IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

L.N.P., on his own behalf and on behalf of his dependent children P.D.P. and L.D.P. and on behalf of all others similarly situated,	)	
Plaintiff,	)	**No. 1:24-cv-01196-MSN-IDD**
vs.	)	
MARTIN O'MALLEY, and **THE SOCIAL SECURITY ADMINISTRATION**,	)	
Defendants.	)	

BRIEF OF *AMICUS CURIAE* NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES

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The National Organization of Social Security Claimants' Representatives (NOSSCR) is a non-profit organization whose members, primarily attorneys, represent claimants before the Social Security Administration (SSA) and the courts. NOSSCR files this brief as *amicus curiae* as this case raises important questions regarding the availability of class action relief relating to Social Security benefit claims.[1]

I. STATEMENT OF INTEREST

NOSSCR is a national membership organization comprised of over 2,000 attorneys and others representing individuals applying for and appealing claims for Social Security and Supplemental Security Income (SSI) benefits. NOSSCR members include individuals in private practice; employees of for-profit law firms and other businesses; and employees of legal services organizations, educational institutions, and other nonprofits. NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the federal courts.

NOSSCR has a great interest in ensuring that its members' clients are awarded benefits when they meet the criteria under the Social Security Act (the Act) and the Commissioner's implementing regulations and that these clients receive all benefits due to them. NOSSCR is a leader in advocating policy reforms for Social Security claimants before Congress, the agency, and the courts.

Class actions protect claimants' rights when SSA policies negatively impact them on a systemic level. As argued below, over the years, class action litigation has resulted in important

[1] *Amicus* affirms that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

policy changes that have resulted in increased access to benefits and increased benefit amounts to millions of vulnerable individuals who are elderly, disabled, or low-income.

II. CLASS ACTIONS, ESPECIALLY NATIONWIDE CLASS ACTIONS, HAVE CONTRIBUTED GREATLY TO THE DEVELOPMENT OF SOCIAL SECURITY POLICY AND PRACTICE.

In the past 90 years, Social Security has undergone significant changes. Statutory and regulatory changes have added and expanded benefits and modified policies and processes. Class action lawsuits have refined and improved these policies and processes.

The Social Security program was established in 1935 as part of the Social Security Act of 1935 (Pub. L. 74-271, 49 Stat. 620) during the Great Depression to provide financial support to the elderly, unemployed, and disabled. Initially, it focused on old-age benefits, but over time, the program expanded. The Social Security Amendments of 1939 (Pub. L. 76-379, 53 Stat. 1360) added survivor and dependent benefits, marking the shift toward a more comprehensive social insurance system. The Social Security Amendments of 1956 (Pub. L. 84-836, 70 Stat. 807) introduced disability benefits. Further expansions in the Social Security Amendments of 1965 (Pub. L. 89-97, 79 Stat. 286) included Medicare and Medicaid. Through the 1980s, reforms focused on program solvency, notably with the Social Security Amendments of 1983 (Pub.L. 98–21, 97 Stat 65), which adjusted tax rates and the full retirement age to secure long-term solvency.

Class actions play a critical role in shaping SSA administrative practices and beneficiary rights. In the 1970s and 1980s, class actions frequently addressed systemic issues like procedural protections for claimants with overpayments, the pain standard for disability claimants, the medical improvement standard for benefit terminations, and delays in disability hearings.

One key case, *Califano v. Yamasaki*, 442 U.S. 682 (1979), upheld the right of Social Security beneficiaries to bring class actions -- nationwide class actions -- ensuring procedural protections like personal hearings before overpayment recovery. The Social Security Disability Benefits Reform Act of 1984 (PL 98-460, 98 Stat 1794) was partly a response to widespread litigation over unfair termination of disability benefits, leading to more safeguards for recipients. More recent class actions, such as *Clark v. Astrue*, 602 F.3d 140 (2d Cir. 2010) -- another nationwide class action -- challenged the suspension of benefits without proper notice and hearings for individuals accused of crimes. The *Campos* case protected the rights of overpaid claimants during the pandemic. *Campos v. Kijakazi*, 2023 WL 8096923, No. 21 CIV. 5143 (VMS), 2023 WL 809692 (E.D.N.Y. Nov. 20, 2023) (nationwide class certified). Using class actions, claimants and their attorneys have continually pushed for greater fairness in the administration of Social Security program benefits.

