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

REPLY BRIEF FOR PETITIONER

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SUMMARY OF THE ARGUMENT

Because the Commissioner of Social Security ("Commissioner") has conceded that the application of issue exhaustion[1] is not jurisdictionally required and is not specifically required by applicable statutes or regulations, the remaining issues before the Court are whether issue exhaustion is inconsistent with governing regulations and core relevant provisions underlying the Social Security Act ("Act"), whether prudential considerations favor the application of common law issue exhaustion principles to Social Security cases, and whether due process considerations preclude the application of issue exhaustion in the current regulatory and statutory scheme.[2] Contrary to the position of the Commissioner, as applied to Social Security proceedings, issue exhaustion is not only inconsistent with the current regulatory and statutory scheme, but it is likewise misapplied as a judicially created prudential principle.

The Commissioner's reliance on habeas corpus cases, cases involving issue waiver between the district and circuit courts, cases involving other regulatory agency

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[1] The Commissioner's suggestion that the term "administrative default" is preferable to the term "issue exhaustion" should be rejected. Resp't. Br. at 17, n.15. The use of the term "administrative default" assumes that Social Security claimants have somehow defaulted on a duty or requirement to raise all issues administratively. The term "procedural default" (similar to the Commissioner's suggestion of the term "administrative default") is used in criminal habeas corpus cases and refers to a state prisoner's failure to comply with a state's ***statutory*** procedural requirements. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). There are no statutes or regulations at issue in this case that require issue exhaustion.

[2] The Commissioner admits that issue exhaustion as applied in the Social Security context does not involve "a matter of appellate jurisdiction in the technical sense." *See* Opp'n Cert. at 5, n.3 and 7. Nor does the Commissioner cite to any regulations or statutes that require issue exhaustion.

proceedings, and decisions of this Court interpreting the Social Security Act ("Act") is misplaced. Social Security proceedings are fundamentally different from those of other agencies by virtue of their non-adversarial, informal, inquisitorial basis. Prudential considerations and applicable exceptions do not support the application of issue exhaustion. Moreover, the Commissioner has not provided this Court with any explanation of why, to date, it has not simply promulgated such a regulation if, indeed, it is consistent with applicable statutes and regulations.

ARGUMENT

I. THE COMMISSIONER FAILED TO REFUTE THAT THE APPLICATION OF ISSUE EXHAUSTION PRINCIPLES TO SOCIAL SECURITY PROCEEDINGS IS INCONSISTENT WITH GOVERNING SOCIAL SECURITY REGULATIONS AND THE CORE PURPOSES UNDERLYING THE ACT.

The Commissioner argues that general exhaustion principles should apply despite the absence of specific authority in the regulations or the statutes. *See* Resp't. Br. at 18-28. However, the Commissioner's regulations and the accompanying statutory scheme are inconsistent with the imposition of an exhaustion requirement. *See* Pet'r Br. at 12-23.

As set forth in 20 C.F.R. § 404.900 (1999),[3] the administrative review process consists of several steps, which must be requested within certain time periods and in a certain order. *Id.* There is no requirement that a claimant raise any issue to preserve the issue for later judicial review.[4] On the other hand, the regulations specifically

[3] All further references to the 1999 edition of the *Code of Federal Regulations* will be omitted.

[4] As Chief Judge Posner noted, "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 space of three lines (roughly two inches in total) for the statement of the issues and grounds, for appeal." *See Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999); *Harwood v. Apfel*, 186 F.3d 1039, 1042-43 (8th Cir. 1999). The regulations also contain a section that is entitled "How to Request Appeals Council Review," 20 C.F.R. § 404.968, that provides that a claimant may request Appeals Council review by filing a written request.

require the Appeals Council to review a case if: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may affect the general public interest. 20 C.F.R. § 404.970.[5] This mandatory duty, imposed by regulation, exists *regardless of whether a claimant raises any or all issues to the Appeals Council.* If the Appeals Council denies a request for review, the Appeals Council tacitly acknowledges that it has fully examined the ALJ's decision.[6]

The Commissioner incorrectly argues that under subsection 404.970(a), the Appeals Council has the "discretion," but not the obligation, to grant a request for review if the Appeals Council identifies an error that a claimant

[5] The full text of 20 C.F.R. § 404.970 is contained in the Appendix attached hereto.

