a common law area, issue exhaustion.
8 And I thought -- I'm not positive, but I thought
9 that there was a pretty well-established
10 exception to the need to exhaust an issue where
11 it is a constitutional issue and maybe another
12 one where it's futile.

13 Well, I mean, here, you have a memo of
14 some kind saying don't even decide this, the
15 ALJs, and maybe that was a well-recognized idea
16 before, they shouldn't decide it, futile, and
17 also constitutional issue, fundamental
18 structure, not within the area of the expertise
19 of the -- of the ALJ. All right? So what do
20 you do with those if I'm right?

21 MR. RAYNOR: Justice Breyer, we
22 acknowledge that there's a futility exception,
23 but courts have construed it narrowly. It only
24 applies when there is utter futility. In
25 Weinberger v. Salfi, for example, the Court said

1 that it would not substitute its conclusion of
2 futility for the Secretary's. And, obviously,
3 here, the Commissioner does not think this was
4 futile, and, indeed, it wasn't because the
5 Commissioner had the power to ratify ALJs, which
6 she eventually did.

7 As to the constitutional issue that
8 you note, we do not agree that there is a
9 categorical -- categorical exception for
10 constitutional arguments. Richardson required
11 exhaustion of a constitutional argument in the
12 Social Security context, and all of the cases,
13 including *Weinberger v. Salfi*, *Mathews v. Diaz*,
14 *Mathews v. Eldridge*, all of those depend on
15 particular circumstances, such as whether
16 additional delay would inflict irreparable harm
17 on the claimant, that are not present here.

18 So we would strongly dispute the
19 existence of a categorical constitutional
20 exception.

21 JUSTICE BREYER: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Alito.

23 JUSTICE ALITO: My questions have been
24 covered. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: So have mine.

3 CHIEF JUSTICE ROBERTS: Justice Kagan.

4 JUSTICE KAGAN: Mr. -- Mr. Raynor, I'd
5 like to go back to Justice Thomas's question to
6 you. You said, well, you didn't really need to
7 adopt a regulation. And I guess I'm just
8 wondering about that because you told the Court
9 in Sims, I think, that the SSA had the matter of
10 issue exhaustion under review. And -- and the
11 Court specifically noted in that opinion that,
12 of course, SSA could adopt a regulation.

13 I mean, if this matters so much to
14 SSA, it seems as though it would not have taken
15 a whole lot of effort to adopt a regulation.

16 MR. RAYNOR: It's certainly possible,
17 Justice Kagan, that the agency could have done
18 so, and we agree that is a step it could take.
19 But, again, there are change costs associated
20 with any type of overhaul like that and
21 particularly in this context, where the circuit
22 case law has been virtually unbroken for
23 literally decades. I think the agency has
24 justifiably felt that it can rely on the
25 background rule without needing to overhaul that

1 through a regulation.

2 JUSTICE KAGAN: Well, how much is it
3 relying on the background rule? How -- how
4 often does SSA raise an exhaustion claim in
5 court?

6 MR. RAYNOR: I think it varies, Your
7 Honor, depending on the types of claims that are
8 being raised by claimants. So the agency, for
9 example, is much more likely to raise a
10 forfeiture argument against a represented
11 claimant than against an unrepresented claimant.

12 And then, of course, there are certain
13 issues that come up periodically, like this one,
14 where -- like the Appointments Clause issue,
15 where it will be forced to raise exhaustion
16 basically across the board to ward off a large
17 number of claims.

18 And I think it's important to note
19 just one -- one point about the number of claims
20 here. Petitioners argue repeatedly that there's
21 not a large number of claims remaining in the
22 pipeline. But I think it's a little bit unfair
23 to piggyback on our success because we succeeded
24 in having dismissed in the majority of districts
25 that addressed this the Appointments Clause

1 issue on the ground of forfeiture.

2 And so we won those, and now
3 Petitioners are asserting, well, there's not
4 many left. But there were a lot at the outset,
5 and if the Court adopts Petitioners' rule, then
6 we wouldn't have that defense available going
7 forward.

