No. 24-206

In the Supreme Court of the United States

MARCUS RAPER, PETITIONER

v.

MARTIN J. O'MALLEY,
COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Attorney General
JOSHUA S. SALZMAN
SONIA CARSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

An administrative law judge (ALJ) who had not been appointed in accordance with the Appointments Clause adjudicated petitioner's application for Social Security disability benefits. Petitioner sought judicial review, but did not raise an Appointments Clause challenge. The district court remanded the case to the agency for reasons unrelated to the Appointments Clause. The same ALJ, who by then had received a constitutionally valid appointment, again adjudicated the application. The question presented is whether petitioner is entitled to vacatur of the ALJ's second decision because the ALJ lacked a constitutionally valid appointment at the time of the first decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 89 F.4th 1261. The opinion of the district court (Pet. App. 36a-53a) is available at 2022 WL 1078128.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2024. A petition for rehearing was denied on May 24, 2024 (Pet. App. 127a-128a). The petition for a writ of certiorari was filed on August 22, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Social Security Administration (SSA) relies on administrative law judges (ALJs) to review claims for Social Security benefits. See *Carr* v. *Saul*, 593 U.S.

83, 85 (2021). Before 2018, SSA ALJs were selected by lower-level staff rather than appointed by the head of the agency. See *id.* at 86. In *Lucia* v. *SEC*, 585 U.S. 237 (2018), however, this Court held that the Securities and Exchange Commission's ALJs are officers of the United States who must be appointed in accordance with the Appointments Clause. See *id.* at 241. The Court also concluded that a litigant who raises a timely challenge to the constitutional validity of an ALJ's appointment is entitled to a new hearing before a different, properly appointed ALJ. See *id.* at 251.

In response to *Lucia*, SSA's Acting Commissioner ratified the appointments of all SSA ALJs. See *Carr*, 593 U.S. at 86-87. SSA subsequently announced that its Appeals Council would "vacate preratification ALJ decisions and provide fresh review by a properly appointed adjudicator," so long as the claimant "had raised an Appointments Clause challenge in either the ALJ or Appeals Council proceedings." *Id.* at 87.

2. In March 2015, before *Lucia*, petitioner applied to SSA for disability insurance benefits. See Pet. App. 3a. In 2017, petitioner received a hearing before ALJ Kevin Detherage. See *ibid.* The ALJ found that petitioner had become disabled on August 8, 2017, and awarded benefits from that date forward. See *id.* at 105a-126a. Petitioner, who claimed that he had become disabled earlier, asked the Appeals Council to review that decision, but the Council denied his request. See *id.* at 93a-98a. Petitioner then sought judicial review in federal district court, but his complaint did not challenge the appointment of the ALJ. See *id.* at 91a. SSA filed a motion for entry of judgment remanding the case for further administrative action, representing that on remand the Appeals Council would instruct an ALJ "to

obtain supplemental vocational testimony to clarify the effect of the assessed limitations on [petitioner's] occupational base for the period prior to August 8, 2017." *Id.* at 91a-92a. Petitioner did not object to the motion, and the court entered judgment accordingly. See *id.* at 92a.

Consistent with the agency's representation and the district court's judgment remanding the case, the Appeals Council remanded the case to the ALJ to obtain supplemental evidence from a vocational expert. See Pet. App. 85a-90a. In 2020, ALJ Detherage, who by then had received a constitutionally valid appointment, held a further hearing on petitioner's application, considering the supplemental testimony of a vocational expert. See *id.*at 4a, 14a, 83a-84a. The ALJ again found that petitioner became disabled only as of August 8, 2017. See *id.* at 58a-84a.

Petitioner forwent the opportunity to seek review before the Appeals Council and sought judicial review in federal district court. See Pet. App. 7a. He argued for the first time that, because ALJ Detherage lacked a constitutionally valid appointment at the time of the 2017 decision, the court should vacate the ALJ's 2020 decision. See *id.* at 50a. The court rejected petitioner's argument and affirmed the agency's decision. See *id.* at 36a-53a. The court emphasized that only the 2020 decision was before it and that there was no Appointments Clause defect in that decision. See *id.* at 52a.

