GRANTED



No. 98-9537

In The

# Supreme Court of the United States

JUATASSA SIMS,

*Petitioner,*

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

May a federal court, without any statutory or regulatory authority in support thereof, and contrary to the informal, non-adversarial nature of the social security administrative adjudicative process, impose an issue exhaustion requirement upon social security claimants in federal court to bar issues that were not specifically raised by the claimant during the administrative process?

TABLE OF CONTENTS





TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page





TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page





TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page





TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued



STATUTES



REGULATIONS





TABLE OF AUTHORITIES – Continued



LEGISLATIVE AND ADMINISTRATIVE HISTORY

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued

## OPINIONS BELOW

The district court's January 9, 1998 unpublished final judgment adopting the Report and Recommendation of the United States Magistrate Judge appear in the Joint Appendix ("J.A.") at 74-84. The Fifth Circuit's unpublished opinion and order dated November 6, 1998 and unpublished order denying the Petition for Rehearing, dated February 18, 1999, appear at J.A. 85-86 and 87 respectively.

## GROUNDS FOR JURISDICTION

The Petitioner's Petition for a W*rit of Certiorari* was timely filed within ninety days of the Fifth Circuit's denial of her Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix attached hereto.

## STATEMENT OF THE CASE

Social Security determinations are governed by procedures coordinated by the Social Security Administration ("SSA") and, in disability cases, assisted by state governments. *See Bowen v. City of New York*, 476 U.S. 467, 472 (1986). The initial determination is generally made by a state agency acting under the authority and control of the SSA in accordance with 42 U.S.C. §§ 421(a), 1383b(a). If the claim is denied initially, the claimant may pursue a three stage administrative review process. First, the decision is reconsidered *de novo* pursuant to 20 C.F.R. §§ 404.909(a), 416.1409(a) (1999) (hereinafter 1999 will be omitted). Second, the claimant is entitled to a hearing before an administrative law judge ("ALJ") in accordance with 42 U.S.C. §§ 405(b)(1) and 1383(c)(1). Third, the claimant may seek review by the Appeals Council. *See* 20 C.F.R. §§ 404.967,

416.1467. After exhausting these steps in the administrative process, the claimant may seek judicial review of that final decision in federal district court pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

Although the Social Security Act ("the Act") does not create an Appeals Council, the SSA established the Appeals Council in 1940. The Appeals Council presently is comprised of twenty administrative appeals judges who determine whether to grant "review" of cases appealed by claimants who are dissatisfied with their ALJ decisions. In the vast majority of cases, the Appeals Council denies the request for review, resulting in the ALJ's decision becoming the SSA's final decision on the claimant's application. *See* 20 C.F.R. §§ 404.981, 416.1481. By way of background, the Appeals Council does not function like a true administrative appeal tribunal but more like an informal, non-adversarial complaint bureau. It receives over 112,000 requests for review each year. Non-lawyer analysts perform the predominant review functions and it is prohibited from applying case law. Its denials of review generally take the form of boilerplate letters which do not respond to any of the issues or arguments raised. The SSA provides claimants with a one-page form to request Appeals Council review, which contains only a three-line space for the statement of issues and arguments.[1]

On August 18, 1994, Ms. Sims filed applications for disability insurance benefits under Title II of the Act and Supplemental Security Income benefits under Title XVI of the Act. Her claims for benefits were denied initially and before the ALJ. The record includes a letter by her attorney and submitted to the ALJ which discussed the relevant medical

[1] *See* Section C2. pages 33 to 38, *infra*, discussing the Appeals Council's functions and operating reality in detail. *See generally*, Charles H. Koch & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. L. Rev. 199 (1990). The SSA's general authority to establish an Appeals Council derives from 42 U.S.C. §§ 405(b)(1), 1383(c)(3). *See id.* at 231-32 and n.177.



evidence and "points of law" supporting her entitlement to benefits. *See* J.A. at 8-24. Ms. Sims requested review of the ALJ's decision by the Appeals Council on March 26, 1996. Her attorney submitted a letter to the Appeals Council arguing that the ALJ erred in the analysis of her various impairments and their effect on her ability to function. *See* J.A. at 70. The Appeals Council denied her request for review on May 13, 1997, rendering the ALJ's decision the SSA's final decision.

On May 23, 1997, Ms. Sims filed a complaint in the district court seeking review of the SSA's final decision. On November 24, 1997, the United States Magistrate Judge issued a Report and Recommendation recommending affirmance of the SSA's decision. *See* J.A. at 74-82. Ms. Sims subsequently filed objections to the Report and Recommendation. She argued that the Report and Recommendation was flawed because the U.S. Magistrate Judge should have found that the SSA: (1) failed to accord proper weight to the uncontroverted medical opinion of a consulting psychologist; (2) improperly evaluated her residual functional capacity;[2] (3) failed to consider all of her impairments; and (4) failed to develop a full and fair record by ordering a consultative examination. On January 9, 1998, the district court entered a final judgment adopting the Report and Recommendation which considered all the issues raised by the parties on the merits and which did not apply issue exhaustion principles.

[2] This Court previously has examined the importance of the residual functional capacity ("RFC") assessment in SSA disability cases:

> [The RFC] assessment measures the claimant's capacity to engage in basic work activities. If the claimant's RFC permits him to perform his prior work, benefits are denied. If the claimant is not capable of doing his past work, a decision is made under the fifth and final step, whether, in light of his RFC, age, education and work experience, he has the capacity to perform other work. If he does not, benefits are awarded.

*City of New York v. Bowen*, 476 U.S. 467, 471 (1986) (regulatory citations omitted).

Ms. Sims filed a Notice of Appeal of the Final Judgment. She asserted three arguments in support of her appeal: (1) the Commissioner erred in according inadequate weight to the uncontroverted medical opinion of the consulting psychologist; (2) the Commissioner improperly determined her residual functional capacity despite her significant impairments; and (3) the Commissioner violated the duty of full inquiry in failing to order either a psychological or physical consultative examination. *See* Appellant's Initial Br. at 20-41. In response, the SSA argued that the court lacked jurisdiction over her second and third arguments since, although raised in the district court, they had not been "exhausted administratively" because they had not been "explicitly raised administratively." *See* Appellee's Br. at 13. On November 6, 1998, in an unpublished, one paragraph, *per curiam* opinion, the Fifth Circuit considered and rejected Ms. Sims' first argument, but held that it did not have jurisdiction to consider the second and third arguments because they were not raised before the Appeals Council. *See* J.A. at 85-86.

Ms. Sims timely filed a Petition for Rehearing, which was also denied in a *per curiam*, fourteen-word order. *See* J.A. at 87; Appellant's Pet. for Reh'g. at 2-11. With respect to her arguments dismissed on jurisdictional grounds, she made three arguments with various sub-arguments. First, she argued that she sufficiently raised the issue of the improper evaluation of her RFC in letters to both the ALJ and the Appeals Council, and that an expansion of this general argument to the court was permissible.[3] Second, she argued that the SSA

[3] In her Fifth Circuit Reply Brief, Ms. Sims argued that she adequately raised the issue of the residual functional capacity assessment to the Appeals Council and/or to the ALJ by means of two letters written by her attorney to the ALJ and to the Appeals Council. *See* J.A. at 8-24 and 50-70, respectively. *See* Appellant's Reply Br. at 1-7. She explained that the underlying basis of her entire appeal was that the ALJ failed to adequately evaluate the medical evidence, thereby resulting in an incorrect residual functional capacity assessment. Indeed, even the SSA conceded that the argument was "implicitly made" when it argued that she failed to "explicitly raise" it before the Appeals Council. *See* Appellee's Br. at 13.



waived this non-exhaustion argument by not objecting to the U.S. Magistrate Judge's Report and Recommendation which had reviewed the issues on the merits and by failing to cross appeal the district court's order reviewing the issues on the merits. Third, she argued that the application of an "issue exhaustion" requirement was inappropriate in SSA cases in light of (a) the non-jurisdictional nature of this form of exhaustion rule; (b) the SSA's non-adversarial, informal administrative process; (c) the rule's lack of authorization under or consistency with the Social Security Act and SSA regulations; and (d) the SSA's misleading notice by regulations and forms that provide only three lines for a statement of issues and no warnings about the consequences of failing to raise issues before the Appeals Council. *Id.*

Ms. Sims subsequently filed a Petition for a *Writ of Certiorari* with this Court. Her Supplemental Brief in Support of Petition for a *Writ of Certiorari* ("supplemental brief") filed with the Court documented the substantial split among the circuits on the question of whether issue exhaustion is inappropriate as applied to the judicial review of SSA proceedings. On November 29, 1999, this Court granted the Petition for a *Writ of Certiorari* to resolve that issue. *See* 145 L. Ed. 2d 407 (1999).

## SUMMARY OF ARGUMENT

As discussed in the supplemental brief filed before this Court, there is a substantial split in the circuits as to whether issue exhaustion should apply to bar Social Security claimants from raising issues in federal court that were not raised administratively. The application of issue exhaustion in the Social Security context is not only unquestionably inappropriate from a jurisdictional perspective as conceded by the SSA, but it is likewise misapplied to SSA proceedings as a *judicially created prudential principle.*

First, the content of the Act, its core relevant legislative purposes, and the text of SSA regulations are inconsistent with judicially created, *ad hoc* issue exhaustion. Unlike its application in the adversarial and more formal contexts from which it arose, the application of issue exhaustion to SSA proceedings flatly contravenes the Act's repeated emphasis on providing claimants with simple, informal, non-adversarial administrative proceedings – objectives which this Court recognized in *Richardson v. Perales*, 402 U.S. 389 (1971). Issue exhaustion undermines the Act's purposes of providing unusually broad judicial review access to protect social insurance rights and to promote uniform adjudication procedures in the administration of a national program. SSA issue exhaustion is inconsistent with the plain language and structural content of numerous provisions of the SSA's regulations and rules, and with more than fifty years of agency practice.

Ms. Sims further submits that this Court should apply a *Darby*-type requirement to SSA proceedings. Because the Court, in *Darby v. Cisneros*, has interpreted the APA – which was modeled on the relevant provisions of the Social Security Act – to preclude the judicial application of non-statutory or non-regulatory exhaustion requirements in APA cases, this Court should apply a similar requirement in SSA cases. *See Darby v. Cisneros*, 509 U.S. 137 (1993). Such a requirement would preclude SSA issue exhaustion since the doctrine is unsupported by statute, regulation, or even by agency practice. *See also Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) (holding that no deference is owed convenient agency litigation positions unsupported by regulations, rulings or agency practice).