[6] Indeed, the standard language appended to ALJ decisions advises claimants that on appeal, the Appeals Council "will consider all of my decision, even the parts with which you may agree." J.A. at 26. The notice accompanying the decision affirmatively provides that the Appeals Council *will* (not "may") review the case if any of the reasons listed in the regulations exist. *Id.* The wording also provides that "*requesting review places the entire record of your case before the Appeals Council.*" *Id.* (Emphasis added). Boilerplate Appeals Council denial of review letters, such as in Ms. Sims' case, also affirmatively represent that the Appeals Council will examine each case according to 20 C.F.R. § 404.970. J.A. at 71.

did not specifically raise to the Appeals Council. Resp't Br. at 30. He essentially argues that the word "will" contained in § 404.970(a) should be interpreted as "may" or "will only if identified by a claimant." *Black's Law Dictionary* (6th Ed. 1991) defines the verb "will" as:

> An auxiliary verb commonly having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one of speculation and uncertainty.

Id. at 1598. The Commissioner's interpretation should be rejected as contrary to the plain language of the regulations and statutes and to the instructions and information provided to claimants in the ALJ and Appeals Council decisions.[7]

The Commissioner has the authority under relevant statutes to amend the foregoing regulation to lessen the Appeals Council's current obligation under Section 404.970. He has not done so, suggesting that the plain language is adequate. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (holding that no deference is owed convenient agency litigation positions unsupported by regulations, rulings or agency practice).[8] Moreover, as Justice Scalia recently stated for a majority of this Court: "it is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct . . . which is in fact different from the rule or standard formally announced [by an agency]." *Allentown Mack v. NLRB*, 522 U.S. 359, 373-75

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[7] Contrary to the Commissioner's assertions, Section 404.969 (specifically permitting the Appeals Council to conduct own motion reviews) does not limit the plain meaning of Section 404.970. *See* Resp't Br. at 36, n.30. Rather, Section 404.970(a) merely sets out those categories of cases which the Appeals Council "will" review. *See Mullen v. Bowen*, 800 F.2d 535 (6th Cir. 1986).

[8] *See also Daniels v. Apfel*, 154 F.3d 1129, 1134 (10th Cir. 1998) (stating that the Commissioner could not interpret a regulation on appeal contrary to its plain language).

(1998). *See also id.* (decrying the "evil" of an agency's application of a "standard other than the one it enunciates").

To date, the Commissioner has elected not to promulgate an issue exhaustion regulation. In his 46-page brief, the Commissioner provides *no explanation* why he has not simply promulgated such a regulation. Indeed, in the Commissioner's Brief in Opposition filed in October 1999, the Office of Solicitor General even acknowledged that the "question presented in this case can be conclusively resolved by regulation." Opp'n Cert at 13.

The Commissioner improperly seeks to have the judiciary craft rules that are inconsistent with the present statutory and regulatory scheme, and in so doing, circumvent the Administrative Procedure Act's rule-making process and principles of public involvement and agency accountability protected thereunder. The Commissioner also seeks control over when he will invoke the doctrine of issue exhaustion, as evidenced by his apparent intent to amend the form appointing a representative. *See* Resp't Br. at 43, n.35. However, it is more appropriate for the Commissioner to promulgate his own regulation that properly considers competing congressional policies and long-term agency practices than for this Court to craft a rule whose application is subject to the whims of agency counsel on a case-by-case basis.

II. THE COMMISSIONER FAILED TO PROVIDE ADEQUATE JUSTIFICATION FOR THE APPLICATION OF PRUDENTIAL JUDICIALLY-IMPOSED ISSUE EXHAUSTION PRINCIPLES TO SOCIAL SECURITY CASES.