Class actions are an appropriate method of resolving policy issues. SSA seeks to administer its programs uniformly and nationally. Nationwide class actions promote uniformity in a nationwide program. Any policy that affects one claimant affects all similarly situated claimants. Class adjudication is an efficient method of resolving policy issues. If there is a change in policy for one claimant, that change should apply to all.

Over the last 50 years, there have been dozens of class actions litigated against SSA. Many were nationwide in scope, but most were not. Some made major changes in the eligibility for and payment of benefits, while others did not. Overall, these cases reveal that the arguments raised by SSA in this litigation are inconsistent with the historical context. A few of these decisions are described below.

A. CALIFANO V. YAMASAKI, 442 U.S. 682 (1979).

In *Yamasaki,* the Second Circuit certified a nationwide class. *Califano v. Yamasaki*, 442 U.S. 682 (1979). The primary legal issue was whether the Due Process Clause of the Fifth Amendment required SSA to provide an oral hearing before recouping overpayments when a waiver was requested. The Supreme Court held that individuals who requested a waiver of overpayment were entitled to a pre-recoupment oral hearing. However, those who only requested reconsideration of the overpayment determination were not entitled to such a hearing. The decision affirmed the right to procedural due process for beneficiaries facing recoupment. The decision also addressed class action issues and affirmed nationwide class certification. It affected a large class of claimants, though the exact number of class members is unknown. The ruling continues to benefit thousands of individuals every year.

B. CITY OF NEW YORK V. HECKLER, 476 U.S. 467 (1986).

The district court in *City of New York* certified a class covering the state of New York and its four judicial districts. *See City of New York v. Heckler*, 578 F. Supp. 1109, 1114 (E.D.N.Y. 1984), *subsequent history omitted.* The primary legal issue was whether SSA's policy of presuming that mentally disabled claimants who did not meet or equal the Listings of Impairments necessarily retained sufficient residual functional capacity to do at least "unskilled work" violated the Social Security Act and due process rights. *See* 42 U.S.C. § 423(d)(2)(A). The Supreme Court upheld the lower court's decision, which required SSA to reopen and reevaluate thousands of improperly denied claims, applying the correct standards for assessing severity and limitations. The Court also affirmed waiver of the 60-day statute of limitations for judicial review because SSA's covert policies effectively prevented claimants from understanding their rights or knowing about the unlawful practices.

The decision had a broad and significant impact on SSA's disability determination process. The ruling forced SSA to abandon its secretive policy and provided relief to thousands of claimants whose benefits had been improperly denied. It also reinforced the principle that statutory deadlines for seeking judicial review could be waived in cases where the government concealed its practices, ensuring that claimants are not unfairly barred from relief. The class was estimated to include more than 50,000 New York residents. *City of New York v. Heckler*, 742 F.2d 729, 731 (2d Cir. 1984).

C. SULLIVAN V. ZEBLEY, 493 U.S. 521 (1990).

In *Zebley,* 493 U.S. at 521, the court certified a nationwide class. *Zebley v. Sullivan*, No. 83-3314, 1991 WL 65530 (E.D. Pa. Mar. 14, 1991). Plaintiffs challenged SSA's regulations for determining childhood disability as inconsistent with the Social Security Act. SSA used a "listings-only" approach, which required children to meet or equal specific medical criteria to qualify for benefits. The Court, relying on 42 U.S.C. § 1382c(a)(3), found this standard violated the Act's "comparable severity" requirement because it did not consider the child's functional limitations, as was done for adult disability claims.

The Court held that SSA must implement an individualized functional assessment for children's claims. SSA estimated that the workload would include re-adjudicating about 550,000 claims, along with an ongoing workload of approximately 35,000 additional cases per year. SSA, 2013 Annual Report of the SSI Program (https://www.ssa.gov/OACT/ssir/SSI13/SSAB_Statement.html) (last accessed Oct. 2, 2024). SSA re-adjudicated hundreds of thousands of previously denied claims under the new standard that included an assessment of functional limitations and their ability to perform age-appropriate

activities. SSA continues to use this standard to adjudicate children's claims. *See* 20 C.F.R. §§ 416.924, 416.924a,416.926, 416.926a.

