GRANTED

No. 98-9537

IN THE
SUPREME COURT OF THE UNITED STATES

JUATASSA SIMS,
Petitioner,

v.

KENNETH S. APFEL,
Commissioner of Social Security,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF AARP; NOSSCR; ET AL.; IN SUPPORT OF PETITIONER

(Additional *Amici* continued on inside cover)

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INTERESTS OF *AMICI CURIAE*[1/]

This *amici curiae* brief is submitted on behalf of AARP, the National Organization of Social Security Claimants' Representatives (NOSSCR), the American

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[1/] This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

Network of Community Options and Resources (ANCOR), The Arc, Family Voices-New Jersey, Iowa Protection and Advocacy, Inc., the National Association of Protection and Advocacy Systems (NAPAS), the National Senior Citizens Law Center (NSCLC), and the Statewide Parent Advocacy Network of New Jersey. The statement of interests of *amici* is included in the appendix to this brief.

By written consent of the parties, *amici curiae* submit this brief in support of Petitioner.[2/]

SUMMARY OF THE ARGUMENT

In order to exhaust administrative remedies and seek judicial review of a denial of Social Security or Supplemental Security Income (SSI) benefits, a claimant must request review from the Social Security Administration (SSA) Appeals Council. The Appeals Council utilizes up to 55 adjudicators to handle over 100,000 cases per year. These adjudicators usually devote no more than fifteen minutes to an individual case, while claimants typically wait over a year to receive a decision from the Appeals Council either denying or granting a request for review.

Unless specifically authorized, the Appeals Council is precluded by SSA regulations and policy from considering or citing judicial authority, including circuit court precedent within each circuit. The Appeals Council is required to follow SSA's interpretation of the Social Security Act and regulations even when that interpretation has been undercut or rejected by judicial precedent. Therefore, it is futile for

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[2/] Letters of consent from all parties have been filed separately with the Clerk of the Court.

attorneys to bring rules of law or interpretations from relevant case law to the attention of the Appeals Council.

The Due Process Clause of the United States Constitution requires the government to inform affected parties of the procedures to be followed for participation in administrative proceedings. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14 (1978). SSA regulations provide that claimants are required only to "request" Appeals Council review and do not require the filing of briefs, a listing of issues, or detailed legal statements before the Appeals Council. 20 C.F.R. §§ 404.967, 404.968, 416.1467, 416.1468 (1999). Neither the regulations nor SSA's own form for requesting Appeals Council review inform claimants that a failure to raise issues before the Appeals Council will result in a waiver of those issues in court. Moreover, since it is unlikely that a detailed legal statement would be read by legal staff at the Appeals Council, it is unfair to impose issue exhaustion on claimants who do not raise every legal issue before the Appeals Council. If courts refuse to hear meritorious legal claims regarding errors in denying benefits because of the failure to raise these issues at the Appeals Council, then individuals who are truly disabled (or otherwise entitled to Social Security benefits) are likely to suffer extreme hardship.

ARGUMENT

I. BECAUSE OF ITS LIMITED RESOURCES, SSA'S APPEALS COUNCIL PROVIDES NO MORE THAN A CURSORY REVIEW TO THE VAST MAJORITY OF CASES THAT COME BEFORE IT.

Congress has established two separate but interrelated programs providing benefits to individuals who are disabled: Social Security Disability Insurance (SSDI) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433 (1999), and Supplemental Security Income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f (1999). The administrative appeals process is identical for these two programs.

SSA's Appeals Council is the fourth and final administrative step for claimants seeking disability benefits under the Social Security Act.[3/] Claims are considered first on an initial application. A claimant denied benefits may seek reconsideration. If denied again, a claimant may obtain a *de novo* hearing before an SSA administrative law judge (ALJ). If denied again, a claimant may request review of the hearing decision by SSA's Appeals Council as a prerequisite for seeking judicial review in federal district court. Additionally, the Appeals Council may perform "own motion" review of an ALJ decision which is favorable to a claimant.

[3/] *See generally Bowen v. City of New York*, 476 U.S. 467, 472 (1986).