The Commissioner failed to provide adequate justification for the application of a judicially-imposed issue exhaustion requirement. Courts have identified four specific goals supportive of administrative issue exhaustion and have developed a number of prudential exceptions that excuse the application of issue exhaustion. *See*

Pet'r Br. at 28-41. The Commissioner argues that although there is no statutory or regulatory authority in favor of applying issue exhaustion in Social Security cases, federal courts should apply common law issue exhaustion principles to Social Security cases. He also incorrectly asserts that "the majority of courts of appeals to consider the question have held that administrative default principles apply in this setting and typically bar a claimant from asserting in court objections not presented to the agency." Resp't Br. at 36. Indeed, the current state of circuit court jurisprudence on issue exhaustion as applied to Social Security proceedings does not support the Commissioner's assertion.[9]

The Commissioner cites four categories of cases in support of the application of issue exhaustion principles in Social Security cases: (1) criminal habeas corpus cases; (2) cases governing waiver of issues not raised in the district courts; (3) U.S. Supreme Court cases interpreting the Act; and (4) cases involving various regulatory agencies.

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[9] The Tenth Circuit has declared its decision in *James v. Chater*, 96 F.3d 1341, 1343-1344 (10th Cir. 1996) to be "on questionable footing" in light of *Johnson v. Apfel, supra* and *Harwood v. Apfel, supra*. *See Jones v. Apfel*, No. 99-7039, 2000 WL 3875 (10th Cir. Jan. 4, 2000). Similarly, the Ninth Circuit recently issued a decision which properly limits the Ninth Circuit's decision in *Meanel v. Apfel*, 172 F.3d 1111 (9th Cir. 1999) to situations where claimants attempt to introduce new evidence on appeal which should have been introduced administratively. *See Silveira v. Apfel*, ___ F.3d ___, Nos. 97-56186, 98-55225 (9th Cir. Mar. 3, 2000). The Seventh and the Eighth Circuits have clearly ruled that issue exhaustion does not apply in Social Security cases. *See Johnson v. Apfel, supra; Harwood v. Apfel, supra.*

The Commissioner is left with only the Sixth Circuit and the Fifth Circuit cases supporting issue exhaustion in Social Security cases, neither of which is analytically sound. *See Harper v. Secretary of Health and Human Servs.*, 978 F.2d 260, 265 (6th Cir. 1992) and *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994).

A. The Commissioner's Reliance, By Analogy, To Habeas Corpus Cases Is Misplaced Due To Fundamental Differences Between Adversarial Criminal Proceedings And Nonadversarial Informal Social Security Proceedings.

The Commissioner's decision to rely on habeas corpus cases by analogy demonstrates the Commissioner's failure to acknowledge the fundamental differences between the nature of adversarial and highly formalized criminal proceedings and the non-adversarial informal nature of Social Security proceedings.

In habeas corpus cases, a prisoner against whom a judgment has already been entered seeks federal court review to determine if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." *Coleman v. Thompson*, 501 U.S. at 730. Federal courts apply the doctrine of independent and adequate state ground to decide whether they should address the claims of state prisoners in these actions. *Id.* The doctrine bars federal habeas when a state court declined to address federal claims because the prisoner failed to meet a state procedural requirement. *Id.* The application of the independent and adequate state ground doctrine is "grounded in concerns of comity and federalism." *Id.* at 730.

None of these considerations exist in Social Security cases. The Appeals Council is not a court of another sovereignty with concurrent powers. Principles of comity and federalism have no place in litigation involving statutorily-authorized appeals from a federal administrative agency decision to federal district court. The Appeals Council and ALJs are generally not even permitted to apply case law,[10] clearly differentiating them from a state court that is empowered to apply the same body of case

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[10] ALJs and the Appeals Council are permitted to apply case law only if required to do so by a ruling issued by the Social Security Administration ("SSA"). *See* Amici Br. at 8-14.

law regarding whether a prisoner is being lawfully detained.