D. POLASKI V. HECKLER, 739 F.2D 1320 (8TH CIR. 1984).

In *Polaski*, 739 F.2d 1320*,* the Eighth Circuit certified a class consisting of six states: Minnesota, North Dakota, South Dakota, Missouri, Nebraska, and Iowa. *Polaski v. Heckler*, 585 F. Supp. 997, 999 (D. Minn. 1984). The primary issues included whether SSA could terminate benefits without a showing of medical improvement and whether SSA improperly evaluated disability claims by requiring objective medical evidence to fully substantiate claimants' subjective complaints of pain and other symptoms. The settlement agreement required SSA to use a more comprehensive and holistic approach to assess disability claims involving subjective symptoms. The court issued a preliminary injunction, ordering the Secretary to stop denying or terminating disability benefits without following the proper standards for evaluating pain and subjective complaints. The court also mandated reconsideration of the claims of individuals within the class under these standards. The case later settled. The *Polaski* case, and other class actions around the same time, led to the promulgation of 20 C.F.R. §§ 404.1529, 416.929, regulations still in effect. *See, e.g., Hyatt v. Sullivan*, 899 F.2d 329 (4th Cir. 1990).

E. SCHISLER V. BOWEN, 851 F.2D 43 (2D CIR. 1988).[2]

In *Schisler,* the class consisted of New York State residents. *Schisler v. Heckler*, 787 F.2d 76, 79 (2d Cir. 1986). The central legal issues were whether SSA could terminate benefits without a showing of medical improvement and whether SSA improperly disregarded the opinions of treating physicians, in violation of the established "treating physician rule." The treating physician rule held that treating physicians' opinions were entitled to extra weight due to

[2] *Schisler, Polaski,* and *Hyatt* all involved the Medical Improvement standard as well.

their ongoing relationship with the claimant. The court ruled that SSA must give these opinions significant deference unless the opinions were inconsistent with other substantial evidence. Relief included the reopening and reevaluation of the claims of the class members whose claims had been adversely affected. The court ordered SSA to revise its regulations to ensure compliance with the treating physician rule. This case led to the codification of the Treating Physician Rule at 20 C.F.R. §§ 404.1527 and 416.927, in effect until 2017. *See* Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 F.R. 5844-01 (Jan. 18, 2017). This decision impacted thousands of claimants, ensuring they were granted a fair review of their disability claims that included proper consideration of treating physicians' opinions.

F. STIEBERGER V. SULLIVAN, 738 F. SUPP. 716 (S.D.N.Y. 1990).

In *Stieberger*, the court also certified a statewide class covering all four district courts in New York State. *Stieberger v. Bowen*, 801 F.2d 29, 31 (2d Cir. 1986). The central legal issue was SSA's failure to comply with court rulings ("non-acquiescence") from the Second Circuit regarding disability determinations, resulting in the wrongful denial or termination of disability benefits for thousands of claimants. The settlement allowed for the reopening and reconsideration of disability claims denied during the relevant period, along with potential retroactive benefits for up to 48 months.

G. CAMPOS V. KIJAKAZI, NO. 21 CIV. 5143 (VMS), 2023 WL 8096923 (E.D.N.Y. NOV. 20, 2023).

The *Campos* case was a nationwide class as well. *Campos v. Kijakazi*, 2023 WL 8096923, No. 21 CIV. 5143 (VMS), 2023 WL 809692 (E.D.N.Y. Nov. 20, 2023). Plaintiffs challenged SSA's actions during the COVID-19 pandemic. SSA had wrongfully reduced or discontinued Supplemental Security Income (SSI) benefits for thousands of recipients while its offices were closed, leaving many without access to the agency to address these reductions. The legal issues