The court of appeals affirmed. See Pet. App. 1a-35a. As relevant here, the court determined that, because "[t]here is no live Appointments Clause violation," "there is no need for a *Lucia* remedy." *Id.* at 17a. The court provided three reasons for that conclusion. First, the court explained that "[t]he decision before [it] now is the 2020 decision," "not the 2017 decision." *Id.* at 18a.

Second, the court explained that "the remedy in *Lucia* served the purpose of encouraging claimants to raise Appointments Clause challenges," but that granting petitioner a new hearing would not serve that purpose here. *Ibid.* Finally, the court stated that "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." *Id.* at 19a.

ARGUMENT

Petitioner renews his contention (Pet. 8-21) that, because the ALJ lacked a constitutionally valid appointment at the time of the 2017 decision, the district court should have vacated the ALJ's 2020 decision and granted him a fresh hearing before a different ALJ. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court and does not present a conflict with the decision of any other court of appeals warranting review. The decision also involves an issue of limited and diminishing importance in light of the ratification of the appointments of all SSA ALJs more than six years ago. The petition for a writ of certiorari should therefore be denied.

1. In *Lucia* v. *SEC*, 585 U.S. 237 (2018), this Court held that a person who makes a "timely challenge" to the constitutional validity of an ALJ's appointment is entitled to a new hearing before a different, properly appointed ALJ. *Id.* at 251. As the court of appeals held, petitioner is not entitled to relief under *Lucia* here. See Pet. App. 10a-19a.

To the extent petitioner seeks to challenge the ALJ's 2017 decision, he is not entitled to relief because his challenge is not "timely." *Lucia*, 585 U.S. at 251. The only agency action that is properly before the courts now is the 2020 decision, not the 2017 decision. See Pet.

App. 18a. Petitioner could have raised an Appointments Clause challenge to the 2017 decision during the 2017 ALJ hearing, when seeking Appeals Council review of the 2017 decision, or when seeking judicial review of the 2017 decision. See *Carr* v. *Saul*, 593 U.S. 83, 95-96 (2021) (holding that a Social Security claimant may raise an Appointments Clause challenge for the first time in district court). Petitioner, however, did not avail himself of those opportunities. He instead acquiesced in the agency's motion to vacate the 2017 decision and remand the case, as a result of which the 2017 decision became "void." Pet. App. 18a. It is now too late for petitioner to raise an Appointments Clause challenge to that decision.

To the extent petitioner seeks to challenge the ALJ's 2020 decision, he is not entitled to relief because there was no Appointments Clause violation to remedy. See Pet. App. 18a. Petitioner does not dispute that the ALJ had received a constitutionally valid appointment by 2020. As a result, the issuance of that decision could not have violated the Appointments Clause.

Contrary to petitioner's suggestion (Pet. 15-18), this case differs meaningfully from *Lucia*. In that case, the private party made a "timely challenge": He contested the constitutionality of the ALJ's appointment before the agency, and he then renewed that challenge when seeking judicial review of the ALJ's decision. *Lucia*, 585 U.S. at 251. In this case, by contrast, petitioner did not raise a timely Appointments Clause challenge to the ALJ's 2017 decision. See p. 3, *supra*. To read *Lucia* to now require another hearing before a different ALJ would read the word "timely" out of the Court's opinion.

Lucia's reasoning confirms that petitioner is not entitled to relief. In *Lucia*, this Court explained that an

important purpose of providing a new hearing before a new ALJ is to create "incentives to raise Appointments Clause challenges." 585 U.S. at 251 n.5 (brackets and citation omitted). Here, however, petitioner did not raise a timely Appointments Clause challenge to the ALJ's 2017 decision. Granting petitioner a new hearing thus would not be justified by the rationale that it creates an incentive to raise Appointments Clause challenges. And while petitioner did raise a timely challenge to the ALJ's 2020 decision, "[t]here was no longer a constitutional violation to remedy" by that point. Pet. App. 18a.