Second, even if issue exhaustion were consistent with the SSA's statutory purposes, regulations and administrative scheme, the application of issue exhaustion to SSA proceedings to bar claimants from raising issues in federal court should still be rejected as none of the prudential purposes recognized by this Court is meaningfully furthered. Issue exhaustion does not prevent flouting or disregard of agency



procedures and it undermines decidedly informal, non-adversarial procedures. It does not meaningfully protect agency autonomy by allowing the agency to apply its special expertise and correct its errors. Under the SSA's non-adversarial scheme, the Appeals Council and the ALJs are required to identify, discover, and correct errors *whether or not they are raised by the claimants*. Moreover, because the predominant review function at the Appeals Council is performed by non-lawyers who, like all SSA adjudicative personnel, are prohibited from applying case law, it lacks appropriate authority and expertise to correct many of the errors brought before it.

Similarly, issue exhaustion does not provide for efficient judicial review and does not promote judicial economy. The Appeals Council pursues a general policy of providing boilerplate form-letter denials of requests for review which are non-responsive to any of the issues or arguments raised and which, therefore, provide no guidance to the courts on judicial review. In addition, there is no need to protect the parties from unfair surprise from new issues asserted on judicial review since the opposing party or SSA (as opposed to the decisionmaker) is neither present nor represented in SSA cases until a court action is filed seeking judicial review. In any event, even if meaningful prudential exhaustion purposes could be discerned, a host of applicable exceptions to the application of issue exhaustion in this context dictate the conclusion that issue exhaustion should not be enforced.

Finally, basic principles of equity and due process further direct the conclusion that issue exhaustion should not be applied in the SSA context. The SSA holds out the promise of informality and non-adversarial assistance on administrative review through its regulations, forms and rules that are widely advertised to claimants. However, claimants are then penalized on judicial review when the SSA turns around and seeks dismissal of issues which have not been specifically and formally raised and preserved. For example, the SSA's request for Appeals Council review form, issued widely to claimants, provides only a three-line, two-inch space for the statement of

issues and arguments and contains no issue exhaustion warnings. The SSA's deceptive and misleading conduct violates basic principles of equity and procedural due process, thereby excusing any arguable procedural default.

## ARGUMENT

### THE FIFTH CIRCUIT ERRED IN IMPOSING AN ISSUE EXHAUSTION REQUIREMENT IN SOCIAL SECURITY CASES TO BAR ISSUES THAT WERE NOT RAISED BY THE CLAIMANT TO THE APPEALS COUNCIL.

#### A. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT IT LACKED JURISDICTION OVER ISSUES WHICH WERE NOT RAISED TO THE SSA'S APPEALS COUNCIL.

The Fifth Circuit's holding that it lacked *jurisdiction* to consider issues not raised to the Appeals Council is not supported by the Act, the case law, applicable regulations, or even the decisions of other circuit courts on this issue. While administrative exhaustion requirements can be mandatory or discretionary, unless Congress has "clearly required" the exhaustion requirement in question, *it is discretionary*. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). There is no statement in the Social Security Act which even remotely suggests that the federal courts' jurisdiction only extends to issues, arguments or objections which have been expressly raised in the SSA administrative appeal process. Section 205(g) of the Act, 42 U.S.C. § 405(g), merely requires that the party obtain a "final decision." The SSA's regulations provide that the Appeals Council's denial of a request for review will render the ALJ's decision the SSA's final one. *See* 20 C.F.R. §§ 404.981, 416.1481.

Indeed, there is no requirement in any of the SSA's regulations, rulings or informal rules for issue exhaustion or issue waiver. Just as Congress knows how to make various forms of exhaustion mandatory and jurisdictional, so too, "[t]he Social Security Administration knows how to draft a waiver rule." *Johnson v. Apfel*, 189 F.3d 561, 562 (7th Cir. 1999) (Posner, C.J.). That neither Congress nor the agency has chosen to do so should end this Court's inquiry.



If further support is needed, however, this Court's § 405(g) jurisprudence also forecloses a finding that issue exhaustion is jurisdictional. This Court has explained that the "final decision" requirement embodied in 42 U.S.C. § 405(g):

> [c]onsists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be waived by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary.

*Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 328 (1976)).

The failure to satisfy a jurisdictional requirement deprives a court of the power or authority to adjudicate the claim. *See id.* at 478-79. In *Bowen v. City of New York*, the claimants satisfied the jurisdictional, nonwaivable presentment requirement simply by filing "applications for benefits [which were] denied by the Secretary." *City of New York v. Heckler*, 742 F.2d 729, 735 (2d Cir. 1984), *aff'd sub nom. Bowen v. City of New York*, 476 U.S. 467 (1986). The vast majority of the SSA's explicit and mandatory statutory or regulatory exhaustion requirements are not truly jurisdictional and may be waived. For example, the explicit requirements that (1) denials of benefits applications be pursued beyond the application denial stage through to an agency reconsideration, an ALJ hearing, and a request for Appeals Council review, and (2) the required compliance with the 60-day limitations periods for each subsequent appellate step in the administrative process, can be waived by the SSA. *See* 20 C.F.R §§ 404.900(a), 416.1400(a); *see Bowen v. City of New York*, 476 U.S. at 478-86. Under this scenario, it follows, *a fortiori*, that the non-statutory, non-regulatory issue exhaustion doctrine cannot possibly be deemed jurisdictional.

Other than the Fifth Circuit, all courts which have discussed the origins of SSA issue exhaustion have found that it "is not jurisdictional however, but prudential." *E.g.*, *Kendrick v. Sullivan*, 784 F. Supp. 94, 99 (S.D.N.Y. 1992); *cf. Pleasant Valley Hosp. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994) (holding in a Medicare case that issue exhaustion "is not a strict jurisdictional bar, it is a prudential one"). Accordingly, although the SSA argued before the Fifth Circuit that issue exhaustion was "jurisdictional," *see* Appellee's Br. at 13-15, it is not surprising that it has abandoned that argument in this Court, *see* Opp'n Cert. at 5 n.3 and 7.

### B. THE JUDICIAL CREATION OF *AD HOC* ISSUE EXHAUSTION REQUIREMENTS IS INCONSISTENT WITH THE SOCIAL SECURITY ACT, CONGRESSIONAL INTENT, SSA REGULATIONS, AND THE SSA'S INFORMAL, NON-ADVERSARIAL ADMINISTRATIVE PROCESS AND INTRICATE STATUTORY AND REGULATORY SCHEME.

As explained below, the judicial creation of *ad hoc* issue exhaustion requirements is inconsistent with the Act, applicable regulations, legislative intent, and the inherent nature of the nationally administered informal Social Security administrative process. The SSA's attorneys have characterized the Fifth Circuit's holding in *Sims* as the explication of a "prudential" issue exhaustion requirement under which the courts presumptively preclude issues which have not been expressly exhausted in the administrative proceedings subject to narrowly delineated discretionary exceptions. *See* Opp'n Cert. at 7.[4] Even if this Court accepted SSA's attorneys' characterization of the Fifth Circuit's action in Ms. Sims' case, this would

[4] It is not clear whether SSA counsel argues for a prudential doctrine that issues must be presented at some point in the administrative proceedings as a whole in order for the court to address them, or more specifically, at the Appeals Council. *Compare* Opp'n Cert. at 5 ("Sound reasons support the principle that a party must raise an issue in an administrative proceeding in order to preserve the issue on judicial review") *with id.* at 7 ("The prudential requirement that a litigant must have raised a matter before the Appeals Council in order to raise it in court is similar to this court's general practice of not reviewing an issue not raised in or passed upon by the lower court."). The Courts of Appeals which have chosen to continue to apply issue exhaustion have reached different results about whether the requirement applies to the ALJ hearings, to Appeals Council requests for review, or more generally, to the administrative process. *Compare Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) ("We have held that appellants must raise issues at their administrative hearings in order to preserve them in this court.") *and Harper v. Secretary of Health and Human Servs.*, 978 F.2d 260, 265 (6th Cir. 1992) (claimant must raise the issue "at the administrative level") *with James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) (claimant must raise the issue before the Appeals Council) *and Paul v. Shalala*, 29 F.3d 208, 210-11 (5th Cir. 1994) (same). The SSA has further complicated this matter by at least temporarily eliminating the Appeals Council step of appeal in some portions of the country, thereby immediately rendering the ALJ decision the SSA's final decision, *see* 20 C.F.R §§ 404.966; 416.1466. The Fifth Circuit's holding in the instant case only addresses whether a claimant must raise an issue to the Appeals Council to preserve the issue for judicial review. However, since the rationales set forth herein would preclude the application of SSA issue exhaustion under any of the above formulations, resolving this matter should be moot.



not cure the Fifth Circuit's erroneous holding. This alternative interpretation of the unarticulated holding in *Sims* is inconsistent with the Act's statutory and regulatory scheme, an informal, non-adversarial legislative mandate, the Act's other core relevant purposes, the SSA's regulations, and over 50 years of agency practice.

" 'Appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with Congressional intent and any applicable statutory scheme.' " *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (quoting *McCarthy*, 503 U.S. at 144). This maxim is particularly instructive in addressing the extent of the courts' authority to craft *ad hoc* restrictions on

judicial review of claims arising from a congressional enactment which "is the most intricate ever drafted by Congress." *Weisbrod v. Sullivan*, 875 F.2d 526, 528 (5th Cir. 1989); *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977). This most intricate enactment arises from a complex statutory and regulatory scheme for delivering mass justice which governs the administrative hearings, appeals and judicial review processes of "probably 'the largest adjudicative agency in the Western World.' " *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983) (quotation omitted). As specifically discussed herein, not only is there no statutory or regulatory authority for an issue exhaustion requirement, but the statutory provisions, administrative regulations, and legislative history which touch on this issue all support the conclusion that Congress did not intend to leave SSA issue exhaustion requirements to *ad hoc* common law development by the judiciary.

### 1. Issue exhaustion is inconsistent with the Social Security Act and its core relevant legislative purposes and history.

a. *Congress intended to provide informal, non-adversarial proceedings in Social Security cases.* Congress' repeated emphasis on the importance of an informal, non-adversarial, administrative scheme, is inconsistent with the intent to permit *ad hoc*, judicially created doctrines which introduce procedural formalism and added complexity to the adjudicative process. As this Court powerfully recognized:

> [I]t is apparent that (a) the Congress granted the Secretary the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the examiner's discretion. 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. at 389. Indeed, in *Perales*, the SSA had specifically argued to the Court that Congress intended to avert a "full blown adversary procedure," to limit adjudication costs, and to "provide a simple procedure whereby claimants can establish their right to benefits." *See* Reply Brief for the Pet'r in *Richardson v. Perales*, at 5-6 n.2 (1970); *see also* H.R. Rep. No. 76-728, at 44 (1939) ("[I]t is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of [SSA] claims . . . "); *cf.* H.R. Conf. Rep. No. 96-944 (1980) ("The Conference Committee wishes to make clear that the Secretary's statement of the case be brief, informal, and not technical. The conferees do not contemplate that the statement would resemble the more formal statement of the case approach used by the Veteran's Administration (VA) in its appeals proceedings.").