involved violations of the Social Security Act and the Due Process and Equal Protection Clauses. The settlement, finalized in November 2023, provided automatic remedies to nearly 250,000 SSI recipients. These individuals were entitled to back benefits or other relief without the need to take further action. This nationwide class action impacted SSI beneficiaries who had their benefits disrupted due to SSA's failures during the pandemic shutdown, especially for those who lost access to both SSI and, in some cases, Medicaid. Under the *Campos* settlement, nearly a quarter million SSI recipients received relief if they incurred overpayments from March 2020 to September 2020 that were manually processed. These overpayments were waived. If a class member repaid all or part of the overpayment, they received back benefits credited to their accounts without further action. The settlement also provided relief to another group of nearly two million more recipients by clarifying the standards by which they can request waivers of overpayments that arose during the COVID-19 National Emergency Period of March 2020 to April 2023. These class members received a notice informing them of how to request a waiver, and of facts that may be relevant to SSA. *See* Empire Justice Center, *Settlement Reached in Campos*, 2023 WL 8096923 (January 31, 2024) (https://empirejustice.org/resources_post/settlement-reached-in-campos/; last accessed Oct. 3, 2024); SSA, Emergency Message EM-24005 REV (July 15, 2024) (https://secure.ssa.gov/apps10/reference.nsf/links/02232024011610PM; last accessed Oct. 10, 2024).

H. STEIGERWALD V. BERRYHILL, 357 F. SUPP. 3D 653 (N.D. OHIO 2019), AMENDED, NO. 1:17-CV-1516, 2019 WL 1433851 (N.D. OHIO APR. 1, 2019).

In *Steigerwald,* the court certified a nationwide class. *Steigerwald v. Comm'r of Soc. Sec.*, 326 F.R.D. 469, 480 (N.D. Ohio 2018). The primary legal issue was whether SSA properly

calculated and disbursed past-due disability benefits by not performing the required "Subtraction Recalculations." This recalculation is necessary to ensure that claimants do not receive more benefits than they are entitled to after attorney fees are deducted from their retroactive benefits. The court found that SSA's failure to perform these recalculations was a systemic issue that led to underpayments. SSA argued that the district court did not have the authority under the Social Security Act's judicial review provision to order these recalculations and that attorney fees could not be recovered under 42 U.S.C. § 406(b) for representation of the claimants. The court ordered SSA to recalculate and pay back benefit payments. This case provided relief for over 130,000 disabled beneficiaries and found that SSA collectively owed 70,000 of those class members more than $107 million.

I. THE PROCESS UNIFICATION RULINGS.

One other specific result of prior class actions was the development of the Process Unification Rulings. In the 1990s, in class actions against SSA and state DDSs, the plaintiffs commonly alleged that the standards used for case development and adjudication at the DDS level were much stricter than the standards used by administrative law judges (ALJs). During depositions, some ALJs and DDS personnel stated that they shared that perception. In the mid-1990s, SSA attempted to ensure more consistent decisions by implementing its Process Unification initiative. As part of this initiative, in 1996 the agency issued a series of Social Security Rulings that require adjudicators to fully explain in their decisions 1) why a claimant was found credible or not credible, 2) how opinion evidence from various sources, especially treating sources, is weighed, 3) what record evidence supported assessments of residual functional capacity, and more. *Id.* at 103; *see* Social Security Rulings 96-1p through 96-9p. The Process Unification Rulings ensure the same standards are used nationally and at all levels of

adjudication by clarifying SSA disability policies and filling in the gaps. *See* General Accounting Office (GAO), *Disability Programs: SSA Has Taken Steps to Address Conflicting Court Decisions, but Needs to Manage Data Better on the Increasing Number of Court Remands* 4, 6, 14, 18, 21 (April 2007) (https://www.gao.gov/assets/gao-07-331.pdf; last accessed October 7, 2024).[3] These policies affect every disability claimant from July 1996 to the present, literally tens of millions of individuals.

These are not isolated cases. The Social Security Advisory Board (SSAB),[4] recognizing the importance of class action lawsuits in the development of Social Security disability policy, issued SSAB, *Aspects of Disability Decision Making: Data and Materials* (2012) (https://s3-us-gov-west-1.amazonaws.com/cg-778536a2-e58c-44f1-9173-29749804ec54/uploads/2021/03/2012-Chartbook_Aspects-of-Disability-Decision-Making_2012.pdf; last accessed October 7, 2024). SSAB discussed some 30 class actions related to SSA's disability policies. *Id.* at 101-03. Individually and collectively, these cases provide a taste of the effectiveness and the need for class actions.