8 Just to give you a general rough
9 picture, at the time Lucia was decided, if you
10 look at the cases that were pending before the
11 Appeals Council that were within the 60-day
12 limitations period and that were pending in
13 district court, I take it under Petitioners'
14 rule all of those cases could have raised an
15 Appointments Clause challenge. That was on the
16 order of about 135,000 cases. So the numbers
17 here are quite significant.

18 JUSTICE KAGAN: Thank you, Mr. Raynor.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch.

21 JUSTICE GORSUCH: Good morning,
22 Mr. Raynor. My question is a factual one, and,
23 again, it's about the 2018 emergency message.
24 Was that purely an internal document that
25 somehow got out in the public, or is that

1 something that was published pursuant to notice
2 and comment or something in between?

3 MR. RAYNOR: It's something in
4 between, Your Honor. Those -- those messages
5 are directions to ALJs, and some of them are
6 made public and some of them are not. And that
7 one was made public, although I am not aware of
8 the precise date at which it became publicly
9 available.

10 For purposes of this case, of course,
11 it was issued after all of the Petitioners --

12 JUSTICE GORSUCH: Right. Yeah, I
13 understand that. Do you have some sense of when
14 it was made publicly available?

15 MR. RAYNOR: I do not have the date.
16 No, I do not, Your Honor.

17 JUSTICE GORSUCH: Okay. Thank you,
18 Mr. Raynor.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh.

21 JUSTICE KAVANAUGH: Thank you, Chief
22 Justice.

23 Good morning, Mr. Raynor. You rely
24 heavily with respect to Sims on Justice
25 O'Connor's opinion, but -- which was concurring

1 in part and concurring in the judgment. Ms.
2 Harris points out that Justice O'Connor joined
3 Part 2A of Justice Thomas's opinion, making that
4 a majority opinion, and that itself is
5 sufficient for the rule that Ms. Harris is
6 advocating here. Can you respond to that?

7 MR. RAYNOR: Yes, Justice Kavanaugh.
8 Obviously, a majority did join that
9 part, and it did -- that part of the opinion did
10 acknowledge that the adversarial quality of the
11 proceeding is a relevant consideration.

12 But I -- I think it's pretty clear
13 that Justice O'Connor didn't think that that was
14 enough to decide the case. And so, if -- if you
15 view her opinion as controlling, which I think
16 is undisputed, then that's not dispositive, the
17 Court has to go further and ask an additional
18 question. And under her opinion, that
19 additional question is, did the agency
20 effectively mislead the claimant? And I don't
21 think Petitioners can make that showing here.

22 And, again, I will just point out that
23 L.A. Tucker and Sims, that -- that's one way to
24 resolve this case. But the de facto doctrine is
25 an additional basis for ruling in favor of the

1 government. And Petitioners have very little
2 response to the timeliness requirement
3 articulated in Ryder and Lucia.

4 JUSTICE KAVANAUGH: You've given us
5 alternative ways you could win. If you were to
6 lose, what's your preferred approach?

7 MR. RAYNOR: Well, Justice Kavanaugh,
8 I obviously reserve my objection to that
9 premise, but I appreciate the question and I
10 think we would prefer a ruling that obviously
11 does as little damage as possible in cases other
12 than this one.

13 And so I think, in that world, the
14 thing the Court should focus on would be the --
15 not only non-adversarial, but there's -- there's
16 no issue exhaustion regulation, and this is a
17 structural constitutional objection that --
18 where the claimant didn't have direct access
19 name -- to the agency actor that could remedy
20 the issue, namely, the Commissioner.

21 JUSTICE KAVANAUGH: Appreciate the
22 answers, Mr. Raynor. Thank you very much.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett.

25 JUSTICE BARRETT: Good morning, Mr.

1 Raynor. So I have a question about the
2 adversarial/non-adversarial distinction too. As
3 Justice Kavanaugh just pointed out, that portion
4 of Justice Thomas's opinion did command a
5 majority of the Court.