The SSA issue exhaustion approach urged by the Commissioner before this Court is derived from and similar to that of courts of appeals and "this Court's general practice of not reviewing an issue not raised in or passed upon by lower courts." Opp'n Cert. at 7. However, as the Eighth Circuit recently explained, "[o]bviously, there are reasons why we, an adversarial forum, choose not to review issues that parties do not raise to the district court, another adversarial forum, that have little bearing on whether a federal court should consider an issue not raised before the Social Security Appeals Council." *Harwood v. Apfel*, 186 F.3d 1039, 1043 (8th Cir. 1999). Indeed, the judicial imposition of formal procedural doctrines derived from adversarial contexts would complicate and decrease both the informality and non-adversarial nature of SSA hearings and appeals and directly frustrate Congress' intent.

For example, under long-term agency practice and SSA regulations, "all that is required [to request review from the Appeals Council] is completion of a one-page form (Form HA-520) that provides only a three-line space (roughly two inches in total) for the statement of the issues and grounds, for appeal," *Johnson*, 189 F.3d at 563 (citing 20 C.F.R. § 422.205(a)); *see also Harwood*, 186 F.3d at 1042-43. The judicial imposition of issue exhaustion will require claimants to "bombard the Appeals Council with full briefs in order to preserve the right to judicial review," *Johnson*, 189 F.3d at 563, and carefully and technically ensure that all issues and arguments are plead with specificity.[5] Thus, for the very same reasons this Court held that the Fifth Circuit erred in *Perales* in holding that SSA administrative denials must have a non-hearsay basis in the record – inconsistency with congressional intent to preserve simplicity, informality and fundamental fairness in the SSA's non-adversarial administrative proceedings – this Court should again reject the Fifth Circuit's attempt to add procedural complexity and formality to the SSA adjudicative process. *See also Bowen v. City of New York*, 476 U.S. at 480 (recognizing that 42 U.S.C. § 405(g) is "a statute that Congress designed to be 'unusually protective' of claimants." *Heckler v. Day*, 467 U.S 104, 106 (1983)").

b. *Congress intended to provide broad judicial review access to protect social insurance rights.* The Social Security Act's express concern with providing particularly broad and extensive access to federal court review to protect social insurance rights, is also inconsistent with the judiciary's *ad*

[5] For a more detailed analysis and discussion of the myriad of ways in which SSA issue exhaustion will complicate and burden the SSA administrative process, see Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1318-21, 1325-1330 (1997).



*hoc* creation of obstacles to judicial review. As the cornerstone of his "New Deal," President Franklin Delano Roosevelt believed that by including payroll contributions in the Social Security program's methodology, he extended to contributors "a legal, moral and political right to collect their pensions." Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Coming of the New Deal* 308-09 (1958). As Fordham Professor Matthew Diller has explained: "[t]he insurance analogy serves as a tremendous source of political strength for social insurance programs. Because payment of benefits appears as the return of contributions, any reduction or elimination of benefits can be seen as expropriation." Mathew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. Rev. 361, 383 (1996). Professor Diller further explained:

> Similarly, the erroneous denial of benefits appears as a form of theft. . . . Extensive possibilities for administrative review were intended to assure claimants that denials of benefits would be carefully scrutinized in recognition of the contributions they have made. *Rigorous judicial review of denials of benefits serves the same purpose.* The procedural scheme thus reflects the treatment of social insurance benefits as earned rights upon which beneficiaries are entitled to rely. Accordingly, in responding to charges that the Social Security system is not really an 'insurance' program, Arthur Altmeyer, Chairman of the Social Security Board, responded that '*beneficiaries may and do sue in the Federal courts to enforce their rights. Indeed, that is one of the great virtues of social insurance.*'

*Id.* at n.66 (Citing Arthur J. Altmeyer, *The Formative Years of Social Security* 222-23 (1966) (other citations omitted and emphasis added)); *see also* H.R. Doc. No. 76-110, at 4 (1939) ("Under federal old-age insurance, benefits are payable as a matter of right"); H.R. Rep. No. 76-728, at 5 (1939) (same).

Consistent with these concerns, Congress enacted a provision in section 205(g) of the Social Security Act, 42 U.S.C.

§ 405(g) (sentence six), which extends unusually broad judicial review rights to claimants through a clause authorizing claimants to submit new and material evidence outside of the administrative records on judicial review and empowering the courts to remand cases back to the agency for the evaluation of new evidence under certain circumstances. In evaluating this provision of the Act, this Court has observed:

> As provisions for judicial review of agency action go, § 405(g) is somewhat unusual. The detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act. As one source puts it:
>
> > The remand power places the courts, not in their accustomed role as external overseers of the administrative process, making sure that it stays within legal bounds, but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council when they act upon a request to reopen a decision on the basis of new and material evidence.

*Sullivan v. Hudson*, 490 U.S. 877, 885 (1989) (citations omitted). It would defy logic for Congress, on the one hand, to extend to courts an unusual additional judicial review responsibility to ensure claimants' social insurance rights are protected by requiring that they evaluate, for remand purposes, new evidence which had not been raised in the administrative proceedings, while, on the other hand, silently authorizing the courts to undermine claimants' pursuit of benefits on judicial review by refusing to consider legal issues which were not raised below.

As a more general matter, § 405(g) establishes the contours and limits on judicial review in SSA cases and does not withdraw the court's judicial review responsibilities over



issues which have not been raised before the agency. Section 405(g) merely requires that the claimant exhaust the administrative process by receiving a final decision from the Commissioner after a hearing in order to secure a right to judicial review. By enacting this section, "Congress has elevated the ordinary administrative 'common law' principle of exhaustion into a statutory requirement." *Doyle v. Secretary of Health and Human Servs.*, 848 F.2d 296, 299 (1st Cir. 1988). Through an express delegation of authority from Congress, *see* 42 U.S.C. § 405(a), the SSA has defined the specific steps which claimants must exhaust to receive a final decision and pursue judicial review under § 405(g), and none of those steps requires issue exhaustion, *see* 20 C.F.R. §§ 404.900, 416.1400.

Obviously, both Congress and the SSA devoted great attention to the codification of appropriate exhaustion requirements. That neither body deemed it necessary or appropriate to add an issue exhaustion prerequisite to judicial review provides further support for the conclusion that the *ad hoc* judicial creation of such a rule was not intended. The task of defining the jurisdiction of federal courts is entrusted to the Congress by the Constitution. *See Palmore v. United States*, 411 U.S. 389, 400-01 (1973). As this Court has recognized, the federal courts' " 'virtual unflagging obligation' to exercise the jurisdiction given them [means] . . . '[they] have no more right to decline the exercise of jurisdiction given than to usurp that which is not given.' " *McCarthy*, 503 U.S. at 146 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821)).

c. *Congress intended to provide uniform procedures in the administration of a national benefits program.* As this Court has recognized:

> wide variations of judicially imposed [procedures] also would prevent realization of the Congress' oft repeated goal of uniform administration of the Act, *see, e.g.*, S. Rep. No. 96-408, at 52-56 (1979) ('emphasizing concern over state-to-state variations and expressing hope that current legislation would

> both improve the quality of determinations and ensure claimants throughout the Nation will be judged under the same uniform standards *and procedures*').

*Heckler v. Day*, 467 U.S. 104, 116 (1983) (emphasis in original); *see also* 63 Fed. Reg. 24,927, 24,930 (1998) (recognizing the importance to SSA of "uniform and consistent adjudication procedures necessary for the administration of a national program").

At present, the Courts of Appeals are hopelessly divided on the contours of this judicially created, *ad hoc*, issue exhaustion rule. They are divided on such questions of: (1) whether issue exhaustion has any place in SSA cases;[6] (2) whether it is a jurisdictional or a prudential doctrine;[7] (3) whether it applies to the failure to raise issues at the Appeals Council level, the hearing level, or to the administrative proceedings as a whole;[8] (4) the degree of specificity or precision required to be deemed to have raised an issue below;[9] and (5) whether SSA's counsel's failure to raise issue exhaustion in a timely fashion precludes the application of

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[6] *Compare Johnson v. Apfel*, 189 F.3d 561, 562-64 (7th Cir. 1999) (Posner, C.J.) (categorically rejecting SSA issue exhaustion, reversing six prior Seventh Circuit decisions which had applied SSA issue exhaustion, and inviting *en banc* rehearing which was declined by all Seventh Circuit judges in regular active service) *and Harwood v. Apfel*, 186 F.3d 1039, 1042-43 (8th Cir. 1999) (categorically rejecting SSA issue exhaustion) *with Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994) (SSA issue exhaustion is jurisdictional).

[7] *See* cases cited at Section A above, pages 8-10, *supra*.

[8] *See* cases cited at n.4 above.

[9] *Compare Johnson*, 189 F.3d at 562-63 (noting that under the pre-*Johnson* Seventh Circuit SSA issue exhaustion cases, the court required that the issue "must be developed") *with McQueen v. Apfel*, 168 F.3d 152, 155 (5th Cir. 1999) (court may consider a new issue if it is an "expansion of the rationale proffered in support of the appeal to the Appeals Council").



issue exhaustion.[10] Indeed, there also appears to be divisions of opinions among different panels within the same circuit[11] and among different members of the same panel.[12] It is possible that a different Fifth Circuit panel could have found: (1) that either Ms. Sims' letter to the ALJ, or letter to the Appeals Council, or both together, satisfied the issue exhaustion requirement by placing the agency on basic notice of the residual functional capacity issue which was further developed and expanded on judicial review; or (2) that SSA counsel waived the issue exhaustion argument by not raising it in a timely fashion.[13]

Moreover, it is unclear whether SSA *ad hoc* issue exhaustion should apply only in cases where claimants were represented by attorneys,[14] or whether it should also apply in cases

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[10] *Compare Nolen v. Sullivan*, 939 F.2d 516, 519 (7th Cir. 1991) (SSA waives issue exhaustion argument by failing to raise it in a timely fashion on judicial review) *with Sims* (Fifth Circuit rejects, without reasoning, argument that SSA counsel's failure to raise issue exhaustion in the district court or by cross-appeal to the Court of Appeals precludes issue exhaustion argument in the Court of Appeals).