[3] The GAO Report includes a more detailed summary of the Process Unification Rulings. *Id.* at 32 (Appendix 2).

[4] The Social Security Independence and Program Improvements Act of 1994 (SOCIAL SECURITY INDEPENDENCE AND PROGRAM IMPROVEMENTS ACT OF 1994, PL 103–296, August 15, 1994, 108 Stat 1464) established a bipartisan board to advise the President, Congress, and the Commissioner of Social Security on matters related to the Social Security and Supplemental Security Income programs and policies. SSAB, *About the Board* (https://www.ssab.gov/about/ last accessed October 7, 2024).

III. THE COMMISSIONER'S POSITIONS IN THIS LITIGATION ARE CONTRARY TO THE GREAT WEIGHT OF THE CASELAW AND THE HISTORICAL CONTEXT OF SOCIAL SECURITY CLASS ACTIONS.

The Social Security Act is a remedial statute, to be broadly construed and liberally applied in favor of beneficiaries. *Dorsey v. Bowen*, 828 F.2d 246, 248 (4th Cir. 1987); *see* Samuels and Telfer, *§ 19:39. Liberal Construction of the Social Security Act,* 2 SOC. SEC. DISAB. CLAIMS PRAC. & PROC. § 19:39 (2nd ed.) ("Virtually every circuit has ruled that the Social Security Act is a remedial statute and should be broadly construed and liberally applied in favor of disability"). The Social Security Act was intended to be unusually protective of claimants. *Bowen v. City of New York*, 476 U.S. 467, 480, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986); *see* Kubitschek and Dubin, *§ 1:14 Statutory law,* SOCIAL SECURITY DISABILITY LAW & PROCEDURE IN FEDERAL COURT (2024). The intent of the Act is inclusion, not exclusion, and its purpose of easing the insecurity of life. *Rivera v. Schweiker*, 717 F.2d 719 (2d Cir. 1983); *Pelletier v. Sec'y of Health, Ed. & Welfare*, 525 F.2d 158, 161 (1st Cir. 1975). This Court must view SSA's arguments to restrict the availability of class relief in this light.

A. THE COMMISSIONER'S ARGUMENTS REGARDING Fed. R. Civ. P. 23(a) *ARE FLAWED, PARTICULARLY REGARDING THE IMPRACTICALITY OF JOINDER.*

The Commissioner's arguments generally are contrary to the historical context of Social Security class action litigation. Of particular concern is the Commissioner's position on Fed. R. Civ. P. 23(a)(1), numerosity and impracticality of joinder.

Although referred to as a numerosity requirement, the real inquiry under Fed. R. Civ. P. 23(a)(1) is whether joinder would be impractical. A relatively small class may be certified if joinder is impractical. *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 603 (D. Colo. 1990). Fed. R. Civ. P. 23(a)(1) requires examination of the specific facts of each case and imposes no absolute

limitations. *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980). Courts have not required evidence of the exact class size or identity of class members to satisfy the numerosity requirement. *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993); *see, e.g., Barlow v. Marion Cnty. Hosp. Dist.*, 88 F.R.D. 619, 625 (M.D. Fla. 1980). Courts generally follow the rule of thumb that a class of over 40 persons is sufficiently "numerous" for Fed. R. Civ. P. 23 purposes. 3B J. Moore, W. Taggart, J. Wicker, *Moore's Federal Procedure* 23.05[1] (2d ed. 1981), *cited in Richter v. Bowen*, 669 F. Supp. 275, 281 (N.D. Iowa 1987). When the class is fluid as it is here (with new members meeting the class definition as time passes), the true impracticability of joinder in this case is clear. *See U.S. ex rel. Green v. Peters*, 153 F.R.D. 615, 618 (N.D. Ill. 1994).