6 One of the reasons, you know, in an
7 adversarial system, the issue exhaustion
8 requirement makes sense is that both sides have
9 every incentive to raise all the issues that
10 would benefit them.

11 In this kind of proceeding, which is
12 non-adversarial, where a claimant has come to
13 the Social Security Administration and come to
14 the ALJ wanting him to give -- or her to give
15 the claimant benefits, what incentive does the
16 claimant have to say to the ALJ: You know, you
17 actually can't give me benefits and you can't
18 adjudicate this proceeding because your
19 appointment should have been made under the
20 Appointments Clause? Especially when, you know,
21 the claimant's interest is in speed of getting
22 the disability benefits as soon as he or she
23 can. So if you could address that.

24 MR. RAYNOR: Yes, Justice Barrett.
25 And if Petitioners were correct that they had a

1 real personal interest in having this ALJ
2 appointed according to the Appointments Clause,
3 I think they would have an incentive to raise it
4 early. But your question highlights the threat
5 of sandbagging here.

6 I agree with you, as a practical
7 matter, they don't have an incentive to raise
8 this early. This isn't like a medical argument
9 that they want to raise early to obtain their
10 benefits early, because whether the ALJ was
11 appointed under one of the methods specified in
12 the Appointments Clause or not really has no
13 effect on their likelihood of success on the
14 merits.

15 So, in this context, the Petitioners
16 have and other claimants have every incentive to
17 litigate on the merits through the ALJ and
18 agency proceedings and then, once they get to
19 district court, to pull out the Appointments
20 Clause argument to obtain a free do-over if they
21 weren't successful the first time around, which
22 is precisely what is occurring here.

23 So I -- I agree with you about the
24 practical incentives, and I think that confirms
25 the threat of sandbagging in this particular

1 context.

2 JUSTICE BARRETT: Well, it -- it also
3 raises the question of why an issue exhaustion
4 requirement makes sense in this non-adversarial
5 context.

6 But let -- let me put that aside
7 because I do want to ask you, do you agree with
8 Ms. Harris that the only other agencies that
9 this holding might affect would be the VA or the
10 Railroad Retirement Board?

11 MR. RAYNOR: Your Honor, I'm not
12 willing to make a statement that categorical.
13 And with respect, I'm -- I'm a little hesitant
14 to wade too much into other agencies because
15 there's a lot of litigation ongoing involving
16 those other agencies and whether or not their
17 regulations require issue exhaustion.

18 So, obviously, to the extent courts
19 rejected those arguments, then we would be
20 reliant on the common law rule. But just to be
21 clear, the Social Security Administration is
22 obviously far and away the most important for
23 this question. I mean, it has 1600 ALJs, the
24 total in the federal government combined is only
25 about 1900, and it adjudicates an enormous

1 number of claims compared to other agencies.

2 JUSTICE BARRETT: Thank you, Mr.
3 Raynor.

4 CHIEF JUSTICE ROBERTS: Mr. Raynor,
5 you have about 10 minutes left if you want to
6 proceed with your argument.

7 MR. RAYNOR: Thank you, Mr. Chief
8 Justice.

9 I'd like to focus on just a couple of
10 topics. Petitioners' presentation has focused
11 heavily on the notion that it is unfair to
12 expect unrepresented claimants to raise legal
13 challenges before the agency. This Court has
14 already rejected that argument in Woodford,
15 which involved administrative exhaustion by
16 unrepresented prisoners.

17 The baseline rule in our legal system
18 is that if a party chooses to proceed pro se, he
19 is still responsible for complying with basic
20 procedural requirements.

21 CHIEF JUSTICE ROBERTS: Mr. Raynor,
22 I -- I wonder if there's a sliding scale
23 approach to this. I mean, it's -- it's -- it's
24 one thing to expect a -- a pro se plaintiff not
25 to raise an obscure lawyerly issue like the

1 Appointments Clause, but maybe different under
2 the Due Process Clause?

3 I mean, if it's an issue that, you
4 know, so-and-so told me that I wasn't entitled
5 to these damages or, you know, I had this -- I
6 never got the letter from the government saying
7 this, but they don't raise that until the
8 district court.