Criminal defendants are also accorded significant due process rights – including the right to jury trials, the application in full force of the rules of evidence, and the right to cross-examine witnesses. Social Security proceedings are non-adversarial, without application of the formal rules of evidence. *See Richardson v. Perales*, 402 U.S. 389 (1971). The Commissioner has not pointed to any regulation or statute that requires issue exhaustion. By way of contrast, habeas corpus cases involve prisoners who failed to follow *established state court procedural appellate requirements*. The Commissioner improperly attempts to mix "apples" and "oranges" by suggesting that the Court rely on case law governing habeas corpus cases.

B. The Commissioner's Reliance, By Analogy, To Issue Waiver As Applied Between A District Court And A Circuit Court Is Misplaced.

The Commissioner also improperly analogizes to the doctrine of appellate practice requiring the preservation of issues in the lower court. Resp't Br. at 39. The analogy is unconvincing. Indeed, in *FCC v. Pottsville*, Justice Frankfurter 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). In *Harwood v. Apfel, supra*, the Eighth Circuit stated that there were "obvious" reasons why a circuit court – an adversarial forum – would not review issues that parties did not raise to the district court, another adversarial forum. *See Harwood*, 186 F.3d at 1043.

The Commissioner erroneously relies on *Virginia Bankshares v. Sandberg*, 111 U.S. 1083, 1099 n.8 (1991) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). The Court, in both of these decisions, indicated that *if the court below examined the issues*, it would consider the

issues raised on appeal for the first time.[11] When a claimant seeks review of an ALJ decision, the Appeals Council is *required* to examine the entire case and determine if there are errors of law or if the decision is not based on substantial evidence. *See* 20 C.F.R. § 404.970. Regardless of whether the Appeals Council ultimately decides to grant a claimant's request for review, the Appeals Council is at least *required to consider all the issues.*

The relationship between the Appeals Council and the judiciary is easily distinguishable from the relationship between the federal district and circuit courts. Because the SSA does not allow its adjudicators to apply court decisions directly, the Appeals Council generally does not countenance arguments based on case law.[12] *See* Amici Br. at 8; Pet'r Br. at 37-38. In contrast, an appellate court and a lower court apply the same law.

Proceedings before the Appeals Council are informal and non-adversarial, as compared with the formal adversarial nature of district court proceedings. Pursuant to Section 404.970(a), the Appeals Council is required to consider all issues, as opposed to the district court that is generally only required to address the issues raised by

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[11] In Ms. Sims' case, the district court considered the merits of her second and third arguments that the Fifth Circuit subsequently refused to consider on jurisdictional issue exhaustion grounds.

[12] It would not be unusual for a claimant to make entirely different arguments in federal court than before the Appeals Council. A claimant reasonably omits any reference to case law in arguments to the Appeals Council. Indeed, in denying a Request for Review, the Appeals Council typically acknowledges, as it did in Ms. Sims' case, that it only considered "applicable statutes, regulations, and rulings in effect as of the date of this action." J.A. at 72.

the parties. Appeals Council functions are generally performed by non-attorneys, while highly-skilled legal professionals are used at the federal district court level.[13] The Appeals Council generally provides no reasons for denying review. District courts provide rationales for their decisions. *See* Pet'r Br. at 33-38. Based on the foregoing, the Appeals Council cannot be fairly compared to the federal judiciary. As noted by Chief Judge Posner, even before the publication of the SSA's Appeals Council Process Improvement ("ACPI") Action Plan,[14] "the Appeals Council operates more like a complaint bureau than an appellate court." *Johnson v. Apfel*, 189 F.3d at 563. The reasoning that supports the application of waiver doctrine between district and circuit courts clearly does not apply to Social Security appeals.