[11] *Compare McQueen with Sims* (on issue specificity *see* note 33 at page 45, *infra*).

[12] *Compare Wienke v. Chater*, No. 95-16406, 110 F.3d 72, 1997 U.S. App. Lexis 5530 at *4-5 (9th Cir. May 21, 1997) (Judges Hall and Johnson find raising due process issue for the first time on motion to reopen to the Appeals Council is insufficient to prevent waiver on judicial review) *with id.* at *10-12 (Judge Reinhardt dissents on ground that the issue was clearly presented on the record and the SSA appeal form (HA-520) is inadequate).

[13] *See* note 3 and accompanying text at pages 4-5, *supra*; *see also Jones v. Apfel*, No. 99-7039, 2000 WL 3875 (10th Cir. Jan. 4, 2000) (holding that the SSA's failure to cross-appeal the district court's decision considering the issues on the merits precluded the Tenth Circuit's consideration of the SSA's assertion of issue exhaustion on appeal to the Tenth Circuit).

[14] *See Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) (claim of issue exhaustion's unfairness would be "more persuasive if [claimant] had not been represented by counsel").

where claimants are represented by paralegals, lay representatives, social workers, friends, relatives and other non-attorneys as suggested by SSA Counsel,[15] or whether it should apply, in addition, to cases where claimants have no representation, as in the Tenth Circuit.[16] Under a judicially created *ad hoc* issue exhaustion scheme, claimants' § 405(g) judicial review rights have significantly different restrictions in different parts of the country (and perhaps even different restrictions in the same parts of the country at different times). Thus, it is unquestionably inconsistent with the Act's "express Congressional goal of uniformity," *Heckler v. Day*, 467 U.S. at 116 n.27, and should be rejected on that basis as well.

**2. Issue exhaustion is inconsistent with SSA regulations and rules.**

Apart from the issue exhaustion doctrine's inconsistency with the Act and its core relevant legislative intent and history, as Chief Judge Posner found, judicially created issue exhaustion in SSA cases "*cannot be squared with the regulations governing appeals to the Appeals Council.*" *Johnson*, 189 F.3d at 563 (emphasis added). He further elaborated:

> The regulations permit but do not require the filing of a brief with the Appeals Council. 20 C.F.R. § 404.975. All that is required is completion of a one-page form (Form HA-520) that provides only a space of three lines (roughly two inches in total) for the statement of the issues and grounds for appeal.

[15] *See* Opp'n Cert. at 11-12; *compare Sears v. Bowen*, 840 F.2d 394, 402 (7th Cir. 1987) (non-attorney representative held to a lesser standard than attorney) *with Hudson v. Heckler*, 755 F.2d 781, 784-85 (11th Cir. 1985) (non-attorney representative held to essentially the same standard as attorney).

[16] *See James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) (announcing that it will apply issue exhaustion prospectively to completely unrepresented claimants who have received "direct admonition" of the requirement from the agency).



> 20 C.F.R. § 422.205(a). (Johnson's lawyer appended his one-page letter to the form rather than attempting to squeeze his argument into the tiny space.) The Appeals Council's review is, moreover, plenary unless the Council states otherwise. § 404.976(a). Basically all that seems contemplated or required is that the disappointed claimant ask the Appeals Council to take a look at what the administrative law judge has done and reverse if it finds an error. The Appeals Council operates more like a complaint bureau than an appellate court; the Social Security Administration estimates that it should take only 10 minutes to fill out the form. 58 Fed. Reg. 28,596 (1993). We do not know what the Appeals Council does in cases in which the appellant leaves the space in his Form HA-520 completely blank, and therefore need not decide whether that would be a case of waiver. The only reference in the regulations to anything that looks like waiver is a warning that if the applicant fails to 'take the next step [in the review process] within the stated time period, you will lose your right to further administrative review and your right to judicial review' (unless you show cause for the failure). 20 C.F.R. § 404.900(b). Johnson took the required next step after being turned down by the administrative law judge by filing his Form HA-520 on time with the Appeals Council. The Social Security Administration knows how to draft a waiver rule. If courts take it upon themselves to adopt waiver rules for the agency that compel disappointed applicants for disability benefits to bombard the Appeals Council with full briefs in order to preserve their right to judicial review, we shall be disserving the agency.

*Id.* Focusing on other aspects of the SSA's regulations, the Eighth Circuit reached a similar conclusion. It stated:

> [T]he Commissioner urges us to adopt a waiver rule that the agency does not itself enforce. The Appeals

> Council routinely considers arguments not specifically raised by claimants before it – a product of its duty to review an ALJ's decision 'in an informal nonadversary (sic) manner' and a fitting analogue to the ALJ's well-established duty to develop a full and fair record (even where, as here, claimants are represented by counsel). *See* 20 C.F.R. §§ 404.900(b), 416.1400(b) (1999); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1325-26 and n.179 (1997); *Wilcutts v. Apfel*, 143 F.3d 1134, 1137-38 (8th Cir. 1998) (stating that Commissioner has duty to develop record because hearing is non-adversarial; 'the goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice').

*Harwood*, 186 F.3d at 1042.

While the Seventh and Eighth Circuits are the only Courts of Appeals to reject SSA issue exhaustion, they are also the only ones to provide more than perfunctory examination of any of the agency's relevant regulations or its statutory and regulatory scheme. *Cf. Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) (applying issue exhaustion without considering statutory or regulatory scheme); *James v. Chater*, 96 F.3d 1341, 3143 (10th Cir. 1996) (same); *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994) (same). Very recently in an unpublished decision, the Tenth Circuit recognized that its decision in *James* was "on questionable footing" in light of *Johnson* and *Harwood*. *Jones v. Apfel*, No. 99-7039, 2000 WL 3875 (10th Cir. Jan. 4, 2000). Even prior to the *Jones* case, however, a district court in the Tenth Circuit had already refused to apply the SSA issue exhaustion rule established in *James v. Chater* in light of the reasoning of *Johnson* and



*Harwood*. *See Wilson v. Apfel*, No. Civ.A. 98-2529-JWL, 1999 WL 966296 (D. Kan. Oct. 19, 1999).[17]

The Seventh and Eighth Circuits' decision to reject issue exhaustion in the SSA context is bolstered by review of additional SSA regulations and rules. For example, 20 C.F.R. §§ 404.940, 416.1440 provides that bias objections to the ALJ assigned to conduct the hearing "must" be made to that ALJ at the "earliest possible time." The very fact that the regulations mandate that a particular issue – bias – must be raised administratively, supports the conclusion that the SSA did not contemplate that prudential exhaustion principles mandated the general administrative assertion of issues to preserve those specific issues for later review.

Moreover, the agency's internal rules provide that a claimant may initiate the Appeals Council review process simply by "impl[ying] that he or she is requesting review." *See* HALLEX I-3-060, Filing a Request for Review, 1993 WL 643084 (SSA), at *1. "Implied request for review occurs when the claimant expresses disagreement or dissatisfaction with the ALJ's action or an intent to pursue appeal rights." *Id.* Obviously, such an implied request for review does not contemplate the presentation of all of a claimant's fully developed issues and arguments.

Finally, 20 C.F.R. §§ 404.966 and 416.1466 provides for testing of the Appeals Council's elimination in several jurisdictions, thereby immediately rendering the ALJ hearing decision as the agency's final decision for judicial review purposes. This test is the result of a series of studies and proposals from the mid-1980s to the present, documenting the Appeals Council's inability to perform sufficiently meaningful functions under its present circumstances and exploring

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[17] In *Wilson*, the court reasoned that "because the foundations of the doctrine have been called into question and it is possible that the Tenth Circuit might, like its sibling circuits the Seventh and Eighth, change its view, the court believes that prudence dictates that the matter be reviewed on the merits." 1999 WL 966296 at *7.

either eliminating the Appeals Council or significantly refocusing its responsibilities.[18] It is manifestly inconsistent to impose an exhaustion requirement which will result in a change in practice to require fully researched briefs, and more aggressive advocacy to an appeals body which the agency has been considering abolishing since the 1980s and which has been partially eliminated by formal regulation already.

### 3. Issue exhaustion is inconsistent with more than fifty years of agency practice.

The SSA's long-term administrative practice further directs the conclusion that issue exhaustion is inconsistent with the SSA's unique statutory and regulatory scheme. Although this Court enunciated the issue exhaustion doctrine many decades earlier,[19] the courts did not begin to apply the doctrine to SSA cases with any frequency (and SSA counsel did not apparently invoke the doctrine with regularity) until the early to mid-1990s. *See* Note 24, *infra* at 31-32 (tracing origins of each circuit's rule). Even in the late 1980s – more than half a century after the Act's enactment – the SSA's issue exhaustion assertion was considered a *"novel argument." See Fandino v. Secretary of Health and Human Servs.*, No. 86 Civ. 0010 (RLC), 1987 WL 16150, at *5 n.4 (S.D.N.Y. Aug. 21, 1987) (emphasis added); *see also Jozefick v. Shalala*, 854 F. Supp. 342, 346 n.9 (M.D. Pa. 1994) (rejecting application of issue exhaustion and noting in 1994 that the SSA had not provided any authority supporting such a rule). In light of the high volume of SSA cases through much of this time period,[20] and the corresponding temptation for the SSA to seek expedient ways to dispose of cases on judicial review without

[18] *See* Dubin, *supra*, at 1325-30 (citing studies and reports).

[19] *See, e.g., United States v. L.A. Tucker Truck Lines Inc.*, 344 U.S. 33, 36-37 (1952); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 154-56 (1946).

[20] *See, e.g., Labonne v. Heckler*, 574 F. Supp. 1016, 1018 (D. Minn. 1983) ("[M]ore than one new [SSA] appeal is being filed here every day.").



reaching the merits, the virtual absence of reference to issue exhaustion in SSA case law until the 1990s strongly indicates that the SSA may have agreed, for the majority of the SSA's life span, that the Act and the regulations are structurally inconsistent with common law issue exhaustion.[21]

### 4. The Court's opinions in *Darby v. Cisneros* and *Bowen v. Georgetown Univ. Hosp.*, support the conclusion that SSA issue exhaustion should be left to the political branches of government and not to *ad hoc* development by the courts.

