No. 24-206

IN THE

Supreme Court of the United States

MARCUS RAPER,

Petitioner,

v.

MARTIN J. O'MALLEY,
COMMISSIONER OF SOCIAL SECURITY,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Richard A. Culbertson
Sarah Jacobs
CULBERTSON, JACOBS & LABODA PLLC
3200 Corrine Drive
Orlando, FL 32803

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Eric A. Shumsky
Counsel of Record
Thomas M. Bondy
Kamilyn Y. Choi
Samantha M. Leff
ORRICK, HERRINGTON & SUTCLIFFE LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037
(202) 339-8400
eshumsky@orrick.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

As the Petition demonstrates, the decision below is a quintessential case meriting review. In square and acknowledged conflict with the decisions of two other courts of appeals, the Eleventh Circuit departed from this Court's decision in *Lucia* on questions "implicat[ing] crucial 'structural interests … of the entire Republic.'" Pet. 9 (quoting *Cody v. Kijakazi*, 48 F.4th 956, 960 (9th Cir. 2022)).

As to the circuit split, the Eleventh Circuit's disagreement with the Fourth and Ninth Circuits could not have been clearer. Pet. App. 15a ("We decline to" "follow the lead of the Ninth and Fourth Circuits."); Pet. App. 17a ("We respectfully disagree with the Fourth and Ninth Circuits."). Notably, the government does not dispute this. Instead, it says only that this acknowledged "circuit conflict" does not "warrant[] this Court's review," on the theory that the Fourth and Ninth Circuit cases purportedly are distinguishable. BIO 6-7. On the contrary, the Eleventh Circuit itself recognized that those other cases were on point and presented "similar factual scenarios." Pet. App. 15a.

The decision below also is flatly irreconcilable with *Lucia*. Tellingly, the government barely defends the Eleventh Circuit's reasoning. Instead, the government principally suggests that Mr. Raper's Appointments Clause challenge is somehow untimely. On the contrary, Mr. Raper timely challenged the ALJ's 2020 decision. And *that* decision was unconstitutional because it was rendered by the same ALJ who impermissibly issued the 2017 decision, as *Lu-*

cia itself makes clear. The "taint[]" of an Appointments Clause violation persists until it is cured—and the only way "[t]o cure the constitutional error" is "a new 'hearing before a properly appointed' official" who is not the prior ALJ, "even if he has [since] received … a constitutional appointment." *Lucia v. SEC*, 585 U.S. 237, 251-52 (2018) (quoting *Ryder v. United States*, 515 U.S. 177, 188 (1995)). In this regard, the government's own theory is equally contrary to *Lucia* as the decision below.

Finally, the government offers up various theories about why this issue is insufficiently important to merit review. On the contrary, the Petition demonstrates (at 19-20 & n.3) that the question presented arises repeatedly in the lower courts, a point that, tellingly, the government ignores. On this issue implicating critical constitutional constraints, this Court ought not leave in place a decision that so thoroughly circumvents this Court's recent holding in *Lucia*.

For all of these reasons, the Court should grant the Petition.

I. The Question Presented Is The Subject Of An Acknowledged Circuit Split.

The Eleventh Circuit was clear: It "decline[d] to" "follow the lead of the Ninth and Fourth Circuits," Pet. App. 15a, and it expressly "disagree[d] with the Fourth and Ninth Circuits" about how a merits-based vacatur of an ALJ's first decision would bear on the Appointments Clause issue after the same ALJ issues a second decision, Pet. App. 17a. As the

Second Circuit has recognized, "the courts of appeals are split on this very issue." *Nersten v. O'Malley*, No. 23-1036, 2024 WL 1985995, at *2 (2d Cir. May 6, 2024); *see* Pet. 8-13.

The government does not dispute any of this. Instead, it recasts the Fourth and Ninth Circuit cases as factually dissimilar from this one. BIO 6-7. The government stands alone in that view. Even the Eleventh Circuit below acknowledged that *Brooks v. Kijakazi*, 60 F.4th 735 (4th Cir. 2023), and *Cody v. Kijakazi*, 48 F.4th 956 (9th Cir. 2022), presented "similar factual scenarios and [yet] held that Appointments Clause violations existed." Pet. App. 15a.