[13] In March 2000, the SSA published the Appeals Council Process Improvement ("ACPI") action plan. *See* Lodging filed by Ms. Sims on March 21, 2000. The ACPI plan notes that the Appeals Council received a 66% increase in requests for review in FY 1999 since FY 1994 and that the average processing time for a request for review has nearly quadrupled to 460 days during the same time period. The number of pending cases has grown over 500%. Indeed, in 1999, the Appeals Council received 115,150 requests for review. Due to this dramatic growth in its workload, commencing on April 1, 2000, non-attorney analysts will not only evaluate pending requests for review but will be required to "present cases orally to adjudicators." Thus, adjudicators will not even physically review the majority of files – they will be solely reliant on the content of an oral presentation by a non-attorney analyst who is under strict time constraints to meet "production" goals.

[14] *See* footnote 13.

C. In Support Of The Application Of Issue Exhaustion In Social Security Cases, The Commissioner Incorrectly Relies On U.S. Supreme Court Decisions Interpreting The Social Security Act.

The Commissioner asserts that "administrative default principles are fully applicable to the Appeals Council process," relying primarily on *Richardson v. Perales, supra*, and also noting *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Bowen v. City of New York*, 476 U.S. 467 (1986); and *Heckler v. Ringer*, 466 U.S. 602 (1984). Resp't Br. at 32. The Commissioner's reliance on the foregoing cases is misplaced and confuses the distinction between issue exhaustion and exhaustion of administrative remedies with respect to a claim.

In *Bowen v. City of New York, Weinberger v. Salfi*, and *Heckler v. Ringer*, this Court considered whether the claimant satisfied the requirement to exhaust administrative remedies as set forth in 42 U.S.C. § 405(g). The Court recognized that exhaustion of administrative remedies under Section 405(g) requires a final decision as a statutorily-specified jurisdictional prerequisite. *Salfi* at 766. The Court further noted that the definition of "final decision" should be left to the SSA "to flesh out by regulation." *Id.* As evidenced by the stark nature of the regulations governing Appeals Council review, the Commissioner has not created any additional exhaustion requirements other than the ones already acknowledged by this Court.

The Commissioner cites *Richardson v. Perales* in support of his argument that "at least where a disability claimant is represented by counsel, he may be foreclosed from raising particular objections to the conduct of the administrative process if he fails to assert his rights in a timely fashion." Resp't Br. at 34. (Citations omitted). The Commissioner misinterprets *Richardson v. Perales*. In *Richardson v. Perales*, this Court held that a written report by an examining physician could be received as evidence in

a Social Security proceeding and could constitute substantial evidence, despite its hearsay character, the absence of cross-examination, and the presence of opposing testimony. *Id.* The Court relied on the existence of both a statute that explicitly empowered the SSA to issue subpoenas requiring attendance and testimony of witnesses and production of evidence and a regulation that provides that a claimant may request the issuance of subpoenas. *See* 42 U.S.C. § 405(d) and 20 C.F.R. § 404.926. In contrast, there is no statute or regulation at issue that requires issue exhaustion, easily distinguishing this case from *Richardson v. Perales.*

D. The Commissioner Incorrectly Analogizes To The Application Of Issue Exhaustion In Administrative Appeals In Other Regulatory Agencies.

The Commissioner cites numerous cases where appellate courts applied issue exhaustion principles to prevent a plaintiff from receiving judicial review of an issue not raised administratively. *See* Resp't Br. at 30-31, n.26. However, in nearly every case, the underlying regulatory or statutory scheme either required the petitioner to raise specific issues at the administrative level or was adversarial in nature. For example, *Hix v. Director, OWCP,* 824 F.2d 526 (6th Cir. 1987) and *Director, OWCP, v. North Am. Coal Corp.,* 626 F.2d 1137 (3d Cir. 1980) both involved arguments that were not presented by the plaintiffs to the agency, even though applicable regulations required issue specificity. *See* 20 C.F.R. § 802.211(b). Similarly, in *Sears Roebuck & Co. v. FTC,* 676 F.2d 385, 398 n.2 (9th Cir. 1982), although the Ninth Circuit applied issue exhaustion principles, the court specifically noted that the Federal Trade Commission's Rules of Practice required any party to specify the questions intended to be urged, citing 16 C.F.R. § 3.52(3) (1981).