Because it lacks sufficient resources, the Appeals Council is often not able to provide meaningful review of the denial of benefits. Over a decade ago, an exhaustive study performed under the auspices of the Administrative Conference of the United States (ACUS) resulted in the conclusion that the Appeals Council was deeply flawed and not performing to anyone's satisfaction because the size of the then current caseload defied effective management.[4/] At the time of that study, by Fiscal Year (FY) 1988, the Appeals Council was receiving annually approximately 81,500 requests for review.[5/] By FY 1999, that figure had swelled to over 115,000.[6/]

In 1987, the ACUS review suggested that in a typical case, members of the Appeals Council examine the paper record for less than 15 minutes.[7/] But even this admittedly

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[4/] *See* Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite of The Apple: A Study of the Operation and Utility of The Social Security Administration's Appeal Council*, 17 FLA. ST. U. L. REV. 199, 202 n.1, 318-319 (1990).

[5/] *Id.* at 242 n.233.

[6/] OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, KEY WORKLOAD INDICATORS HEARINGS - APPEALS - CIVIL ACTIONS - ATTORNEY FEES ("KEY WORKLOAD INDICATORS") 19 (1999).

[7/] *See* Administrative Conference of the United States, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49141, 49143 (1987) (codified at 1 C.F.R. § 305.87-7). Even though the Appeals Council considers every request for review, it only awards benefits in approximately 2% of cases and remands approximately

(continued...)

cursory handling of cases by the Appeals Council in 1987 was better than the current situation, as requests for review climbed by well over 50% between FY 1993 and FY 1999.[8/]

The figures reveal the inevitable reality of the scarce amount of time devoted to an individual case at the Appeals Council level. In FY 1998, the Appeals Council disposed of approximately 100,000 cases.[9/] The legal staffing at the Appeals Council consists of positions for 30 Administrative Appeals Judges (AAJs) and 25 Appeals Officers (AOs).[10/] Thus even when all of these positions are filled, there are only 55 adjudicators, who if they act singly each decides over 1,800 cases per year. Although the AAJs and AOs also have staff analysts to assist them, staff analysts are not required to be attorneys.

As the time spent by adjudicators at the Appeal Council per case has diminished, the overall processing time

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[7/] (...continued)
18% of cases. When a request for review is denied, it is extremely unlikely that the Appeals Council will have carefully considered legal objections raised by claimants. Richard Posner, THE FEDERAL COURTS, CRISIS AND REFORM 161 (1985). It is normal practice for the Appeals Council not to provide any explanation when it denies review.

[8/] KEY WORKLOAD INDICATORS, *supra* note 6, at 19.

[9/] *Id.*

[10/] The AOs have authority, on their own, only to deny requests for review, not to grant them. 20 C.F.R. § 422.205(c) (1999). A minimum of two AAJs are required to review a case when a request for review has been granted. 20 C.F.R. § 422.205(b) (1999).

has skyrocketed. In FY 1994, the average processing time in the Appeals Council was 126 days. By FY 1998, that figure was 417 days, and incomplete data for FY 1999 showed an average wait of 441 days.[11/] Commissioner Apfel recently testified that claimants now must "wait more than a year for an Appeals Council decision...."[12/]

Meanwhile, during the period of FY 1993 to FY 1998, as receipts of requests for review rose and time spent per case fell, the percentage of cases in which the Appeals Council reversed the denial of benefits dropped from 3.3% to 2.1%.[13/]

Given the low number of legal staff, the most likely persons to read legal arguments filed at the Appeals Council are the analysts, who generally are not lawyers. The analysts are responsible for reviewing hearing tapes and medical records of more than 100,000 claimants per year.

Moreover, the Appeals Council generally does not respond to claimants' arguments when a request for review is denied.[14/] Instead, typical denial notices consist of boilerplate

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[11/] KEY WORKLOAD INDICATORS, *supra* note 6, at 23.

[12/] *Disability Oversight, Committee on Ways and Means, Subcommittees on Social Security and Human Resources* 7 (Oct. 21, 1999)(statement of Kenneth S. Apfel).

[13/] KEY WORKLOAD INDICATORS, *supra* note 6, at 23. During the same period, Appeals Council remands dropped from 27% to 18.3%. *Id.*

[14/] Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitional Administrative* (continued...)

language that does not inform the claimant or the reviewing court of the Appeals Council's reasoning but only states that the request has been denied. For the vast majority of cases reaching the courts, the ALJ decision from over a year earlier provides the only explanation of the agency's rationale. The first opportunity for meaningful review of legal challenges to the ALJ's reasoning arises in court, although judicial review may not be obtained until the Appeals Council has denied the claimant's request for review.