9 I mean, it seems to me that that might
10 be a stronger argument for waiver than the
11 Appointments Clause. Is there -- is there any
12 basis for -- for such a sliding scale approach?

13 MR. RAYNOR: I don't think so, Mr.
14 Chief Justice. I think the -- the best approach
15 here, which requires the least policymaking by
16 the courts, is just a clear background rule.

17 But, if the Court wanted to calibrate
18 a rule to the specific circumstances, the issues
19 to focus on here would be twofold. One is that
20 this isn't the kind of question that the ALJ has
21 a duty to raise, and so there's all the more
22 onus on the claimant to raise it.

23 And then, second, I think the main
24 thing that should drive the analysis in this
25 case is the fact that there's no allegations of

1 prejudice whatsoever. And so the unfairness,
2 the alleged unfairness to the claimant, really
3 should not be the motivating factor here
4 because, as Justice Alito pointed out, there's
5 effectively no purpose in this do-over. It's
6 just imposing additional labor on the agency for
7 no real benefit.

8 CHIEF JUSTICE ROBERTS: Well, but you
9 really need someone in this position to be able
10 to raise the Appoints -- Appointments Clause
11 concern or -- or it just isn't raised.

12 I mean, it is certainly designed to
13 protect the separation of powers, which is
14 designed to protect the liberty of all of us.
15 So I think there is prejudice in that respect.

16 MR. RAYNOR: Right. Yes, Your Honor.
17 We're not attempting -- we're not trying to
18 downplay the significance of the Appointments
19 Clause, but I think the remedy for an
20 Appointments Clause violation has to be
21 understood against the history of remedies.

22 And traditional de facto doctrine, the
23 only way to obtain a remedy for this kind of
24 alleged harm was through a writ of quo warranto
25 where the part -- where the officer was a direct

1 party in the suit, and another party could
2 obtain prospective relief.

3 Now I think the courts eventually
4 decided in the theories of cases in the late
5 20th century, culminating in *Ryder*, that that
6 rule was a little too strict and it loosened it,
7 and it adopted a rule that as long as you raise
8 your argument before the adjudicator before he
9 acts on your case, then that's reserved the
10 argument and you can obtain relief on direct
11 review.

12 JUSTICE ALITO: Yeah. Counsel, if the
13 only reason for providing relief in a case like
14 this is to provide an incentive for parties to
15 raise Appointments Clause claims, does our case
16 law allow us to draw a distinction between the
17 party who gets to the Supreme Court or perhaps a
18 limited category of parties who are similar and
19 everybody else who might be covered by an
20 eventual holding that a category of appointments
21 was unconstitutional?

22 MR. RAYNOR: Your Honor, I think there
23 are certain lines the Court could draw. It
24 could apply its ruling prospect -- prospectively
25 perhaps. Of course, there are hundreds of these

1 still pending in the lower courts, but that
2 would eliminate many of the prior ones.

3 It could adopt a rule in a similar
4 vein that collateral attacks aren't permissible.
5 But I think the right rule is the one the Court
6 adopted in *Ryder*, which is that you have to
7 raise it before the adjudicator before he acts
8 on your case, and that provides a sufficient
9 incentive to raise these kinds of claims. And
10 that requirement, obviously, wasn't satisfied
11 here.

12 On the history of the de facto
13 doctrine, I'd also like to just make one
14 additional note, which is that Petitioners
15 suggest that it traditionally did not apply to
16 constitutional claims.

17 And that assertion is -- is patently
18 ahistorical. The Court applied it to
19 constitutional claims in *Ex parte Ward*. Norton
20 contains one of the Court's most extended
21 discussions of the de facto doctrine, and it --
22 that discussion makes clear that it applies to
23 constitutional claims. And in distinguishing
24 some of those cases, *Ryder* mentioned that they
25 didn't involve constitutional claims, but there

1 it was talking about McDowell and Ball, which
2 were statutory challenges. And the prospective
3 rule that Ryder announces is that you have to
4 raise a timely challenge to the adjudicator.