Many of the cases cited by the Commissioner involve appeals from decisions of the Interstate Commerce Commission ("ICC"), the Environmental Protection Agency ("EPA"), and the Federal Communications Commission ("FCC"). Each of these agencies has enacted or abides by detailed statutory and/or regulatory provisions that require the petitioner to specify issues to be considered on appeal. While the Second Circuit declined to consider an issue not raised before the ICC in *Railway Labor Executives' Ass'n v. U.S.,* 791 F.2d 994, 1000 (2d Cir. 1986) because it was not raised administratively, the underlying regulations required the plaintiff to specify its issues in its objection to the abandonment proceedings. *See* 49 C.F.R. § 1152.5 (1986). In *State of Alabama v. U.S. Environmental Protection Agency,* 911 F.2d 499, 505 (11th Cir. 1990), the Eleventh Circuit refused to consider issues not raised by the petitioners to the EPA Administrator, reasoning that 40 C.F.R. § 124.91 specifically required the petitioners to include a statement of the supporting reasons for the appeal. An underlying statute requiring issue exhaustion was relevant in entertaining claims against the FCC. *See Omnipoint v. FCC,* 78 F.3d 620, 635 (D.C. Cir. 1996). In *Rana v. United States,* 812 F.2d 887, 889-890 (4th Cir. 1987), a Merit Systems Protection Board ("MSRB") case, the court properly applied issue exhaustion principles as required by the regulations governing MSRB review that specifically require the petitioner to list objections. *See* 5 C.F.R. § 1201.115.

Other agency proceedings are distinguishable from Social Security proceedings by virtue of their inherently adversarial nature or due to the publication of agency decisions of regulatory law. For example, proceedings before the Commodity Futures Trade Commission are adversarial, thus making issue exhaustion more reasonable. *See Myron v. Chicoine,* 678 F.2d 727 (7th Cir. 1982). The Commissioner also erroneously relies on *Edwards v. Dept. of the Navy,* 708 F.2d 1344 (8th Cir. 1993), an Equal Employment Opportunity Commission case. In *Edwards,*

the EEOC dismissed a complainant's charge of discrimination because it was too general and failed to contain any specific allegations. The court held that the complainant failed to exhaust his administrative remedies, reasoning that the agency could not render a decision without an allegation "personal to the Title VII complainant." *Id.* at 1347. In contrast, the Appeals Council does not need any additional information from the claimant to conduct its review.

As the foregoing summary illustrates, although courts sometimes impose issue exhaustion in appeals of agency action, issue exhaustion is largely a creature of statute or regulation. *See Marine Mammal Conservancy, Inc. v. Dept. of Agriculture*, 134 F.3d 409, 412 (D.C. Cir. 1998). There are no statutes or regulations that require issue exhaustion in this case.

It is critical to distinguish Social Security proceedings from those of most other agencies. Social Security proceedings are non-adversarial, inquisitorial, and informal.[15] 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. *See* Pet'r Br. at 34. 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. The Appeals Council's structure and operating reality further provide strong prudential justifications against issue exhaustion,

[15] By comparison, the Federal Republic of Germany, in common with most continental systems, provides an example of a modern inquisitorial legal system which does not impose issue exhaustion. *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1301, n.51 (1997).

as the Appeals Council is required by regulation to consider all the issues. *See* 20 C.F.R. § 404.970.

Not only are the purposes for issue exhaustion not served in Social Security cases, but prudential exceptions also apply. Pet'r Br. at 28-42. As noted above, it is generally futile to raise issues before the Appeals Council due to its "complaint bureau" operating reality. *See* Pet'r Br. at 35-37.