II. AN ISSUE EXHAUSTION REQUIREMENT IS OFTEN FUTILE, SINCE SSA REFUSES TO ALLOW ITS ADMINISTRATIVE APPEALS JUDGES TO APPLY CONTROLLING CASE LAW.

Because SSA will not allow its judges and appeals officers to apply federal court decisions directly, the Appeals Council generally will not consider legal arguments based on case law. At the administrative level, Social Security law is comprised of detailed SSA regulations promulgated in the Federal Register and annually codified in Title 20 C.F.R. Parts 400-499, as well as less generally known sub-regulatory authority such as Social Security Rulings (SSRs),[15] the

[14] (...continued)
Proceedings, 97 COLUMBIA L. REV. 1289, 1329 (1997) (citing letter from William C. Taylor, Executive Director, Office of Appellate Operations, Social Security Administration Appeals Council, to Nancy Shor, Executive Director, National Organization of Social Security Claimants' Representatives 1 (July 28, 1995)(on file with the Columbia Law Review)).

[15] *See* 20 C.F.R. § 402.35(b) (1999).

Hearings, Appeals and Litigation Law (Lex) (HALLEX) Manual, and the Program Operations Manual System (POMS). At the level of federal court review, it is comprised of an enormous body of case law. West's United States Code Annotated lists 1,626 *headings* for annotations to 42 U.S.C. § 405, "Evidence, procedure and certification for payments," as well as 428 *headings* for annotations to 42 U.S.C. § 423, "Disability insurance benefit payments."

SSA instructs its administrative judges to adhere to the regulations and Social Security rulings but not to apply judicial holdings to cases before them. SSA's Office of the General Counsel has advised ALJs that they are "bound to follow Agency Policy even if, in the ALJ's opinion, the policy is contrary to law."[16]

Instead of permitting its administrative judges to apply case law, SSA reviews decisions of the Courts of Appeals. If SSA determines that a decision conflicts with SSA's interpretation of the Social Security Act or regulations, and if it chooses not to seek further judicial review of the decision, then SSA will issue an "Acquiescence Ruling." The Acquiescence Ruling explains how SSA and its personnel will apply the judicial decision. 20 C.F.R. §§ 404.985(a), (b), 416.1485(a), (b) (1999).

Such Acquiescence Rulings are issued as Social Security Rulings which are binding on all components of SSA,

[16] Memorandum from Social Security Administration, Office of the General Counsel, Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges 5-6 (Jan. 28, 1997).

including the AAJs and AOs of the Appeals Council.[17] Therefore, SSA personnel are allowed to cite the Acquiescence Ruling (if there is one), not to apply the case. Indeed, Social Security Ruling (SSR) 96-1p explicitly states SSA's purposes as follows:

> *Purpose*: To clarify longstanding policy that, unless and until a Social Security Acquiescence Ruling (AR) is issued determining that a final circuit court holding conflicts with the Agency's interpretation of the Social Security Act or regulations and explaining how SSA will apply such a holding, SSA decisionmakers continue to be bound by SSA's nationwide policy, rather than the court's holding, in adjudicating other claims within that circuit court's jurisdiction. This Ruling does not in any way modify SSA's acquiescence policy to which the Agency continues to remain firmly committed, but instead serves to emphasize consistent adjudication in the programs SSA administers. This Ruling is also issued to clarify longstanding Agency policy that, despite a district court decision which may conflict with SSA's interpretation of the Social Security Act or regulations, SSA Adjudicators will continue to apply SSA's nationwide

[17] *Id. See Sullivan v. Zebley*, 493 U.S. 521, 530 n.9 (1990).

> policy when adjudicating other claims within that district court's jurisdiction unless the court directs otherwise.[18]

The General Counsel of SSA recently defended this policy in testimony in opposition to a bill to require SSA adjudicators to follow circuit court precedent, stating:

> By requiring each of the more than 32,000 individuals who rule on SSA claims (including, but not limited to, ALJs) to individually apply their own interpretation of Court of Appeals decisions without guidance from the Commissioner, would greatly undermine the fairness and consistency in our decisionmaking process.
>
> If each of SSA's thousands of decisionmakers were responsible for interpreting circuit court holdings, it could result in conflicting decisions by different decisionmakers, even within the same office.[19]

SSA's regulation explicitly states that it "*will release* an Acquiescence Ruling for publication in the Federal Register for any precedential circuit court decision that *we determine* contains a holding that conflicts with our interpretation of a

[18] 61 Fed. Reg 34470 (July 2, 1996).