5 And so we disagree that historically
6 this wouldn't have covered constitutional
7 claims. And if Petitioners' claim doesn't fall
8 within the narrow exception that Ryder adopted,
9 which it plainly does not, then it falls within
10 the background de facto rule and is
11 categorically barred.

12 Petitioners have also suggested at
13 points that the Court should not fix a problem
14 of the agency's own making. But that inverts
15 what's actually going on here. This Court has
16 applied a background exhaustion rule for 100
17 years. The courts of appeals have uniformly
18 applied that rule to Social Security ALJ
19 proceedings for decades. And apart from the
20 decisions in the circuit conflict under review,
21 all of which rely on reasoning specific to the
22 Appointments Clause, Petitioners haven't
23 identified a single court of appeals decision in
24 history rejecting the forfeiture rule as applied
25 to ALJ hearings under the Social Security Act.

1 The agency has reasonably relied on
2 that well-established and virtually unquestioned
3 rule. And it's Petitioners that are asking this
4 Court to change the rules of the game.

5 JUSTICE KAGAN: Well, Mr. Raynor, are
6 there any judicial decisions after Sims which
7 accepted the government's argument on this
8 question?

9 MR. RAYNOR: Yes, Justice Kagan.
10 There's about five courts of appeals that have
11 -- that have continued to apply forfeiture at
12 the ALJ stage after Sims. Those cases are
13 listed at pages 30 and 33 of our brief.

14 And Petitioners have suggested that
15 there are guardrails that would prevent any type
16 of factual issues from arising unexhausted to
17 the courts of appeals. But I think, as those
18 decisions indicate, that's just not the case.
19 Oftentimes, there will be factual arguments that
20 the ALJ failed to properly develop the evidence
21 or failed to reconcile alleged conflicts in the
22 evidence, and that will become apparent to the
23 claimant during ALJ proceedings and the claimant
24 will be able to object at that time.

25 JUSTICE SOTOMAYOR: Counsel, how many

1 of those cases that you're referencing from the
2 court of appeals didn't rely on other statutory
3 or regulatory exhaustion requirements that are
4 in place?

5 MR. RAYNOR: Justice Sotomayor, all --
6 all the cases I'm talking about were in the
7 Social Security context. So those -- those five
8 circuits were all relying on -- on the common
9 law rule because the government has not asserted
10 that there is a regulatory or statutory issue
11 exhaustion requirement here.

12 And so, in this context, in the Social
13 Security context, I think Petitioners' argument
14 really just boils down to Sims. Sims does not
15 control this case. The regulations governing
16 ALJ and Appeals Council proceedings are
17 meaningfully different. The ALJ regulations
18 require claimants to list the reasons they
19 disagree with the reconsideration decision, to
20 object to the list of issues contained in the
21 notice of hearing, to object to any prejudice on
22 the part of the ALJ at the earliest opportunity.

23 The Appeals Council regulations
24 require none of those things. There's simply no
25 plausible argument that claimants might be

1 misled into thinking that they are entitled to
2 sit on their hands throughout ALJ proceedings.
3 And under Justice O'Connor's controlling
4 opinion, misleading is what is required.

5 The consequences of Petitioners'
6 position here would also be far more dramatic
7 than they were in Sims. In Sims, the question
8 was whether a claimant needed to raise issues
9 before a particular adjudicator, but, here, the
10 question is whether a claimant needs to raise
11 issues before the agency at all.

12 If the Court has no further questions,
13 then I'll just close briefly -- briefly by
14 noting that there are two independent grounds
15 for affirming the judgments below.

16 First, the Court can simply decline to
17 make an exception to the longstanding background
18 rule that a party must raise an issue before the
19 agency in order to preserve that issue for
20 judicial review. Sims doesn't displace that
21 rule in this particular context.