The numbers support the existence of a large class of affected claimants that increases every year. In fiscal year 2022, SSA awarded reduced early retirement benefits to 1.74 million claimants. SSA, *Annual Statistical Supplement, 2023* (Table 6.B3) (https://www.ssa.gov/policy/docs/statcomps/supplement/; last accessed Oct. 4, 2024). That same year, SSA awarded benefits to 115,627 children based on a parent's entitlement to retirement benefits (both reduced early retirement and retirement at full retirement age or later). *Id.* (Table 6.D4). Of those children, 60,278 were under age 18; 22,348 were Disabled Adult Children; and 33,001 were students ages 18-19 and attending secondary school. *Id.* The numbers amply justify a finding that the joinder of all class members in a nationwide class is impractical.[5]

Even if the Court accepts SSA's tolling and venue arguments (*see* III.B., C., *infra*), joinder is impractical. A conservative assumption is that 1/3 of the 115,000 children awarded

[5] While the data for fiscal years 2023 and 2024 are not yet available, the numbers are believed to be similar.

benefits in FY 2022 received benefits based on a parent's early retirement which means about 38,333 children were in such households. Assuming a class limited to the approximately 6.5 million people residing in the Eastern District of Virginia indicates there are about 755 new class members yearly. The latest possible opening date for the class is 60 days before filing the complaint in this matter. In the last three months, then, almost 190 children have entered the class and, perhaps more importantly, 60 more children join the class every month. Joinder, then, is impractical even for a class limited to the Eastern District of Virginia.

The Court, then, should find joinder is impractical. The real question is the scope of the class, as discussed below.

B. THE COMMISSIONER'S ARGUMENTS REGARDING TOLLING ARE FLAWED AS THE COMMISSIONER'S POLICY FEIGNED ACQUIESCENCE WITH PARISI.

The Supreme Court in *City of New York* established that a secret policy can justify equitable tolling of waiver of exhaustion.[6] *Accord Hyatt v. Heckler*, 807 F.2d 376, 381 (4th Cir. 1986); *Goodnight v. Shalala*, 837 F. Supp. 1564, 1573 (D. Utah 1993). In contrast, the Supreme Court denied waiver when the claim involved a regulation published for notice and comment. *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988). The dividing line is publication in the Federal Register.[7] Several courts have found that the failure to

[6] A secret policy is not the only way to justify equitable tolling. *See, e.g., Medellin v. Shalala*, 23 F.3d 199, 204 (8th Cir. 1994); *Titus v. Sullivan*, 4 F.3d 590, 592–93 (8th Cir. 1993). Equitable tolling is available, for example, where the claimant has actively pursued judicial remedies by filing a defective pleading during the statutory period. *See, e.g., Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96, 111 S. Ct. 453, 457–58, 112 L. Ed. 2d 435 (1990).

[7] In addition, some courts have refused to toll the sixty-day appeal period where the notice specifically recited the policy. *See, e.g., Day v. Shalala*, 23 F.3d 1052, 1058 (6th Cir. 1994) (policy not secret when included in denial notice); *Clark v. Astrue*, 274 F.R.D. 462, 470 (S.D.N.Y. 2011). Upon information and belief, the notice sent to L.N.P. and class members did not articulate the policy at issue here.

publish the challenged policies has had the same practical effect on claimants as the defendant's secretive conduct in *City of New York*. *See, e.g., Wilson v. Sullivan*, 734 F. Supp. 157, 173 (D.N.J. 1990); *Hill v. Sullivan*, 125 F.R.D. 86, 95 (S.D.N.Y. 1989). In contrast, publication of regulations or a Social Security Ruling in the Federal Register precludes the finding of a secretive policy. *See, e.g., Medellin v. Shalala*, 23 F.3d 199, 205 (8th Cir. 1994); *Johnson v. Sullivan*, 922 F.2d 346, 355 (7th Cir. 1990).

The Commissioner asserts the decision at issue here was based on policy manual sections. *See* Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification (Dkt. 27) at 12. The Program Operations Manual System (POMS)[8] is not published in the Federal Register. SSA has not published the challenged policy.

In contrast, SSA published in the Federal Register:

1. Acquiescence Ruling 97-1(1), 62 F.R. 1792 (Jan. 13, 1997) (applying *Parisi* in the First Circuit);
2. Rescission of Social Security Acquiescence Ruling 97-1(1), 64 F.R. 57919 (Oct. 27, 1999) (rescinded as SSA adopted the holding of *Parisi* on a nationwide basis); and
3. Interim Final Rules purporting to adopt the holding of *Parisi* on a nationwide basis, Reduction of Title II Benefits Under the Family Maximum Provisions in Cases of Dual Entitlement; Interim Final Rules, 64 F.R. 57774 , (Oct. 27, 1999); and
4. Final Rules, Reduction of Title II Benefits Under the Family Maximum Provisions in Cases of Dual Entitlement, 65 F.R. 38424 (June 21, 2000) (These final rules adopt nationwide the holding of the U.S. Court of Appeals for the First Circuit in ***Parisi*** *by Cooney v. Chater*).