The government seeks to distinguish *Brooks* on the theory that there, unlike here, the claimant raised the Appointments Clause issue on her first appeal to the district court. BIO 6. But that is a distinction without a difference; the question in both cases was whether the second decision (here, the 2020 decision) was unconstitutionally tainted. The Fourth Circuit said that it was; the Eleventh Circuit says that it was not.

Insofar as the government insinuates that Mr. Raper's challenge to the ALJ's 2020 decision was untimely, the decision below made clear that Mr. Raper raised a timely Appointments Clause challenge to the ALJ's 2020 decision. Pet. App. 9a, 14a. Indeed, the Ninth Circuit in *Cody* rejected the exact timeliness argument the government presses now. The claimant in *Cody*—as here—"did not raise an Appointments Clause claim" when he appealed the "[first] ALJ decision to federal district court." 48

F.4th at 959. But that was of no concern because the claimant was challenging the "ALJ's post-ratification [second] decision," "not the now-vacated [first] decision." *Id.* at 962. And "[a]s *Lucia* makes clear, claimants are entitled to relief from any 'adjudication *tainted* with an appointments violation.'" *Id.* (citation omitted).

The government seeks to distinguish *Cody* on the basis that "the Ninth Circuit found it 'obvious' that the ALJ's first decision 'tainted' the ALJ's second," given the contents of the respective decisions. BIO 6-7. But *Lucia* explained that this is irrelevant as a matter of law; such decisions are tainted by their very nature. *See* Pet. 15-17 (discussing *Lucia*). Moreover, even if such an analysis were required, the government offers no response to the Petition's showing (at 17 & n.1) that the ALJ here did not engage in a "fresh look"; instead, the government simply parrots (BIO 7) the Eleventh Circuit's unsupported assertion that the ALJ did so.

II. The Eleventh Circuit's Decision Is Contrary To *Lucia*.

As the Petition demonstrates, the decision below is flatly incompatible with *Lucia*'s Remedy Rule. Pet. 13-18; *see infra* 7-9. Conspicuously, the government all but ignores the fundamental defects that are the source of the conflict between the decision below, on the one hand, and *Lucia* and the Fourth and Ninth Circuits' decisions on the other. *Infra* § II.B. Instead, in an effort to manufacture a vehicle issue, the government changes the subject, repeatedly insinuating that there is some issue of forfeiture—namely, the

lack of a timely challenge to ALJ Detherage's 2017 decision. But this is entirely beside the point; the question presented is whether ALJ Detherage's unconstitutional appointment tainted his *2020* decision, notwithstanding that he was constitutionally reappointed in the meantime. All agree that Mr. Raper timely challenged *that* decision, and *Lucia* makes clear that that decision is unconstitutionally tainted.

A. *Lucia* required remand to a new, constitutionally appointed ALJ here.

The government agrees that ALJ Detherage lacked a constitutional appointment when he conducted Mr. Raper's first hearing and issued his 2017 decision. BIO 3. This Court made clear in *Lucia* "what relief follows": The only way to eliminate the "taint[]" of this Appointments Clause violation is for a different, constitutionally appointed official to hold "a new 'hearing'"—and that is true regardless of whether ALJ Detherage "received … a constitutional appointment" in the meantime. 585 U.S. at 251 (quoting *Ryder*, 515 U.S. at 188); Pet. 13-14. Otherwise, "the constitutional error" remains "[un]cure[d]" and infects any subsequent proceedings. *Lucia*, 585 U.S. at 251-52. In direct conflict with this Court's clear direction, the Eleventh Circuit held that the "merits-based vacatur of the … 2017 Decision eliminated the taint of the unconstitutional appointment," so "[t]here is no live Appointments Clause violation" in the 2020 decision. Pet. App. 17a.

The government never addresses the crucial question whether the "taint[]" of the Appointments

Clause violation originating from the 2017 decision contaminated the 2020 decision. *See Lucia*, 585 U.S. at 251-52; Pet. 13-14. It does not even argue—as the Eleventh Circuit wrongly held—that the taint caused by the initial violation was absolved by the merits-based vacatur. Instead, the government argues that because Mr. Raper is challenging the 2020 decision, and because ALJ Detherage "had received a constitutionally valid appointment by 2020[,] … the issuance of that decision could not have violated the Appointments Clause." BIO 5. But this argument simply ignores *Lucia*, which makes clear that a decision infected by an Appointments Clause violation taints later proceedings if the same official presides, regardless of whether that official is now properly appointed. 585 U.S. at 251-52.