2. Petitioner contends (Pet. 8-13) that the court of appeals' decision in this case conflicts with the Fourth and Ninth Circuits' decisions in *Brooks* v. *Kijakazi*, 60 F.4th 735 (4th Cir. 2023), and *Cody* v. *Kijakazi*, 48 F.4th 956 (9th Cir. 2022). Those decisions do not give rise to a circuit conflict warranting this Court's review.

In *Brooks*, the ALJ's first decision was vacated and remanded by the Appeals Council, not by a district court. See 60 F.4th at 737. When the claimant later sought judicial review of the decision that the ALJ issued on remand, that was his first opportunity to raise the issue in court. And the Fourth Circuit concluded that his Appointments Clause challenge was timely because he was not required to raise that challenge in administrative proceedings. See *id.* at 742 (citing *Carr*, 593 U.S. at 85). In this case, by contrast, petitioner did not raise an Appointments Clause challenge when he first had the opportunity to do so in court. His challenge therefore was not timely.

In *Cody*, the Ninth Circuit found it "obvious" that the ALJ's first decision "tainted" the ALJ's second, post-ratification decision because the ALJ "copied verbatim

parts of the [first] decision into her [second] decision." 48 F.4th at 962. The Ninth Circuit found it "clear" that the ALJ "didn't take a fresh look at the case" after receiving a proper appointment. *Id.* at 963. In this case, by contrast, the court below stated: "Unlike the ALJ in *Cody*, the ALJ here did not just adopt his earlier decision verbatim. Nothing in the record suggests that he failed to take a fresh look at [petitioner's] claim." Pet. App. 19a. Any tension between the reasoning of the decision below and the reasoning in *Brooks* and *Cody* does not amount to a conflict warranting review by this Court.

This Court's review is particularly unwarranted, moreover, because the question presented is of limited and diminishing prospective importance. See Sup. Ct. R. 10(a) (explaining that, in deciding whether to grant certiorari, this Court considers whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same *important* matter") (emphasis added).

The question presented concerns only a narrow class of cases. The question arises only if (1) a Social Security claimant received an adverse decision from an ALJ who was not appointed in accordance with the Appointments Clause, (2) the claimant seeks judicial review but fails to raise an Appointments Clause challenge, (3) the case is remanded to the agency on grounds unrelated to the Appointments Clause, (4) the same ALJ reviews the matter on remand, (5) that ALJ's appointment was among those ratified by the Acting Commissioner in 2018, (6) the ALJ again issues an adverse decision, and (7) the claimant again seeks judicial review and for the first time raises an Appointments Clause challenge.

The number of cases that fit that pattern is limited and rapidly diminishing. More than six years have passed since SSA acted to ensure that all its ALJs have constitutionally valid appointments. See p. 2, *supra*. And if this Court were to grant certiorari, almost seven years would have passed by the time this Court issues a decision next spring. As a result, the number of pending cases in which the initial adjudication was conducted by an ALJ without a valid appointment has already greatly dwindled—and will only dwindle further over time.

In addition, even in the handful of cases that fit that fact pattern, the resolution of the question presented will not affect the outcome for many claimants. As a matter of SSA policy, a case will be reassigned to a new ALJ if the case was "previously remanded" and "the same ALJ issued both prior actions" (*i.e.*, the original decision and the decision after the first remand). SSA, *HALLEX: Hearings, Appeals, and Litigation Law Manual* § I-2-1-55(D)(2) (last updated Apr. 9, 2019); https://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-55.html.

That policy is relevant here for two reasons. First, it further reduces the set of cases in which the question presented will arise. In many cases that have been pending long enough for the initial hearing to have been held before the June 2018 ratification, the claimant will already have had at least three hearings and, thus, will already have received a new ALJ. Second, the policy means that, even in cases where the question presented does arise, the resolution of the question would often make no practical difference. If the reviewing court finds a defect in the agency's decision and remands the case to the agency for a second time, the claimant would receive a new ALJ as a matter of SSA policy, regardless of how the Court resolves the question presented here.

To be sure, the SSA policy does not apply in this case because the reviewing court affirmed the agency's decision rather than remanding it to the agency for a second time. But the fact pattern presented by this case is unlikely to recur frequently enough to justify certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Attorney General
JOSHUA S. SALZMAN
SONIA CARSON
Attorneys

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