The POMS accurately stated SSA's policy. In light of SSA's published statements that do not accurately reflect the holding in *Parisi,* relying on the POMS is akin to burying it in a footnote.

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[8] According to SSA, the POMS is a primary source of information used by Social Security employees to process claims for Social Security benefits. The public version of POMS is identical to the version used by Social Security employees except that it does not include internal data entry and sensitive content instructions. SSA, *POMS Home Page* (https://secure.ssa.gov/apps10/; last accessed Oct. 10, 2024).

Each published notice led the public to believe SSA policy followed *Parisi.* SSA gave the illusion of following a public policy while implementing a secretive policy through the POMS.

SSA also argues that tolling "cannot be resolved on a class-wide basis" as tolling often necessitates individualized inquiries. Dkt. 27 at 13. While that principle may be true generally, that is not true where a policy is secret as, by definition, the class as a whole is not aware of the policy. The Defendants' position is inconsistent with *City of New York* where the Supreme Court affirmed equitable tolling. *See City of New York,* 476 U.S. at 482. Similarly, the Defendants' position is also inconsistent with the class certified in *Zebley* where the Complaint was filed in July 1983, but the class extended back to January 1, 1980. *Zebley by Zebley v. Bowen*, 855 F.2d 67, 71 (3d Cir. 1988), *aff'd sub nom. Sullivan v. Zebley*, 493 U.S. 521, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990); *Zebley v. Sullivan*, No. 83-3314, 1991 WL 65530, at *1 (E.D. Pa. Mar. 14, 1991). These cases demonstrate that tolling can, in fact, be resolved on a class-wide basis.

In short, to preclude a finding that SSA employs a secret policy requires publication in the Federal Register, not the POMS. SSA did not do that. Moreover, publication in the Federal Register of the general policy that may mislead the public on this issue supports the finding of a secret policy.

C. THE COMMISSIONER'S ARGUMENTS REGARDING VENUE ARE INCONSISTENT WITH THE REMEDIAL NATURE OF THE ACT, VENUE GENERALLY, AND VENUE IN CLASS ACTIONS.

The Commissioner's argument that any class must be limited to the Eastern District of Virginia flies in the face of the statute and past judicial proclamations. The venue provision of 42 U.S.C. §405(g) cannot be taken literally. The relevant sentence states:

> Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has **his** principal place of business, or, if **he** does not reside or have **his** principal place of business within

> any such judicial district, in the United States District Court for the District of Columbia.

42 U.S.C. § 405(g) (sentence two; emphasis added). That provision allows only male plaintiffs and no female to file for judicial review. Rather, this Court should broadly construe and liberally interpret the venue provision, and the Social Security Act generally, in favor of beneficiaries. *See Dorsey v. Bowen,* 828 F.2d 246, 248 (4th Cir. 1987). As the Supreme Court found in *Yamasaki,* the fact that the statute speaks in terms of an action brought by "any individual" or that it contemplates case-by-case adjudication does not indicate that Fed. R. Civ. P. 23(a) providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible. *Califano v. Yamasaki*, 442 at 682. Similarly, the venue provision contemplates case-by-case adjudication. That provision should be read broadly in favor of claimants and class relief, requiring only the named plaintiff to reside in this district.

Similarly, "the venue provision in 42 U.S.C. § 405(g) should be interpreted in harmony with 28 U.S.C. § 1391(e), such that venue is proper in an action under § 405(g) for all plaintiffs so long as it is proper for at least one plaintiff." *Fournier v. Johnson*, 677 F. Supp. 2d 1172, 1174 (D. Ariz. 2009). In any case, venue is generally proper as to a class so long as venue is proper as to the representative plaintiff. *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 139–40 (7th Cir. 1974). This is true in the Social Security context as well. *Blackman v. Shalala*, No. 92 C 5472, 1993 WL 181466, at *5 (N.D. Ill. May 27, 1993). Sovereign immunity, then, is not at issue here as the named plaintiff is a resident of this district.