[19] *See generally Acquiescence, Hearing before the House Judiciary Committee, Subcommittee on Commercial and Administrative Law* (Oct. 27, 1999)(statement of Arthur J. Fried, Office of General Counsel, Social Security Administration).

provision of the Social Security Act or regulation *no later than 120 days from receipt of the court's decision.*" 20 C.F.R. §§ 404.985(b)(1), 416.1485(b)(1) (1999)(emphasis supplied). Interestingly, in his testimony, SSA's General Counsel repeatedly referred to this provision as setting a *goal* of publishing Acquiescence Rulings within 120 days, and he claimed that SSA is complying with this goal.[20/]

SSA has been justly criticized both for taking a very limited view of when circuit court rulings conflict with its own interpretation and for failing to issue Acquiescence Rulings in a timely fashion.[21/] There are significant practical ramifications resulting from SSA's limited policy of acquiescence. If an attorney believes that a federal court precedent compels the overturning of an ALJ decision denying a client benefits, it is futile for the attorney to raise that precedent to the Appeals Council which is forbidden to apply it.

[20/] *Id.*

[21/] Indeed, on October 26, 1999, the day before SSA's General Counsel testified that SSA is meeting its "goal" of issuing Acquiescence Rulings within 120 days, the agency issued Acquiescence Ruling 99-4(11), acquiescing in a circuit court decision handed down sixteen and a half years earlier, in April 1983. 64 Fed. Reg. 57687-57689 (Oct. 26, 1999). *See generally Hearing on H.R. 1294 Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary* (Sept. 16, 1999)(statement of the Hon. Walter K. Stapleton of the United States Court of Appeals for the Third Circuit, on behalf of the Judicial Conference of the United States, and statement of John H. Pickering, on behalf of the American Bar Assoc.).

Moreover, issue exhaustion only makes sense when the administrative and judicial forums are applying the same legal standard. Yet, SSA forbids the Appeals Council from applying cases which have not been addressed in an Acquiescence Ruling, while district courts within a circuit are required to follow their circuit court's decisions as soon as they are issued. When the administrative proceeding is actually applying different legal standards than the reviewing court, counsel may seek to frame the case quite differently in the two forums. The claimant should not be precluded from reformulating the relevant issues when the case reaches the district court.

The practical problems caused by SSA's limited acquiescence in circuit court rulings are best illustrated through an example. Under SSA's regulations, a person who is terminally ill with Hodgkin's disease will be entitled to benefits if he can show that the disease is "not controlled by prescribed therapy."[22/] On June 25, 1999, the United States Court of Appeals for the Third Circuit decided a case in which SSA had denied benefits to a claimant with Hodgkin's disease because a nontreating doctor had reported that the claimant was "responding to" chemotherapy. SSA argued to the circuit court that when a person who suffers from Hodgkin's disease is "responding to" chemotherapy, the illness is "controlled by the prescribed treatment." The Third Circuit expressly rejected that interpretation: "We hold that 'control,' as used here, means that the treatment has been so successful that the disease can be considered effectively neutralized." *Schaudeck v. Commissioner of SSA*, 181 F.3d 429, 432 (3rd Cir. 1999). Now, 209 days later, SSA has neither issued an Acquiescence Ruling regarding *Schaudeck*, nor sought review of *Schaudeck*

[22/] 20 C.F.R. Part 404, Subpart P, App.1, Listing 13.06A (1999).

in this Court, despite the fact that the Third Circuit clearly rejected SSA's interpretation of its own regulation.

If counsel for a claimant residing within the Third Circuit cited *Schaudeck* to any adjudicator at any level within SSA, including the Appeals Council, that adjudicator would be compelled by SSR 96-1p to ignore this clear precedent. Indeed, Social Security Ruling 96-1p specifically prohibits any adjudicator, including any AAJ, from applying the court's holding even if the claimant lives within the circuit. Since the Appeals Council is precluded by SSA from following *Schaudeck,* it would be unfair to bar judicial consideration of this issue based on the claimant's failure to raise the issue in a request for Appeals Council review.