Even though the Social Security Act's structure and legislative history reveals even greater solicitude to the importance of judicial review access than is the case with agencies governed solely by the Administrative Procedure Act (APA) on judicial review, *see Sullivan v. Hudson*, 490 U.S. at 885, a requirement that the SSA promulgate an issue exhaustion rule (or seek one from Congress) would simply place SSA exhaustion jurisprudence on par with that of APA agencies under this Court's decision in *Darby*. *See Darby v. Cisneros*, 509 U.S. 137 (1993). In *Darby*, this Court held that federal courts do not have the authority to require a plaintiff to exhaust available administrative remedies before seeking judicial review under the APA where neither the statute nor relevant agency rules specifically mandate exhaustion as a prerequisite to judicial review. *See id.* As this Court has held in a different context that it need not determine whether SSA claimants are entitled to the protections of the APA because the APA was "modeled upon the Social Security Act," such a *Darby*-type

[21] The SSA has provided no reasons or justification for this apparently relatively recent departure from long-term agency practice. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 57 (1983) ("[A]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course *must supply a reasoned analysis.*") (emphasis added).

requirement for SSA exhaustion should be inferred. *See Perales*, 402 U.S. at 409; *Ginsburg v. Richardson*, 436 F.2d 1146, 1148 n.1 (3d Cir. 1971) (collecting cases "holding that the Administrative Procedure Act must be read *in para materia* with the appropriate section of the Social Security Act on the subject of judicial review"), *cert. denied*, 402 U.S. 976 (1971).

The political branches of government are best suited to determine if an SSA issue exhaustion rule can be implemented which will be consistent with the SSA's intricate and complex scheme, the Act's core relevant legislative purposes, and with both present fiscal and operational realities and projected inevitable transformations of the Social Security adjudicative process and overall pension system. For that reason, a constitutionally enacted congressional issue exhaustion provision would be dispositive and a duly promulgated issue exhaustion regulation would be entitled to substantial deference under this Court's decision in *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

The courts "accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (*rather than the courts*) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (emphasis added). However, as this Court has explained:

> We have never applied the principle of [*Chevron* and its progeny] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'



*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (citations omitted); *see also Smiley*, 517 U.S. at 741. Moreover, "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect." *Smiley*, 517 U.S. at 741. Because in the instant case, as in *Georgetown Univ. Hosp.*, "deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate," 488 U.S. at 213,[22] this Court should reverse the Fifth Circuit's decision and require the agency, if it so chooses, to explore issue exhaustion "pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley*, 517 U.S. at 741.[23]

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[22] Because SSA counsel has indicated that it "has the [issue exhaustion] matter under review" and that it can "conclusively resolve [it] by regulation," *see* Opp'n Cert. at 13, the agency can claim no prejudice from a holding that the courts are not free to mandate issue exhaustion until the doctrine is effectuated through duly promulgated regulations.

[23] Although the APA exempts from public rulemaking requirements, matters related to grants and benefits, the SSA has agreed to be bound by APA rulemaking including the requirements of notice and public participation. *See* 36 Fed. Reg. 2,532 (1971) (publicizing SSA announcement to follow APA notwithstanding benefit exception in 5 U.S.C. § 553(a)); 47 Fed. Reg. 26,886 (1982) (extending announcement to follow APA). Upon agreeing to be bound by the APA, an agency may not disregard its provisions on a case-by-case basis. *See Rodway v. United States Dept. of Agric.*, 514 F.2d 809, 814 (D.C. Cir. 1975).

## C. THE APPLICATION OF A PRUDENTIAL ISSUE EXHAUSTION RULE TO THE SSA'S UNIQUELY INFORMAL, NON-ADVERSARIAL ADMINISTRATIVE APPEALS PROCESS IS IMPROPER SINCE IT LACKS MEANINGFUL PRUDENTIAL JUSTIFICATION IN THIS COURT'S ADMINISTRATIVE COMMON LAW EXHAUSTION JURISPRUDENCE.

Even if judicially created issue exhaustion were not deemed inconsistent with the SSA's statutory and regulatory scheme, it still should be categorically rejected in SSA cases since none of the purposes recognized as a prerequisite to the application of a prudential exhaustion requirement is meaningfully furthered in this context. As a general matter, the administrative, common law principle that parties must usually exhaust prescribed administrative remedies before seeking relief from federal courts, was created by courts to promote the twin, general goals of protecting administrative agency authority and promoting judicial efficiency. *See McCarthy*, 503 U.S. at 145. Courts have identified four specific applications in support of administrative exhaustion: (1) implementing congressional intent to delegate authority to the agency by discouraging frequent and deliberate flouting of administrative procedures; (2) further protecting agency autonomy by allowing the agency in the first instance to apply its special expertise and correct its errors; (3) providing more efficient judicial review by permitting the parties to develop the facts of the case in the agency proceedings; and (4) promoting judicial economy by avoiding needless repetition of administrative and judicial fact-finding and perhaps mooting the judicial controversy. *See id.* at 145-46; Bernard Schwartz, *Administrative Law* § 833 (3d ed. 1991) (citing cases).

The doctrine that *issues* not properly raised or preserved in administrative proceedings cannot be asserted on judicial review, while more often explicitly derived by statute, has also been applied as a form of judicially created prudential exhaustion. *See Marine Mammal Conservancy v. Department*



*of Agric.*, 134 F.3d 409, 412 (D.C. Cir. 1998). Similar to other forms of exhaustion, issue exhaustion also serves the general goals of agency autonomy and judicial efficiency and the four specific applications of those goals and purposes discussed above. *See Massachusetts Dept. of Pub. Welfare v. Secretary of Agric.*, 984 F.2d 514, 523-24 (1st Cir. 1993) (describing purposes underlying the "raise or waive rule in the administrative law context").

Because issue exhaustion, like other forms of common law exhaustion, is a flexible, prudential doctrine, the courts have identified prudential exceptions. Courts have declined to apply this doctrine in situations where: (1) assertion of the unpresented claim or issue would have been futile, *see Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 406-07 (1988); (2) the issues involved were strictly legal and did not call for unique agency expertise, *see, e.g., Atlantic Richfield v. Department of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1984) (" 'No factual development or application of agency expertise will aid the court's decision.' Additionally, because we are 'relatively more expert' to ascertain the meaning of statutory terms, we would not displace agency skill or invade the field of agency discretion.") (quotation omitted); (3) the issue not raised by the appellant was raised by another party to the proceeding, *see NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987); (4) "exceptional circumstances" are present, *see Duncanson-Harrelson Co. v. Director, Office of Worker's Compensation Programs*, 644 F.2d 827, 832 (9th Cir. 1981); or (5) "manifest injustice" would result from the court's refusal to entertain the new issue on judicial review, *see Board of Instruction v. Finch*, 414 F.2d 1068, 1072-73 (5th Cir. 1969).

Unlike other forms of exhaustion, issue exhaustion is derived from a well-established prudential principle of formal appellate judicial procedure. Motivated by similar concerns over judicial economy and the autonomy of inferior tribunals, the Supreme Court ordinarily "does not decide questions not raised or resolved in the lower court." *Taylor v. Freeman & Krontz*, 503 U.S. 638, 645-46 (1992). The courts of appeals

have followed the Supreme Court's lead and have held that appellate courts should not ordinarily consider issues and arguments that have not been properly raised or preserved in the trial courts. *See, e.g., Crow v. Shalala*, 40 F.3d 323, 324 (10th Cir. 1994); *In re Corrugated Container Antitrust Litig.*, 647 F.2d 460, 461 (5th Cir. 1981). The issue exhaustion doctrine reflects the appropriation to administrative law of this settled principle of formal judicial appellate procedure. *See Massachusetts Pub. Welfare*, 984 F.2d at 523-24 ("raise or waive rule in the administrative law context" is "analogous to the established rule that appellate courts will not entertain arguments which could have been, but were not raised in the trial court"); *see also United States v. Menendez*, 48 F.3d 1404, 1413 (5th Cir. 1995) ("[T]he doctrine of waiver in administrative law parallels the well-established rule that appellate courts will not consider issues not raised before the trial court.").

However, Justice Frankfurter has expressly counseled against the careless application of appellate judicial procedure to judicial review of *agency action*. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) ("To assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far reaching, of the judicial process."). In rejecting the application of issue exhaustion to SSA cases, the Eighth Circuit properly noted that the adversarial nature of court proceedings and the non-adversarial nature of SSA proceedings is a critical distinction for the application of this prudential doctrine. *See Harwood*, 186 F.3d at 1043.

This Court has also specifically directed that in applying common law exhaustion principles, "[a]pplication of the doctrine to specific cases *requires an understanding of its purposes and of the particular administrative scheme involved.*" *McKart v. United States*, 395 U.S. 185, 193 (1969) (emphasis added). The court's attention must be "directed to both the



nature of the claim presented and *the characteristics of the particular administrative procedure provided.*" *McCarthy*, 503 U.S. at 146 (emphasis added).

In their decisions to superimpose a formal principle of appellate judicial procedure on agency adjudication through the issue exhaustion doctrine, the Fifth Circuit and the other Circuits which have approved SSA issue exhaustion have failed to provide any meaningful consideration of the relevance of the SSA's unique statutory and regulatory scheme, administrative model, or operational reality. Indeed, a review of the origins of each Circuit's SSA issue exhaustion rule reveals that each court has heedlessly appropriated the rule from an adversarial context without any analysis of the propriety of applying the doctrine in the SSA's informal, non-adversarial setting.[24] If issue exhaustion is a discretionary,

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[24] The Fifth Circuit's issue exhaustion rule in *Paul v. Shalala*, applied to Ms. Sims, was directly derived in part from the unexplained application of the formal appellate procedural issue preservation rule announced in *In re Corrugated Container. See Paul*, 29 F.3d at 210-211 (citing *In re Corrugated Container Antitrust Litig.*, 647 F.2d 461 (5th Cir. 1981)). The Sixth Circuit's rule in *Harper v. Secretary of Health and Human Servs.*, 978 F.2d 260, 265 (6th Cir. 1992) and the Eighth Circuit's pre-*Harwood* rule, announced in *Weikert v. Sullivan*, 977 F.2d 1249, 1254 (8th Cir. 1992), each relied, without explanation, on a Sixth Circuit Black Lung worker's compensation decision, *Hix v. Director, Office of Workers' Compensation Programs*, 824 F.2d 526, 527 (6th Cir. 1987). The *Hix* case, in turn, relied on *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986) which clarified that these adversarial worker's compensation hearings are governed by a duly promulgated issue exhaustion requirement that "a petition for review shall contain a statement indicating the specific contentions of the petitioner and describing with particularity the substantial questions of law or fact to be raised on appeal 20 C.F.R. § 802.210(a) (1985)." *Id.* In *Johnson*, Chief Judge Posner noted that the Seventh Circuit's SSA issue exhaustion cases arose from the application of a decision from "an unrelated area of administrative regulation." 189 F.3d at 563 (citing *Weyerhauser Co. v. Marshall*, 592 F.2d 373, 376 (7th Cir. 1979) (applying exhaustion analysis to excuse complete bypass of adversarial OSHA hearing to test validity of OSHA inspection warrant in

prudential doctrine, these courts have abused their discretion by not even considering a critical factor which this Court has made mandatory in exhaustion analysis under *McKart* and *McCarthy* – the purposes, nature and character of the agency's administrative scheme. *Cf. Stevens v. Northwest Ind. Dist. Council*, 20 F.3d 720, 733 n.29 (7th Cir. 1994) (failure to consider the relevant factors enumerated by the Court in *Clayton v. UAW*, 451 U.S. 679, 688-89 (1981), or proffered grounds which could legitimately excuse failure to exhaust remedies under the Labor and Management Reporting Disclosure Act, would be an abuse of discretion).