Another exception to the application of issue exhaustion is where the issue is "purely legal." Indeed, the Ninth Circuit recently applied this doctrine in *Silveira*, refusing to apply issue exhaustion to a Social Security claimant who did not raise an issue *either* before the district court or the Appeals Council. *See Silveira*, n.8. The Ninth Circuit held that where new evidence was not introduced in district court, issue exhaustion did not apply because the newly submitted issue was "a pure question of law and the SSA would not be unfairly prejudiced by [the claimant's] failure to raise it below." *Id. See also Atlantic Richfield v. U.S. Dept of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1985); *Cf. Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); *U.S. v. Krynicki*, 689 F.2d 289, 291-292 (1st Cir. 1982).

III. WHETHER OR NOT A CLAIMANT IS REPRESENTED DOES NOT VITIATE THE COMMISSIONER'S OBLIGATION TO COMPLY WITH FUNDAMENTAL DUE PROCESS CONSIDERATIONS.

The Commissioner argues that Ms. Sims had fair warning that arguments raised before the Appeals Council would be barred on judicial review and that her attorney should "fairly be charged with knowledge of [issue exhaustion]. Resp't Br. at 15.[16] As argued in the Brief for

[16] The Commissioner's argument that *Paul v. Shalala* provided adequate notice to Ms. Sims' attorney is weak, given

the Petitioner, 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. *See* Pet'r Br. at 42-49.

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.[17] *Id.* at 46. In evaluating procedural due process claims, the Court has established a three-factor calculus or balancing test for determining what process is due. *Id.* at 49, citing *Matthews v. Eldridge*, 424 U.S. 319, 328 (1976). 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. *Id.*

In the early 1980's, the courts grappled with the effect of misleading reconsideration notices that failed to inform a claimant of the res judicata consequences of filing a new application instead of appealing the denial decision. In *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990), the Ninth Circuit found the 1983 version of the SSA's denial notice to violate a claimant's fifth amendment right to procedural due process, noting that district

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the Commissioner's concession that *Paul* is not based on sound legal principles. *See* footnote 2.

[17] The SSA implicitly concedes some degree of inequity in light of its plans to change the wording on one of its forms. *See* Opp'n Cert. at 11-12; Resp't Br. at 43, n.35.

courts considering the issue had uniformly found the notice inadequate. The Ninth Circuit found that requiring notices to accurately state how a claimant might appeal an initial decision did not impose a significant financial or administrative burden on the Commissioner and that the form of the notice used was sufficiently misleading that it introduced a high risk of error into the disability decision-making process. *Id.* Four years later, in *Day v. Shalala*, 23 F.3d 1052 (6th Cir. 1994), a class action that included represented and unrepresented claimants, the Sixth Circuit also held that the denial notices were inadequate and violated the claimants' fifth amendment right to procedural due process. Neither *Day* nor *Gonzalez* limited their holdings to unrepresented claimants.[18]

Just as in *Day* and *Gonzalez*, the scales in *Mathews v. Eldridge* tip in favor of the Social Security claimant. Requiring the Commissioner to accurately set forth the risk of failing to raise, with specificity, all issues to the Appeals Council to preserve the issues for judicial review does not impose a significant financial or administrative burden on the Commissioner. Indeed, in response to Ms. Sims' certiorari petition, the agency indicated that it would amend some forms to provide more accurate notice of the risk of issue exhaustion in future cases. *See* Opp'n Cert. at 11-12. The Commissioner has offered no conceivable government interest which is served through the continued usage of its misleading forms, notices, and regulations.

As in *Day* and *Gonzalez*, the private interest in SSA benefits and in fairness of the SSA process is high. Moreover, the provision of misleading and deceptive notice results in claimants unintentionally waiving their rights to raise potentially meritorious arguments in federal court in an otherwise informal, non-adversarial process.

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[18] Indeed, two years after *Gonzalez* was decided, the Commissioner finally issued Acquiescence Ruling 92-7(9) that also does not limit *Gonzalez* to unrepresented claimants.