III. SOCIAL SECURITY AND SSI CLAIMANTS HAVE NOT RECEIVED PROPER NOTICE PURSUANT TO THE DUE PROCESS CLAUSE REGARDING ISSUE EXHAUSTION.

The Court has repeatedly held that when the government conducts proceedings affecting the interests of citizens, the government must inform affected parties of the procedures to be followed for participation in these proceedings. In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314. Similarly, in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14 (1978), the Court stated that the "purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing."

The Court has previously analyzed the Social Security statute and regulations and concluded that:

> there emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.

Richardson v. Perales, 402 U.S. 389, 400-401 (1971).

The Social Security regulations do not preclude the claimant from raising new issues at any stage of the administrative proceedings. The regulations provide that "any party may raise a new issue" at a hearing before an ALJ, "even though [the issue] arose after the request for a hearing and even though it has not been considered in an initial or reconsidered determination." 20 C.F.R. §§ 404.946(b), 416.1446(b) (1999). Similarly, the Appeals Council may review any "error of law" and "abuse of discretion by the

administrative law judge," without consideration of whether the claimant identified these issues during the initial, reconsideration, and ALJ determinations.[23] 20 C.F.R. §§ 404.970(a), 416.1470(a) (1999).

The Social Security regulations provide that a "request" is the only prerequisite to obtaining Appeals Council review. 20 C.F.R. §§ 404.967, 404.968, 416.1467, 416.1468 (1999). The regulations further indicate that the Appeals Council may review cases in which the claimant did not request review and that the Appeals Council may identify or limit issues to be addressed in its review. 20 C.F.R. §§ 404.969, 404.973, 404.976(a), 416.1469, 416.1473, 416.1476(a) (1999). The regulations do not place any burden on the claimant to conduct an exhaustive presentation of all legal issues before the Appeals Council. Indeed, SSA envisions that a request for review by the claimant will take 10 minutes to prepare. 58 Fed. Reg. 28596 (May 14, 1993). Since a "request" is the only legal requirement to obtain Appeals Council review, the regulations do not inform the claimant that the failure to raise issues before the Appeals Council will result in the waiver of those issues in court.

SSA's regulations explicitly provide that the Appeals Council will "conduct the administrative review process in an informal, non-adversarial manner."[24] While the regulations permit claimants to file a brief with the Appeals Council, 20

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[23] The one exception is the requirement in the regulations for the claimant to notify the ALJ if the claimant believes that the ALJ is biased. 20 C.F.R. §§ 404.940, 416.1440 (1999).

[24] 20 C.F.R. §§ 404.900(b); 416.1400(b) (1999). *See also, Richardson v. Perales*, 402 U.S. at 400.

C.F.R. §§ 404.975, 416.1475 (1999), the regulations do not require claimants to do so. Instead, the regulations provide that claimants may use Form HA-520 in order to request Appeals Council review.[25] 20 C.F.R. § 422.205 (1999). This form provides three single spaced lines for the statement of the issues and grounds for appeal. Like SSA regulations, this form does not notify the claimant that issues which are not raised before the Appeals Council will be waived.

The regulations provide that if the Appeals Council denies review, the decision of the ALJ, not the Appeals Council, is binding on the claimant. 20 C.F.R. §§ 404.981, 416.1481 (1999). Far from informing the claimant of issue exhaustion, this regulation suggests that proceedings before the Appeals Council, including any legal arguments presented, are irrelevant when the Appeals Council denies review. The regulations permit the filing of "an action in a Federal district court within 60 days after the date [claimants] receive notice of the Appeals Council action." *Id.* Thus, exhaustion only requires that the claimants have requested review of the ALJ hearing decision by the Appeals Council and have obtained a notice from the Appeals Council that the requests were denied.

The Social Security Act states:

> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals

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[25] A copy of Form HA-520 may be found at *Social Security online* (last modified Jan. 18, 2000) <http://www.ssa.gov/online/ha-520.pdf>.