Undertaking the analysis mandated by *McKart* and *McCarthy* reveals that the purposes underlying administrative exhaustion generally, and adversarial agency issue exhaustion more specifically, are not similarly well-served – and in some cases are substantially undermined – in the SSA setting. Further, even if recognized exhaustion purposes were deemed to be furthered in SSA cases, some or all of the recognized exceptions to exhaustion apply in this context.

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federal court)); *see also Pappendick v. Sullivan*, 969 F.2d 298, 302 (7th Cir. 1989) (applying *Weyerhauser* issue exhaustion *dicta* to Medicare case without reasoning), *cert. denied*, 506 U.S. 1050 (1993); *Pope v. Shalala*, 998 F.2d 473, 480 n.6 (7th Cir. 1993) (applying *Pappendick* issue exhaustion rule to SSA proceedings without explanation). The Ninth Circuit's rule in *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) was derived, without reasoning, from *Avol v. Secretary of Health and Human Servs.*, 883 F.2d 659, 660 (9th Cir. 1989), a Medicare decision. *Avol* was derived, without explanation, from a decision in an adversarial immigration proceeding. *See id.* (citing *Israel v. INS*, 710 F.2d 601, 605 (9th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984). Finally, the Tenth Circuit's rule in *James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) relied on *Pope*, *Harper*, *Weikert* and other unpublished or inapposite cases, without any reasoning beyond the recognition that some courts had applied the general issue exhaustion rule to SSA proceedings.



**1. SSA issue exhaustion does not implement congressional intent to delegate authority to the agency or to discourage frequent and deliberate flouting of administrative procedures.**

The absence of an issue exhaustion rule would not encourage a deliberate flouting of the SSA hearing and administrative appeals process. By statute and regulation, all claimants would still be required to resort to those decidedly informal processes before securing judicial review of a decision denying benefits. Indeed, there would be absolutely no decrease in the invocation of these processes in the manner specified in the Social Security Act and in the SSA's numerous relevant regulations. Although the absence of issue exhaustion might arguably reduce the degree to which legal issues and arguments would be asserted in SSA hearings and administrative appeals, this Court recognized in *Perales* that Congress did not intend to promote comprehensive evaluation of legal issues and arguments through the informal, non-adversarial SSA adjudicative process. *See* Section B above, pages 10-27, *supra*.

In addition, congressional intent to promote broad judicial review rights, uniformity, and consistency of adjudication in a national program would also be undermined through this requirement. Moreover, the agency's exercise of delegated authority, as evidenced by its regulations and rules governing adjudication and exhaustion, are inconsistent with an issue exhaustion requirement and would be furthered rather than flouted by a decision invalidating *ad hoc* SSA issue exhaustion. *Id.*

**2. SSA issue exhaustion does not meaningfully protect agency autonomy by allowing the agency to apply its special expertise and correct its errors.**

The application of issue exhaustion in the SSA context will not further the goal of meaningfully protecting agency autonomy by allowing the Agency to apply its expertise and

correct its errors. The substantial distinctions between the informal non-adversarial SSA hearing adjudication model and the traditional adversary model employed by courts and regulatory administrative agencies, compel different expectations regarding the presentation of issues or claims at the hearing and the manner in which the agency marshals its "special expertise." In the non-adversarial or "inquisitorial" SSA administrative model, the ALJ is charged with the duty of protecting the claimant's rights, developing the facts on the claimant's behalf, and identifying the issues, whether or not the claimant is represented. *See Harwood*, 186 F.3d at 1042-43. Thus, the responsibility to have raised, developed or identified a particular issue at the hearing is at least shared by the "expert" ALJ.

Even more so than the SSA hearing process, the SSA's Appeals Council's structure and operating reality provide strong prudential justifications against the creation of an issue exhaustion requirement. "The Appeals Council routinely considers arguments not specifically raised by the claimants before it – a product of its duty to review an ALJ's decision in an 'informal non-adversary (sic) manner' and a fitting analogue to the ALJ's well-established duty to develop a full and fair record (even when, as here, claimants are represented by counsel)." *Harwood*, 186 F.3d at 1042 (quoting 20 C.F.R. §§ 404.900(b), 416.1400(b) other citations omitted); *see also Weinke v. Chater*, No. 95-16406, 110 F.3d 72, 1997 U.S. App. LEXIS 5530 at *11-12 (9th Cir. Mar. 21, 1997) (Reinhardt, J., dissenting). Indeed, as Chief Judge Posner observed, SSA regulations (20 C.F.R. §§ 404.976(a), 416.1476(a)) only permit the Appeals Council to limit the issues it considers in its usual review process if it specifically notifies the claimant in writing. *See Johnson*, 189 F.3d at 563 (review is "plenary unless the council states otherwise," citing § 404.976(a)). Accordingly, the "expert" Appeals Council also shares responsibility for the failure to have considered issues that arise from the record before it.



Moreover, in view of the Appeals Council's present operational reality as documented in two public record reports – the 1987 report of the Administrative Conference of the United States ("ACUS") and a comprehensive study of the Appeals Council's operations commissioned for the ACUS and conducted by Professors Charles H. Koch, Jr. and David A. Koplow – the Appeals Council wields very little expertise and corrects relatively few errors. *See* Administrative Conference of the United States, *A New Role for the Social Security Appeals Council*, 52 Fed. Reg. 49,141, 49,143 (1987); Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199 (1990). Indeed, the latter study specifically concluded that "[t]he Appeals Council as it now stands, . . . is buried in case files and *is unable to marshal its unique expertise or perspective*." Koch & Koplow, *supra*, at 319 (emphasis added). Significantly, within a few years after these studies, the SSA recommended abolishing the Appeals Council request for review step entirely as an exhaustion prerequisite to judicial review, *see* 59 Fed. Reg. 47,887, 47,917-18 (1994), and at present, is testing the Appeals Council's elimination by formal regulation in a variety of jurisdictions. *See* 20 C.F.R. §§ 404.966, 416.1466. Salient features of the Appeals Council's review process which support Koch & Koplow's conclusion and the SSA's subsequent actions, and which further demonstrate that prudential principles do not support SSA issue exhaustion, are described below.

a. *The primary Appeals Council review functions are performed by non-attorneys.* In evaluating the exercise of the Appeals Council's expertise, the Koch & Koplow study revealed that the Appeals Council's "primary review function" is now performed by non-attorney analysts in the Office of Appeals Operations (OAO). *See* Koch & Koplow, *supra*, at 240. These analysts "make recommendations which the Appeals Council members accept in the vast majority of instances." *Id.* The analyst's responsibilities include listening

"to the testimony of the medical advisor or vocational evidence to determine whether the ALJ's decision to deny benefits was based on substantial evidence." *Id.* at 253 n.289. The analyst must then "complete[ ] a three-page 'face sheet' form, checking appropriate boxes and filling blanks to reflect the salient characteristics of the claim and its handling by the ALJ." *Id.* at 253-54. The face sheet asks questions regarding unfavorable aspects of the ALJ's decision, whether the ALJ correctly assessed residual functional capacity, and the "legal basis the analyst identifies to support a recommendation." *Id.* at 254 n.290. Interestingly, "[t]he face sheet does not call for a narrative of the case *or the arguments of counsel.*" *Id.* (emphasis added). "The analyst then drafts a proposed decision and appropriate notification letters to the claimant." *Id.* at 254.

b. *Individual Appeals Council members devote less than fifteen minutes per case.* By the mid-1980s, the twenty member Appeals Council annually disposed of a staggering 50,000 cases per year. *See* ACUS Report, *supra*, at 49,143. That docket has more than doubled to 112,000 per year at present. *See* 63 Fed. Reg. 36,560, 36,561 (1998). In the 1980s, because of the demands on each member, "(up to 500 cases per member per month), a typical case [was] likely to receive less than 15 minutes of paper review by the members [and] the council almost never s[at] in panels or conduct[ed] oral arguments." ACUS Report, *supra*, at 49,143.

c. *The Appeals Council's denial letters generally are boilerplate and unresponsive to any issues raised.* As noted by Koch & Koplow, *supra*, at 290, "Appeals Council decisions are so standardized and non-responsive that they 'convince' no one; the review proceedings are so opaque that few claimants accept this process as a satisfying day in court." In 1995, the Appeals Council announced that it would "temporarily suspend" whatever remained of an apparent earlier prior practice of "including a specific response to contentions



and discussion of additional evidence in notices denying requests for review."[25] [26]

d. *The Appeals Council is prohibited from applying case law.* The SSA specifically prohibits ALJs and Appeals Council judges from applying case law in the adjudication of claims unless that case law is embodied in an acquiescence ruling ("AR"). An AR is an occasionally issued limited SSA ruling that only applies in limited jurisdictions and which explains the SSA's view as to specific issues recently decided by a circuit court. *See* 63 Fed. Reg. 24,927, 24,931 (1998). As the SSA explained:

> [I]f each of the agency's 15,000 adjudicators were permitted to apply his or her own interpretation of a circuit court decision in resolving these difficult questions, rather than relying on guidance from the Commissioner in the form of an AR, it could result in conflicting standards being used by decision makers, even within the same circuit. . . . In addition, adjudicators at the initial and reconsideration levels of review generally do not have any legal training in interpreting and applying circuit court

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[25] *See* Dubin, *supra*, at 1329 n.192 (quoting Letter from William C. Traylor, Executive Director, Office of Appellate Operations, Social Security Administration Appeals Council, to Nancy Shor, Executive Director of the National Organization of Social Security Claimants' Representatives, July 28, 1995). The Appeals Council's OAO executive director, William Traylor stated: "As you know, we are again facing unprecedented workloads at the Appeals Council and we believe that these procedural changes will help us keep cases moving as quickly as possible." Dubin, *supra*, at n.193 (quoting William Traylor at 2).