It is not surprising, then, that the courts have repeatedly certified classes that extend beyond the borders of one judicial district and the Supreme Court and circuit courts of appeal have repeatedly affirmed those findings. Again, there are multiple examples:

- *Califano v. Yamasaki*, 442 U.S. 682 was a nationwide class regarding the right to an overpayment hearing before recoupment. *Califano v. Yamasaki*, 442 U.S. at 684.
- *City of New York v. Bowen*, 476 U.S. 467 (1986) affirmed certification on a class encompassing all four U.S. district courts in the State of New York. *City of New York*, 578 F. Supp. at 1114.
- *Sullivan v. Zebley*, 493 U.S. 521 (1990), the nationwide children's SSI disability case, included a half-million claimants. *Zebley v. Sullivan,* No. 83-3314, 1991 WL 65530, (E.D. Pa. Mar. 14, 1991).
- *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984) covered most of the Eighth Circuit - Minnesota, North Dakota, South Dakota, Missouri, Nebraska, and Iowa. *Polaski*, 585 F. Supp. at 999.
- *Schisler v. Bowen*, 851 F.2d 43 (2d Cir. 1988) led to the promulgation of the Treating Physician Rule; brought as a class covering the four districts in the State of New York. State. *Schisler*, 787 F.2d at 79.
- *Stieberger v. Sullivan*, 738 F. Supp. 716 (S.D.N.Y. 1990) was another New York State class leading to national policy changes. *Stieberger*, 801 F.2d at 31.
- *Campos v. Kijakazi*, No. 21 CIV. 5143 (VMS), 2023 WL 8096923 (E.D.N.Y. Nov. 20, 2023), relating to overpayments assessed during the pandemic, was a nationwide class action.
- *Steigerwald v. Berryhill,* 357 F. Supp. 3d 653 (N.D. Ohio 2019) was a nationwide class. *Steigerwald*, 326 F.R.D. at 480.

In addition, as noted above, SSA's 1991 pain standard resulted from several class actions, including *Hyatt*, 899 F.2d at 329. Of note, the *Hyatt* class encompassed the state of North Carolina, including all three judicial districts. *See Hyatt v. Heckler*, 711 F. Supp. 837, 838 (W.D.N.C. 1989), *aff'd in part, amended in part, vacated in part sub nom. Hyatt v. Sullivan*, 899 F.2d 329 (4th Cir. 1990).

The takeaway is that the courts have consistently recognized the venue provision of 42 U.S.C. § 405(g) applies to the named plaintiff, not the plaintiff class. *See Lugo v. Heckler*, 98 F.R.D. 709, 713 (E.D. Pa. 1983) (the Secretary's venue argument was unavailing as the Supreme Court stated that a nationwide class may be appropriate in some Social Security litigation). The Commissioner's position defies logic, asserting venue must be proper for all members of a class to bring a valid class action. Accepting the Commissioner's venue argument means no nationwide class action could ever be brought. Such a circumstance is not what the Federal Rules contemplated when authorizing a class action. It is sufficient that L.N.P.'s claims are properly brought in this district. *Andre v. Chater*, 910 F. Supp. 1352, 1361 (S.D. Ind. 1995). This Court has the authority to certify a nationwide class.

IV. CONCLUSION.

Social Security class action litigation has a long and rich history. The courts have consistently provided broad-based relief over the last forty or more years. Policies affecting all claimants are particularly susceptible to classwide relief. Nationwide class actions promote uniformity in a nationwide program. SSA's attempts to limit class action relief are not well-founded. This Court should interpret the Act liberally to further its goals of providing for the elderly, blind, and disabled workers and their families.

SSA's early retirement program encompasses millions of workers and millions of family members. Even a relatively small policy change affects many people. Joinder simply is not practical. SSA's failure to publish the policy at issue in the Federal Register justifies the finding of a secret policy, especially in light of its public and published pronouncements of following *Parisi.* Finally, the statutory language and construction, as well as its history, all support a broad reading of the venue provision.

Respectfully submitted,

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By:

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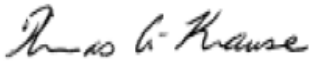

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