> who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

42 U.S.C. § 405(h) (1999). The Social Security Act does not require any additional administrative review of the ALJ hearing decision. Pursuant to the Commissioner's power to promulgate regulations, 42 U.S.C. § 405(a) (1999), he created the Appeals Council. The role of the Appeals Council is defined exclusively by regulation, not by statute. Therefore, claimants should be able to rely upon the regulatory instructions for presenting cases to the Appeals Council.

SSA admits that neither the Social Security Act nor the implementing regulations require claimants to "raise an issue before the agency in order to preserve the issue for judicial review." Brief for the Respondent in Opposition to the Petition for Certiorari, ("Resp. Opp. Cert."), *Sims v. Apfel,* (No. 98-9537) at 6-7. SSA contends that Due Process was satisfied in this case, because it was "well-settled" by the Fifth Circuit in cases such as *Paul v. Shalala*, 29 F.3d 208 (5th Cir. 1994), that claimants were required to present their contentions to the Appeals Council in order to preserve issues for judicial review. Resp. Opp. Cert. at 9.

The Fifth Circuit held in *Paul v. Shalala* as well as in the instant case[26/] that the court lacked jurisdiction to review issues which had not been raised at the Appeals Council. However, in this case and in other cases concerning issue exhaustion in the Social Security context, SSA concedes that courts *do* have jurisdiction to review legal issues which were not raised before the Appeals Council. Resp. Opp. Cert. at 5, n.3. As explained by Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit, the Commissioner conceded that when a claimant failed to brief a particular issue before the Appeals Council, the claimant nevertheless "did *not* fail to exhaust his administrative remedies." *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999).

There is no dispute that the legal reasoning of the Fifth Circuit was incorrect. Claimants who sought review by the Appeals Council but did not raise specific legal issues have nevertheless succeeded in exhausting their administrative remedies. Therefore, courts have *jurisdiction* to review all legal issues raised by claimants in federal court. Since the opinions of the Fifth Circuit were based upon erroneous legal reasoning, these decisions cannot provide constitutionally adequate notice to claimants of the procedures to be followed to preserve judicial review of legal issues.

SSA further asserts that petitioner's attorney was notified of the "judicial practice" of imposing issue exhaustion by published case law in Courts of Appeals other than the Fifth Circuit. Resp. Opp. Cert. at 5-9. However, SSA concedes that there is a conflict among the Courts of Appeals

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[26/] *Sims v. Apfel*, No. 98-60126, slip op. at 2 (5th Cir. Nov. 6, 1998).

regarding whether issue exhaustion applies in the context of Social Security hearings. *Id.* at 10-11. Indeed, Chief Judge Posner reversed previous Seventh Circuit decisions in ruling that issue exhaustion is incompatible with the procedures of the Appeals Council which he considered "more like a complaint bureau than an appellate court." *Johnson v. Apfel*, 189 F.3d at 563. *See also, Richardson v. Perales*, 402 U.S. at 400 (SSA appeals procedures are informal). Far from being "well-settled," the judicial imposition of issue exhaustion in the Social Security context has now been rejected in two circuits. *Johnson v. Apfel*, 189 F.3d at 563; *Harwood v. Apfel*, 186 F.3d 1039 (8th Cir. 1999).

Moreover, a substantial number of claimants are not represented by attorneys[27/] and therefore cannot be expected to sort through the maze of contradictory court opinions. SSA now asserts that it will raise issue exhaustion only when claimants have been represented by counsel or a lay representative,[28/] and the Ninth Circuit seeks to apply issue exhaustion only when claimants are represented by counsel. *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999). *Amici* submit that such a trifurcated rule would undermine the uniformity of a national benefits program and could even serve to discourage attorneys from representing claimants before the Appeals Council.

Since the Appeals Council operates informally, it is unfair to apply issue exhaustion to any Social Security or SSI

[27/] Dubin, *supra* note 14, at 1294 n.29.

[28/] Resp. Opp. Cert. at 9. Claimants may be (and often are) represented by non-attorneys during the administrative process. 20 C.F.R. §§ 404.1705, 416.1505 (1999).

claimant, regardless of whether the claimant is represented by counsel or has been constructively "notified" of the judicial doctrine. The Court has previously stated in a case involving an application for Social Security disability benefits that "procedural due process is applicable to the adjudicative administrative proceeding involving the differing rules of fair play, which through the years, have become associated with differing types of proceedings." *Richardson v. Perales*, 402 U.S. at 401 (citations omitted). The Fifth Circuit's judicial requirement that claimants, including unrepresented claimants,[29/] supply detailed legal positions at the Appeals Council, when these legal papers are unlikely to be read by an attorney and are not required by the regulations, violates the "rules of fair play."