22 Second, the Court can apply Ryder and
23 Lucia's requirement that a party raise an
24 appointments challenge before the relevant
25 adjudicator before that adjudicator acts on its

1 case. Although Petitioners have suggested at
2 points that Ryder and Lucia can be explained by
3 agency-specific exhaustion rules, that argument
4 ignores the actual reasoning of those opinions,
5 which do not cite any such rule.

6 Cases like this one that don't fall
7 within the narrow exception adopted by Ryder are
8 barred by the de facto doctrine. On either of
9 these independent grounds, the Court should
10 affirm the judgments below.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Raynor.

14 Ms. Harris, rebuttal?

15 REBUTTAL ARGUMENT OF SARAH M. HARRIS
16 ON BEHALF OF THE PETITIONERS

17 MS. HARRIS: Three quick points.

18 First of all, the government's
19 explanation for why the Social Security
20 Administration has not adopted an issue
21 exhaustion rule does not make a ton of sense.
22 The idea that the agency has not been operating
23 against the backdrop of Sims but is instead
24 relying on five court of appeals that have
25 purported to -- to require at least issue

1 exhaustion for some people doesn't quite work
2 out.

3 The circuits are either not
4 acknowledging Sims and, therefore, requiring
5 exhaustion of issues that Sims itself would
6 cover because they are errors that arose only in
7 the ALJ decisions, or they're really explainable
8 by a refusal to allow new evidence in
9 proceedings, which is already covered by a lot
10 of different provisions of the Social Security
11 Act.

12 And so it's pretty curious that if the
13 agency were, in fact, operating under the
14 assumption that issue exhaustion were -- was, in
15 fact, the rule of the road for ALJ proceedings,
16 why would ALJs ask for an issue exhaustion rule
17 and why would the agency never tell claimants
18 about such a rule if -- if that is, in fact, the
19 reality on the ground?

20 The government points to purported
21 change costs of not adopting a rule. I'm not
22 sure what change costs entail, but it seems like
23 engaging in rulemaking where there's notice and
24 comment and people can weigh in about the costs
25 of -- to unrepresented claimants in particular

1 of not knowing that they have to raise issues to
2 ALJs and how people are supposed to navigate
3 obtaining counsel, what the penalties are, would
4 -- would seem like something that the agency
5 would need to consider instead of trying to ask
6 courts to read in a requirement that seems so
7 fundamentally in tension with the regulations
8 that the agency has adopted.

9 Second of all, the government points
10 to a lot of numbers and projections with respect
11 to stability. It's suggesting maybe 135 cases
12 could have raised the Appointments Clause
13 problem. But there are only 18,000 cases in
14 court every single year for Social Security
15 claimants of any type; 45 percent of those get
16 reversed on other grounds.

17 And so the numbers, even assuming that
18 all of the remaining cases involve Appointments
19 Clause challenges, are not particularly high.
20 The NADR brief, I think, explains why that is
21 often the case. And any numbers here, again,
22 are of the government's own making. The
23 government knew of the Appointments Clause
24 problem and simply allowed ALJs who were
25 unconstitutionally appointed to keep

1 adjudicating these cases.

2 And if there are concerns with respect
3 to the breadth of a Sims-based holding, of
4 course, there are a number of narrower off-ramps
5 both for futility and the established rule that
6 constitutional questions are not subject to
7 issue exhaustion.

8 Finally, a point on the remedy. The
9 government seems to want this Court to tinker
10 with the Lucia remedy for Appointments Clause
11 challenges. But I don't think the government
12 disputes that if it were proper to hear an
13 Appointments Clause challenge on the merits, the
14 new hearing before a new ALJ should be the
15 remedy. And I'm not quite sure where they are
16 getting the authority to tinker with exactly
17 what people and claimants choose would go.

18 CHIEF JUSTICE ROBERTS: Thank you --

19 MS. HARRIS: Thank you.

20 CHIEF JUSTICE ROBERTS: -- thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 11:02 a.m., the cases
23 were submitted.)

24

25

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