The government's repeated suggestions that Mr. Raper is raising an "[un]timely" challenge to the 2017 decision are just a different way of making the same mistaken argument. BIO 4-6. The question raised here is not whether ALJ Detherage was constitutionally appointed at the time of the 2017 decision. Everyone agrees that he was not. BIO 3; Pet. App. 14a. The question is whether ALJ Detherage's 2020 decision was tainted by the earlier, unconstitutional decision. All agree that that question was timely raised.[1] And as to that question, *Lucia* dictates the answer—and, as importantly for present

[1] For these same reasons, requiring a hearing before a different ALJ would not "read the word 'timely' out of" *Lucia*. BIO 5. Quite the opposite—again, everyone agrees that Mr. Raper "did raise a timely challenge to the … 2020 decision." BIO 6.

purposes, that timely raised question is the subject of the acknowledged conflict of authority.

B. The Eleventh Circuit's justifications for its decision conflict with *Lucia*.

The Eleventh Circuit offered three reasons for rejecting Mr. Raper's Appointments Clause challenge. As the Petition shows, each of them conflicts with *Lucia*. Pet. 15-18. Vividly demonstrating the extent to which the decision below is an outlier, the government does not seriously defend the Eleventh Circuit's reasoning.

1. The Eleventh Circuit held that "[t]here is no live Appointments Clause violation" related to the ALJ's 2020 decision. Pet. App. 17a. Its theory was that the district court's "merits-based vacatur" of the ALJ's 2017 decision "eliminated the taint of the unconstitutional appointment," and that there was no further Appointments Clause violation because ALJ Detherage was constitutionally appointed for "the entire second administrative adjudication." Pet. App. 17a-18a. That reasoning directly conflicts with *Lucia*, which held that the way "[t]o cure the constitutional error" of an Appointments Clause violation—that is, to eliminate the taint of an Appointments Clause violation—is for a different and properly appointed official to preside on remand. 585 U.S. at 251-52. The government does not contend otherwise.

2. Next, the Eleventh Circuit reasoned that, notwithstanding ALJ Detherage's initial unconstitutional appointment, it was fine for him to issue the 2020 decision. Its theory was that he knew about the

merits-based remand from the district court (there was no "danger that [ALJ Detherage] would lack notice of the deficiency in his earlier decision"), and "[n]othing in the record suggests that [ALJ Detherage] failed to take a fresh look at" Mr. Raper's case. Pet. App. 18a-19a.

This reasoning also is flatly contrary to *Lucia*, which stressed that an ALJ that has "both heard [a] case and issued an initial decision on the merits … cannot be expected to consider the matter as though he had not adjudicated it before." 585 U.S. at 251. That a footnote suggests the *Lucia* remedy is "especially" necessary when an ALJ has "no reason to think he did anything wrong on the merits," *id.* at 251 n.5, does not change the necessity of this remedy when the ALJ has been told he is wrong on the merits. And nothing in *Lucia* hinged on whether an ALJ may have taken a "fresh look" at a case on remand; rather, the Court avoided this uncertain inquiry by requiring a remand to a new, untainted official. *Id.* at 251-52. The Eleventh Circuit's decision leads to a perverse result where "a decision by an improperly appointed ALJ is tainted, but a decision by an improperly appointed ALJ who *also* errs on the merits is not." Pet. 16.

The government provides no meaningful response. It simply repeats the Eleventh Circuit's suggestion that ALJ Detherage here did take a "fresh look" at Mr. Raper's case. BIO 7. Even if that were relevant, it is incorrect. As the Petition explains, ALJ Detherage reached the same conclusion for the exact same reasons in 2020 as he did in 2017, using nearly verbatim language—notwithstanding that in

the interim, Mr. Raper presented new evidence that should have been afforded greater weight and implicated a higher burden before it could be discredited. Pet. 17 & n.1.