[26] Even in the 1980s, most requests for review culminated in boilerplate form denials of review, only 5% of cases reviewed resulted in reversals, and another 10% resulted in remands to the ALJ. *See* Koch & Koplow, *supra*, at 238. Present statistics reveal that the Appeals Council reverses in only 2.1% of cases and remands cases only 18% of the time. *See* Key Workload Indicators: Hearings, Appeals-Civil Actions-Attorneys Fees, Fiscal Year 1998, Social Security Administration Office of Hearings and Appeal at 23.

> decisions. If authority to apply circuit court decisions in the absence of an AR was extended only to ALJs and the Appeals Council, it would further undermine uniformity in decisionmaking by creating different standards of adjudication at different levels of review.

*Id.*

However, by adhering to this policy, the agency has simply transferred the task of interpreting the interrelationship between the regulations and the case law to the federal courts, as the number of AR issued are minimal compared with the number of significant circuit court decisions issued each year. Thus, not only do the courts have authority to apply an entire body of law – judicial decisions – that the agency cannot consider but, not surprisingly, the courts tend to accord great solicitude to the judicial form of law in SSA judicial review actions. *See generally Steiberger v. Sullivan*, 738 F. Supp. 716 (S.D.N.Y. 1990) (SSA's issuance of acquiescence rulings did not cure illegal ongoing policy of "non-acquiescence" – deliberately disregarding circuit court SSA precedent).

### 3. SSA issue exhaustion does not provide for more efficient judicial review by permitting the parties to develop the facts in the agency proceedings.

Issue exhaustion does not promote more efficient judicial review that follows from the parties' development of facts in the agency proceedings. Because Congress has specifically restricted the consideration of new facts on judicial review of SSA proceedings, with the exception of its authority to remand for new and material evidence under § 405(g) (sentence six), issue exhaustion is not needed to ensure that fact-finding will occur in agency proceedings and not during judicial review. It is highly unlikely that issue exhaustion would promote significantly more efficient judicial review through the development and analysis of legal issues due to (1) the fast-paced, multifaceted nature of the ALJ hearings;



(2) the generally non-responsive, boilerplate manner of non-attorney-led Appeals Council review; and (3) the prohibition on applying case law at all levels of administrative review.

### 4. SSA issue exhaustion does not meaningfully promote judicial economy by avoiding needless repetition of administrative and judicial fact-finding and by mooting judicial controversies.

As discussed above, § 405(g) specifically averts the problem of a repetition of fact finding. Further, while greater comprehensive development of legal issues in SSA proceedings might obviate the need for judicial review in some cases, as also discussed above, the nature and manner of those proceedings suggest that very few additional cases would be mooted from such a requirement. Chief Judge Posner characterized the Appeals Council as "operat[ing] more like a complaint bureau" than like a true appellate body. *See Johnson*, 189 F.3d at 563. His characterization is shared by Congress.[27]

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[27] *See, e.g.*, Staff of House of Representatives Comm. on Ways and Means, 93d Cong. Report on Disability Insurance Program, at 39 (1974) ("The Report stated that the Appeals Council should be made a true appellate administrative court for social security claimants."); Staff of House of Representatives Comm. on Ways and Means, 97th Cong., 1st Sess., Social Security Hearings and Appeals: Pending Problems and Proposed Solutions, at 13 (Comm. Print. 1981) ("[T]here has been a lot of criticism of the Appeals Council as presently constituted . . . [including] . . . charges that it is merely a bureaucratic layer rather than an entity carrying out a legitimate function"); *Id.* at 13-14 (recommending establishment of "a statutory base for a Review Board which would generally carry out the functions of the Appeals Council but in a more effective manner"). Judge Posner had much earlier pointed out the need for meaningful administrative reform of the Appeals Council if the SSA were to truly address judicial economy concerns. *See* Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 Fla. St. L. Rev. 1, 26 and n.163 (1987) (quoting R. Posner, *The Federal Courts Crisis & Reform*, 161 (1985)) ("Judge Posner has suggested that it would be easier and cheaper [than creating an Article I Social Security

Moreover, a variety of new judicial controversies centered on procedural issues would more than compensate for issues precluded on the merits.

**5. SSA issue exhaustion does not protect the parties from unfair surprise or ambush through the assertion of new issues on judicial review.**

In sharp contrast to adversarial adjudication, the SSA or "opposing party" (as distinct from the decision maker) is neither present nor represented in SSA cases until an action is filed in federal district court seeking judicial review. Thus, there is no possibility of prejudice or unfairness to opposing counsel from having to alter positions or introduce new evidence to respond to "surprise" issues raised by the claimant until those new issues are raised on appeal from the district court to the court of appeals. In that situation, the formal doctrines of appellate procedure would ordinarily bar consideration of the new issue on appeal.

**6. Even if meaningful prudential purposes for SSA issue exhaustion could be ascertained, prudential exceptions would excuse exhaustion in light of the SSA's operational reality.**

In short, Appeals Council review can be generally summarized as follows: a claimant who lacks attorney representation nearly half of the time,[28] will request review, often on a one-page, three-line form provided to the claimant by the agency by regulation to accomplish the request for review. The request typically will then be analyzed and disposed of by an analyst with no legal training and then adopted by an

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Court] for Congress to create at the Appeals Council level, a tier of credible appellate administrative judges who would write opinions in all but frivolous cases").

[28] *See* Key Workload Indicators, FY 1998 ("57.4% of all the dispositions in FY 1998 had attorney involvement").



Appeals Council judge who is prohibited from considering or applying case law after a ten to fifteen minute review of the non-lawyer analyst's work. After "a delay of more than one year,"[29] the process generally culminates in a one-page, non-responsive form letter denial of review. Under these circumstances, it is hard to imagine what important purposes are served by requiring claimants, whether or not represented by counsel, to develop fully any and all legal issues and arguments to the Appeals Council to preserve them for judicial review.[30] However, even if a meaningful prudential basis could be discerned, the futility, legal issue, exceptional circumstances, manifest injustice, and issue raised by other party

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[29] Charles T. Hall, *Social Security Disability Practice* § 4.4 (Appeals Council) (West 1999 ed.); Commissioner Apfel has recently confirmed this conclusion. *See* Statement by Kenneth S. Apfel regarding Disability Oversight to the Committee on Ways and Means, Subcommittee on Social Security and Human Resources at 7, Oct. 21, 1999, attached to Reply to Opp'n Cert.

[30] Other than an unpublished Magistrate's Report, the SSA's only suggestion of precedent supporting prudential justifications for SSA issue exhaustion is the Tenth Circuit's opinion in *James v. Chater*, 96 F.3d 1341, 1344 (10th Cir. 1996). *See* Opp'n Cert. at 5-6. However, the Tenth Circuit's opinion in *James* reflects a profound lack of awareness of the true nature of Appeals Council review. In *James*, the court noted that the claimant's request for administrative review form "which [did] not identify the issues with any particularity, effectively sandbags the Appeals Council" and deprives the court of the Appeals Council's "informed views on those issues." 96 F.3d at 1344. If the agency has been "sandbagged," it has done so to itself by printing and encouraging the use of the very summary appeal form that facilitates perfunctory "informal, non-adversarial" appeals. Moreover, the court, in lamenting the absence of the Appeals Council's "informed views," was also apparently unaware of the Appeals Council's *policy* of providing non-responsive, summary denials. More critical, however, is the Tenth Circuit's recent admission that its prior decision in *James* is "on questionable footing" in light of *Harwood* and *Johnson*. *Jones v. Apfel*, No. 99-7039, 2000 WL 3875 n.1 (10th Cir. Jan. 4, 2000).

exceptions would excuse exhaustion under these circumstances.[31]

### D. THE SSA PROVIDES MISLEADING AND DECEPTIVE NOTICE OF THE NEED TO EXHAUST ISSUES WITH SPECIFICITY TO PRESERVE THOSE ISSUES FOR JUDICIAL REVIEW, VIOLATING BASIC PRINCIPLES OF EQUITY AND DUE PROCESS.

Even if the application of *ad hoc* common law issue exhaustion were not foreclosed by the Act, its regulations and overall administrative scheme, and even if issue exhaustion could be found to serve meaningful prudential purposes and not fall within settled prudential exhaustion exceptions, the SSA's argument would still fail. The SSA holds out the promise of informality and non-adversarial assistance on administrative review through its regulations, forms, and rules widely advertised to claimants. However, claimants are

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[31] Since a large proportion of arguments made to the court are based on case law which the agency is prohibited from considering, presentation of those issues to the agency would be futile. The legal issue exception should also apply since virtually all of the issues presented to the Appeals Council are legal issues as the Appeals Council reviews cases under a similar deferential standard of review as the courts. *See* 20 C.F.R. §§ 404.970, 416.1470. Requiring comprehensive issue exhaustion of legal issues to non-lawyer analysts and to Appeals Council members who will devote less than 15 minutes per case, in cases where the agency's regulations and forms encourage a *pro forma* request for review, further presents "exceptional circumstances" which render the application of issue exhaustion to SSA proceedings a "manifest injustice." Finally, in light of the non-adversarial, informal nature of the proceedings, the ALJ and Appeals Council are independently required to identify issues and review or develop the full record in all cases. They should be deemed to have constructively raised or considered applicable issues, whether or not those issues were expressly raised by the claimants. *See Harwood*, 186 F.3d at 1042-43; *Weinke*, 1997 U.S. App. LEXIS at *11-12 (Reinhardt, J., dissenting).



then punished on judicial review for following those regulations and forms when the SSA turns around and seeks dismissal of issues which have not been specifically and formally raised and preserved. The SSA's deceptive and misleading conduct violates basic principles of equity and procedural due process, thereby excusing any arguable procedural default.

Consistent with the Act's clear intent, SSA's regulations explicitly provide that the Appeals Council will "conduct the administrative review process in an informal, non-adversarial manner." *See* 20 C.F.R. §§ 404.900(b), 416.1400(b). The SSA's seriousness about advertising the informality of Appeals Council review is underscored by SSA regulations which widely publicize the availability of a one-page SSA form to facilitate the request for review – Form HA-520. *See* 20 C.F.R. § 422.205(a). This form is available at all local Social Security offices, *see id.*, and it provides "only a space of three lines (roughly two-inches in total) for the statement of the issues and grounds for appeal." *Johnson*, 189 F.3d at 563. It contains no warning that failing to raise specific issues in the three lines provided, waives review of those issues by the courts. *Harwood*, 186 F.3d at 43; *Weinke*, 1997 U.S. App. LEXIS at *10-11 (the form "does not even advise the applicant to raise all issues that constitute the basis for the appeal, and that, unlike most forms involving far less important rights, does not even advise claimants that they may include an attachment if more space is required").