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Because the Appeals Council affords cases only a cursory review by an attorney and a brief review by a non-attorney analyst, the Appeals Council often does not provide a meaningful review of legal issues. The failure of reviewing courts to consider meritorious legal issues offends the Due Process Clause. If legal errors which led to the improper denial of benefits are not corrected, then disabled claimants will be deprived of benefits which are designed by Congress to provide them the necessities of life.

[29/] Unrepresented claimants would be expected to know that they are unable to work but could not possibly be expected to be able to identify procedural errors, such as the incorrect application of the sequential evaluation process. 20 C.F.R. §§ 404.1520, 416.920.

IV. DISABLED CLAIMANTS ARE LIKELY TO SUFFER HARM IF COURTS REFUSE TO CONSIDER MERITORIOUS ISSUES THAT HAVE NOT BEEN RAISED AT THE APPEALS COUNCIL.

Judicial imposition of issue exhaustion can result in the denial of benefits to disabled individuals who meet all the requirements in the Social Security Act and regulations for obtaining benefits. These people have disabling conditions that have persisted through the many years needed to complete four levels of administrative review and satisfy the prerequisites for judicial review.[30/] Because of their disabilities, they are unable to obtain gainful employment which would provide them with the necessities of life. "[M]any disabled persons are forced to subsist on state public assistance programs. Others are left with no means of subsistence."[31/]

> There is no question that the denial of benefits causes extreme hardship to the poor and disabled. Newspaper articles have chronicled the deaths of people from illnesses that SSA said they did not have,

[30/] Others may be in dire need of benefits as dependents, survivors, or retirees.

[31/] Matthew Diller & Nancy Morawetz, *Intracircuit Non-acquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Reversz*, 99 Yale L.J. 801, 815-816 (1990)(footnotes omitted).

> from the exertion of returning to work after losing benefits, or from suicide. Many of the survivors join the ranks of the homeless or the institutionalized. Others are forced to forego medical treatment that would improve their health.[32/]

The Court has recognized that Social Security disability benefits and SSI provide "the very necessities of life," and that the wrongful denial of these benefits imposes "trauma" which is "beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens." *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988). The Court has stated that the harm from wrongful denials of Social Security disability benefits can be "irreparable." *Bowen v. City of New York*, 476 U.S. 467, 483-484 (1986).

The Ninth Circuit similarly stated:

> Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. Society's interest lies on the side of affording fair

[32/] Carolyn Kubitschek, *Social Security Administration Non-acquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT L. REV. 399, 410 (1989) (footnotes omitted).

> procedures to all persons, even though the expenditure of governmental funds is required. It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time.

Lopez v. Heckler, 713 F.3d 1432, 1437 (9th Cir. 1983), *vacated on other grounds*, 469 U.S. 1082 (1984). The Eighth Circuit also explained the plight of the individuals denied Social Security disability benefits.

> Claimants who lose or are denied benefits face foreclosure on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing—all of which aggravates their medical conditions.

Polaski v. Heckler, 751 F.2d 943, 951 (8th Cir. 1984) (quoting *Polaski v. Heckler*, 585 F. Supp. 1004, 1013 (D. Minn. 1984)), *vacated on other grounds*, 476 U.S. 1167 (1986).

The Social Security Act was "designed" by Congress "to be 'unusually protective of claimants.'" *Bowen v. City of New York*, 476 U.S. at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). Judicial imposition of issue exhaustion is inconsistent with the goals of both the Social Security Act and the informal nature of the SSA appeals process. The Act relies upon the courts to remedy erroneous denials of benefits by the Commissioner. Meritorious issues should be heard by the courts to prevent the tragedy of the wrongful denial of the necessities of life to disabled people.

CONCLUSION

For the reasons stated, *amici* urge the Court to reverse the decision below and to remand this case to the Fifth Circuit for consideration of all legal issues raised by petitioner in district court.

Respectfully Submitted,

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Dated: January 20, 2000