Like the Eleventh Circuit (Pet. App. 18a), the government contends that recognizing a violation here would not further *Lucia*'s goal of incentivizing Appointments Clause challenges because Mr. Raper "did not raise a timely Appointments Clause challenge to the … 2017 decision." BIO 5-6. This contention is entirely circular; it assumes that there is no timely Appointments Clause challenge here. But, as discussed above, it is undisputed that Mr. Raper raised a timely Appointments Clause challenge to the ALJ's 2020 decision. *Supra* 3, 6. Thus, the government's theory would disincentivize raising the very challenge at issue here, contrary to *Lucia*.

3. The Eleventh Circuit's third rationale for finding no violation was that ALJ Detherage can be presumed to have rethought his earlier decision following remand because "our entire judicial system works on the premise that a judge can set aside his or her earlier decision and look at a case anew." Pet. App. 19a. But *Lucia* reached precisely the opposite conclusion—that an ALJ in this circumstance "cannot be expected to consider the matter as though he had not adjudicated it before." 585 U.S. at 251. As the Petition shows (at 18), the Eleventh Circuit's reasoning comes straight out of the *Lucia* dissent, which the *Lucia* majority explicitly rejected. 585 U.S. at 251 n.5. It is again telling that, here too, the government does not even attempt to defend the decision below.

III. The Case Is An Ideal Vehicle To Resolve An Important And Recurring Issue.

This case presents a clean opportunity to address the question presented, which is critical to the uniform and fair resolution of Social Security claims across the country. Pet. 18-21. The government offers two basic responses, neither of which is a basis to deny review.

First, the government repeatedly suggests that Mr. Raper's claim is untimely. *E.g.*, BIO 3-7. That assertion is misplaced for the reasons set forth above (at 3, 6).

Second, the government seeks to diminish the importance of the question presented. For instance, it asserts that this question "concerns only a narrow class of cases" that are "rapidly diminishing." BIO 7-8. But this bare assertion about a supposed "handful of cases," BIO 8, ignores the Petition's showing that numerous cases raising the question presented continue to arise in courts throughout the country. Pet. 19 & n.3. Indeed, the Social Security adjudication process involves a massive administrative system with millions of claims, as a result of which there is a huge pipeline of cases at any given time.[2] Proceed-

[2] *See* Social Security Administration, *Disabled Worker Beneficiary Statistics by Calendar Year, Quarter, and Month*, https://www.ssa.gov/oact/STATS/dibStat.html#f1 (last visited Nov. 21, 2024); Social Security Administration, *Annual Statistical Supplement to the Social Security Bulletin, 2022*, at Tables 2.F8 & 2.F9, SSA Publication No. 13-11700 (Dec. 2022),

ings involving the question presented can thus reasonably be expected to continue to arise for years. Nor is there any reason to await further percolation, given that the two most significant circuits regarding social security issues (the Ninth and Eleventh) already have weighed in. *See* Pet. 19 & n.2.

Similarly, the government asserts that, as a matter of SSA policy, *other* claimants may have their cases remanded to a new ALJ if they have had "at least three hearings." BIO 8. Even crediting this supposed policy from 5+ years ago, the government, who would know better than anyone how often these circumstances might arise, offers nothing more than a bare assertion to support this claim. And the government concedes ("To be sure …") that there are circumstances when this claimed policy would not even apply. BIO 9.

More fundamentally, the government's speculation does nothing to detract from the basic importance of the question presented. As the Ninth Circuit explained in *Cody*, "[a]n Appointments Clause violation is … no mere technicality or quaint formality"; rather, it implicates crucial "structural interests … of the entire Republic" and "weakens our constitutional design." 48 F.4th at 960 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991)). Only this Court can step in to correct the Eleventh Circuit's serious error and clean up the ongoing disagreement in the lower courts.

---

https://www.ssa.gov/policy/docs/statcomps/supplement/2022/supplement22.pdf.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition should be granted.

Respectfully submitted,

Richard A. Culbertson
Sarah Jacobs
CULBERTSON, JACOBS & LABODA PLLC
3200 Corrine Drive
Orlando, FL 32803

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Eric A. Shumsky
Counsel of Record
Thomas M. Bondy
Kamilyn Y. Choi
Samantha M. Leff
ORRICK, HERRINGTON & SUTCLIFFE LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037
(202) 339-8400
eshumsky@orrick.com

November 22, 2024