In addition, while the SSA's notice of unfavorable hearing decision form provides other warnings, it fails to provide *any warning whatsoever* of the consequences of not raising an issue or argument before the Appeals Council. As the Eighth Circuit described:

> The ALJ's written decision denying benefits stated that the Appeals Council 'may review your case for any reason.' Further the decision warned Harwood that he could not obtain judicial review unless he first sought review by the Appeals Council, or unless the Council reviewed the decision on its own

> motion. Nowhere did it state that Harwood would forfeit issues not raised to the Council, and the ALJ's reassurance that the Council 'may review your case for any reason' misleadingly implies otherwise. In effect the Commissioner asks us to deny judicial review to those claimants who have relied upon the agency's own professed duty to proceed in an 'informal nonadversary manner.' We decline to do so.

*Harwood*, 186 F.3d at 1043. Thus, by advertising an informal, non-adversarial Appeals Council process, by encouraging claimants to present their issues in a three-line space, and by failing to provide an issue waiver warning along with the other appellate review warnings in the notice of unfavorable ALJ decision, the SSA's notice to claimants is not merely unclear; it is deceptive and misleading regarding the consequences of their administrative appeals.

This Court has suggested, in an analogous context, that the mere lack of "clear notice" of the consequences of failing to object to an issue in a Magistrate Judge's report, can preclude an assertion that the unpresented issue has been waived for further appellate review. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985) (Application of issue waiver rule to Magistrate Judges' reports is a valid exercise of the courts' supervisory power and neither violates the Federal Magistrate's Act nor the Due Process Clause "at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections . . . ").

In *James v. Chater*, the Tenth Circuit applied this "clear" or "adequate notice" concept to its enunciation of an SSA issue exhaustion rule. *James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996). It held that because of "due process concerns" over the absence of notice, it would only apply the rule prospectively. *Id.* In addition, claimants who are unrepresented before the agency must receive "adequate notice through such means as direct admonition" for a "waiver" to be enforced. *Id.* Represented claimants would be charged with



adequate notice based on clear published case law. *Id.* Significantly, the Tenth Circuit did not mention and was apparently unaware any of the aforementioned SSA regulations and rules or the informal nonadversarial nature of the SSA's statutory and regulatory scheme. *See Wilson v. Apfel*, No. Civ. A. 98-2529-JWL, 1999 WL 966296 at *4-7, n.1 (D. Kan. Oct. 19, 1999) (declining to follow *James* and specifically reserving the question of *James*' continued viability in light of a challenge based upon those SSA regulations).

In this Court, the SSA contests Ms. Sims' "due process" argument, claiming that since Ms. Sims was represented at the Appeals Council, she can be charged with clear notice of an issue exhaustion requirement pursuant to *James* based on the Fifth Circuit's decision in *Paul v. Shalala*, 29 F.3d 208, 210-11 (5th Cir. 1994). *See* Opp'n Cert. at 8-9. This argument presupposes two other steps as part of a three-step argument: (2) that Ms. Sims was also on notice that the SSA would ignore its widely announced policy of disregarding or not invoking circuit case law principles establishing new agency requirements – especially requirements, such as issue exhaustion, which are inconsistent with long-term agency practice – unless that case law is embodied in an SSA acquiescence ruling;[32] and (3) that *Paul* would be interpreted as requiring a strict and precise issue specification standard.[33]

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[32] *See* Section C2d above, pages 37-38, *supra*.

[33] The SSA cannot demonstrate that notice has been provided to claimants that the agency expects (and will turn around and claim in court) a requirement of strict specificity in determining whether issues are deemed "raised" before the Appeals Council based on *Paul*. Indeed, the Fifth Circuit's decision in *McQueen* appears to interpret *Paul* as announcing a requirement closer to quite general notice pleading as opposed to the code pleading suggested in *Sims*. *See McQueen v. Apfel*, 168 F.3d 152, 155 (5th Cir. 1999). As a general matter, the Courts of Appeals have long recognized that "[a] technical application of the rules of pleading is inappropriate to the informal proceedings provided in disability determinations." *Cannon v. Harris*, 651 F.2d 513, 519 (7th Cir. 1981) (quoting *King v. Califano*, 599 F.2d 597, 599 (4th Cir. 1979)).

Nevertheless, if mere "unclear" notice can preclude the SSA's assertion of issue waiver in certain circumstances, it follows, *a fortiori*, that the SSA's own deceptive and misleading notice on the consequences of failing to raise issues in the administrative proceedings, should more broadly prevent the SSA from escaping judicial review of those issues. As one court has observed: "The language in the instant case, although not complex or confusing, is more offensive than [unclear or confusing notice] because it serves to mislead and deceive the disability applicant and denies the applicant the right to make an intelligent and informed decision." *Dealy v. Heckler*, 616 F. Supp. 880, 887 (W.D. Mo. 1984); *see also Harwood*, 186 F.3d at 1043 (specifically holding that the SSA's notices "*misleadingly impl[y]*" that issue exhaustion is unnecessary).

### 1. The SSA's misleading and deceptive conduct violates basic equitable principles.

Misleading notice – as an act of commission rather than omission – raises stronger prudential and equitable considerations against applying a discretionary, prudential doctrine to bar claims by the victims of that deceptive notice. The legal maxim *commodum ex injuria sua nemo habere debet, see Black's Law Dictionary* 249 (5th ed. 1979), expresses the common sense equitable proposition that no party should profit from his own wrong and has been held to apply in SSA cases. For example, in *Bowen v. City of New York*, 476 U.S. 467 (1986), a unanimous Court held that the SSA's "fixed clandestine policy against those with mental illness" justified the district court's equitable tolling of the express 60-day time limits for appealing to the next exhaustion step in the agency's three-step administrative review process and for seeking judicial review of a final decision pursuant to § 405(g). *Id.* at 479-82. If the Court can compel the SSA's forfeiture of express statutory and regulatory exhaustion requirements based on equitable principles, it follows, *a fortiori*, that the courts should compel a similar forfeiture of a



solely "prudential" issue exhaustion requirement on equitable grounds.

The SSA apparently concedes that its failure to raise the issue exhaustion argument would amount to a waiver. *See* Opp'n Cert. at 9. Significantly, the SSA asserts in this Court that since the SSA has a policy of generally not raising issue exhaustion in cases where claimants were unrepresented in the agency proceedings, few if any unrepresented claimants should be injured by the application of an issue exhaustion rule. *Id.* The Seventh Circuit (prior to *Johnson*) at least implicitly relied on equitable principles by holding that SSA can be deemed to have forfeited the right to claim an issue waiver by raising the waiver argument in an untimely fashion. *See Nolen v. Sullivan*, 939 F.2d 516, 519 (7th Cir. 1991). Indeed, the Tenth Circuit in *Jones* specifically held that the SSA waived its right to raise issue exhaustion where it failed to object to the U.S. Magistrate Judge's Report and Recommendation that considered the issues on the merits. *Jones v. Apfel*, No. 99-7039, 2000 WL 3875 (10th Cir. Jan. 4, 2000). It follows, *a fortiori*, that equitable principles should mandate a similar forfeiture of the SSA's issue exhaustion argument when the agency affirmatively facilitated the claimant's "waiver"[34] through deceptive and misleading conduct. Thus, even accepting, *arguendo*, the SSA's apparent three-step argument, the SSA's intervening, misleading and deceptive conduct through the use of notices and forms, neither evaluated in *Paul* nor *James*, should preclude the SSA from relying on the doctrine.

Indeed, the SSA implicitly concedes some degree of inequity from its reliance on issue exhaustion in light of its misleading forms since it now plans to change one of its

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[34] Moreover, under these circumstances, characterizing the claimant's failure to raise an issue before the agency as a "waiver" seems misplaced. *Cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding in another context that a waiver is "an intentional relinquishment or abandonment of a known right").

forms. Specifically, SSA has informed this Court that it intends to amend the appointment of representative form which "in the future will advise the claimant's representative that the failure to present an issue to the Appeals Council may preclude the claimant from raising the issue upon judicial review of the agency's decision." Opp'n Cert. at 11-12. Unless and until the SSA completes that promised amendment and rescinds similarly misleading forms and rules, and enacts appropriate and consistent rules and regulations, SSA issue exhaustion should be barred on equitable grounds.

### 2. The SSA's misleading and deceptive conduct violates procedural due process.

Because this case is easily resolvable on non-constitutional grounds, this Court should adhere to its well-established policy of avoiding resolution of constitutional questions when not necessary to the decision of the case. *See Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). However, should resolution of the constitutional issue be deemed necessary, the remaining section demonstrates that the SSA's misleading and deceptive conduct also violates established procedural due process norms.

Misleading notice presents more serious procedural due process concerns than mere unclear notice by undermining principles of fundamental fairness and by introducing a higher risk of error into the adjudicative process. An SSA claimant's cause of action for judicial review, like other causes of action, "is a species of property protected by the . . . Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1985) (citation omitted). In *Logan*, the Court noted that it has "traditionally held that the Due Process Clauses protect civil litigants in the courts, [including] . . . plaintiffs seeking to redress grievances," 455 U.S. at 429 (citations omitted), and it "has read the 'property' component of the Fifth Amendment's Due Process Clause to



impose constitutional limitations upon the power of courts, even in the aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* (citations omitted). Moreover, in SSA benefit application cases, the Court has also recognized the "long established" proposition, that "procedural due process is applicable to the adjudicative administrative proceeding through 'the differing rules of fair play, which through the years have become associated with differing types of proceedings.' " *Perales*, 402 U.S. at 401-02; *see also Heckler v. Campbell*, 461 U.S. 458, 468-69 (1983).

In evaluating procedural due process claims, the Court has established a three-factor calculus or balancing test for determining what process is due. First, the court must balance the private interest affected by the agency action; second, it must assess the risk of erroneous deprivation of such interest through the present procedure and the probable value of an alternate procedure; and third, it must balance the government interest and administrative burdens that an alternate notice or procedure would impose. *See Eldridge*, 424 U.S. at 335. For the reasons developed comprehensively in Dubin, *supra*, at 1335-39, all three factors strongly support a procedural due process bar to the application of issue exhaustion in SSA cases.

## CONCLUSION

Based on the foregoing, the application of issue exhaustion in the Social Security context is not only unquestionably inappropriate from a jurisdictional perspective, but it is likewise misapplied to SSA proceedings as a judicially created prudential principle. Therefore, the decision of the United States Court of Appeal for the Fifth Circuit should be reversed and the case remanded to the Fifth Circuit for consideration of the merits of Petitioner's previously dismissed arguments.

Respectfully submitted,

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