There is a significant risk of error in misleading claimants, even if that risk is somewhat lessened when the claimant is represented. To rule that the agency can mislead represented claimants, but not those who are unrepresented, would be an illogical, unjust and underinclusive result. *See Allentown Mack v N.L.R.B.*, 522 U.S. at 373-75 (decrying the "evil" of an agency's application of a "standard other than the one it enunciates"). Specifically, it is improper for a governmental agency to mislead and deceive claimants, regardless of whether one might expect a sophisticated claimant or representative to be more likely to see through the agency's deception. Because all three *Eldridge* factors tip decidedly in favor of the claimant, the SSA should not be permitted to continue issuing its misleading forms, notices and regulations to any claimants.

IV. THE COMMISSIONER HAS NOT PROPOSED A RATIONAL, EFFICIENT, OR FAIR ISSUE EXHAUSTION RULE.

While the Commissioner does not propose any parameters for application of an issue exhaustion rule to Social Security cases, he appears to maintain that issue exhaustion should apply only to represented parties.[19] He

[19] The Commissioner states, "moreover, as a matter of policy, the government has not invoked administrative default in suits brought by claimants who were unrepresented during the Appeals Council proceedings" and even argues that amending a form that appoints a representative will resolve pending concerns. Resp't Br. at 41-43. The Commissioner's policies are not always enforced by the SSA litigation attorneys. For example, in *Dorothy Owens v. Apfel*, No. 1:98CV1442 (N.D. Ohio Aug. 3, 1999), rev'd *Dorothy Owens v. Apfel*, No. 99-4178, 2000 WL 191795 (6th Cir. Feb. 7, 2000) (unpublished) (district court decision lodged with the Court on March 21, 2000), the Commissioner argued before the district court that issue exhaustion applied even though the claimant was unrepresented at the Appeals Council level.

does not explain how and if the rule should be applied if the claimant is represented by a non-attorney who is in the business of handling Social Security claims vs. a non-attorney (such as a paralegal) who acts under the auspices of a law firm. He does not explain how and if exhaustion principles should apply to priests, ministers, relatives, friends, or even a parent of a child seeking benefits, who take the role of representing claimants on an as-needed basis.

The Commissioner also does not describe how courts will determine whether an issue has been sufficiently raised to the Appeals Council. The Commissioner suggests that an "inartful statement" is sufficient, while at the same time arguing that Ms. Sims did not adequately raise the issue of her residual functional capacity below.[20] *See* Resp't Br. at 40.

Due to the complex nature of the issues surrounding the imposition of issue exhaustion principles in Social Security cases, the SSA should be required to promulgate regulations setting forth the parameters for the doctrine as applied to the various categories of claimants. The imposition of ad hoc judicially created issue exhaustion is inconsistent with the non-adversarial, informal framework created by Congress for the administration of the national Social Security benefits program. It also likely will result in a groundswell of new procedural litigation over whether, as to a specific case, the issue in question was sufficiently raised administratively, whether prudential considerations require exhaustion, whether the exceptions (such as futility and pure legal issues) apply, and whether the claimant was represented by an individual

[20] If an "inartful" statement was enough to satisfy the issue exhaustion requirements, Ms. Sims' attorney's correspondence should have been enough to preserve the issues where he specifically discussed her possible carpal tunnel syndrome and the ALJ's failure to credit her resultant limitations. *See* J.A. at 63, 65.

who could have been expected to see through the agency's misleading notices, forms, and regulations.

CONCLUSION

Many agencies have crafted detailed regulations that require specification of issues to be considered on administrative appeal. Others are bound by statutes that require the non-government party to present all issues to the administrative agency. Clearly, if an agency considers issue exhaustion important, the agency can promulgate a valid regulation. The Commissioner, however, invites this Court to make rules about agency proceedings, while the agency itself abstains from rule-making. The imposition of issue exhaustion in Social Security cases is inconsistent with the current statutory and regulatory scheme. Prudential considerations and exceptions strongly indicate that issue exhaustion should not be applied in Social Security cases. Accordingly, this Court should find that issue exhaustion principles do not apply in Social Security cases, reverse the decision of the Fifth Circuit, and remand this case to the Fifth Circuit for consideration of the merits of Ms. Sims' previously dismissed arguments.

Respectfully submitted,

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