No. 16-1371

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DENISE HART, *et al.*,

Plaintiffs-Appellants,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security Administration,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
at Greenbelt

BRIEF OF *AMICI CURIAE* JUSTICE IN AGING, IMPACT FUND, AND CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

KATHRYN R. LANG*
ANNA RICH*
JUSTICE IN AGING
1444 Eye Street NW, Suite 1100
Washington, DC 20005
T: (202) 289-6976
klang@justiceinaging.org
arich@justinginaging.org

DANIEL F. GOLDSTEIN
CHELSEA J. CRAWFORD
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202
T: (410) 962-1030
dfg@browngold.com
ccrawford@browngold.com

Counsel for Amici Curiae

ADDITIONAL COUNSEL

JOCELYN LARKIN*
LINDSAY NAKO*
LYNNETTE MINER*
IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
T: (510) 845-3473
jlarkin@impactfund.org
lnako@impactfund.org
lminer@impactfund.org

JULIE WILENSKY*
CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER
2120 University Avenue
Berkeley, CA 94704
T: (510) 431-8484
jwilensky@creeclaw.org

* Not admitted to practice in this Court.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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AMICI CURIAE
(continued)

- Disability Rights Education and Defense Fund
- Disability Rights North Carolina
- Legal Aid Society – Employment Law Center
- Maryland Disability Law Center, Inc.
- National Association of the Deaf
- Protection and Advocacy for People with Disabilities, Inc.
- Judge David L. Bazelon Center for Mental Health Law
- Disability Rights California
- National Federation of the Blind

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CONSENT OF PARTIES TO FILING

Counsel for *amici curiae* hereby certify that all parties consent to the filing of this brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), Justice in Aging, Impact Fund, the Civil Rights Education and Enforcement Center, and 12 fellow non-profit legal organizations respectfully submit this brief supporting Plaintiffs-Appellants Denise Hart et al. and urging reversal of the district court's decision.[1]

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Established in 1972, Justice in Aging, formerly known as the National Senior Citizens Law Center, works to preserve and strengthen Medicaid, Medicare, Social Security, and Supplemental Security Income—benefits programs that allow low-income older adults to live with dignity and independence. Justice in Aging seeks to ensure that low-income older adults have ready access to the courts and regularly participates in class action litigation, primarily focused on post-eligibility issues in these

[1] *Amici* are non-profit organizations of attorneys and are not parties to this action. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* hereby state that the brief was not authored, in whole or in part, by either party's counsel; they know of no party or party's counsel who have contributed money that was intended to fund preparing or submitting the brief; and they know of no person who contributed money that was intended to fund preparing or submitting the brief.

federal benefits programs. Justice in Aging has developed expertise on the experiences and concerns of recipients of federal benefits and the effect of policies that unlawfully deprive individuals of these benefits.

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for litigation to achieve economic and social justice. The Impact Fund provides funding for impact litigation, offers innovative training and support, and serves as counsel in impact litigation across the country. The Impact Fund has served as counsel in a number of major class actions, including cases challenging employment discrimination, wage-and-hour violations, lack of access for those with disabilities, and violations of fair housing laws. Through its work, the Impact Fund seeks to preserve class actions as an effective mechanism to effect structural reform and institutional change, particularly for individuals who would otherwise not be able to challenge unlawful government or corporate policies or practices.

The **Civil Rights Education and Enforcement Center ("CREEC")** is a national non-profit membership organization whose mission is to ensure that everyone can fully and independently participate in our nation's civic life without discrimination based on race, gender, disability, religion, national origin, sexual orientation, or gender identity. Based in Colorado and California, CREEC promotes its mission through education, advocacy, and litigation nationwide on a

broad array of civil rights issues. A major focus of CREEC's work is ensuring that people with disabilities have access to all programs, services, and benefits of public entities, and that laws protecting the rights of people with disabilities are effectively enforced to ensure equal access and independence.

AARP is a non-profit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, **AARP Foundation**, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. Over 20 million low-income people age 50+ lack adequate financial resources to meet their basic needs. Among other things, AARP and AARP Foundation advocate to assure that Social Security benefits, including disability benefits and Supplemental Security Income, are paid promptly to eligible recipients.

The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities ("I/DD"). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc has appeared as *amicus curiae* in this Court in a variety of cases involving disability civil rights and has a vital interest in ensuring

that all individuals with I/DD receive the appropriate protections and supports to which they are entitled by law.

Disability Rights Advocates ("DRA") is one of the leading non-profit, disability rights legal centers in the nation. Its mission is to advance equal rights and opportunity for people with all types of disabilities nationwide. DRA identifies and dismantles barriers in partnership with a broad spectrum of local and national client organizations, representing people with the full spectrum of disabilities, including mobility, sensory, cognitive and psychiatric disabilities. DRA represents these organizations in complex, systems-change litigation with a focus on class actions.

Disability Rights California (formerly known as Protection and Advocacy, Inc.), is a non-profit agency established under federal law to protect, advocate for and advance the human, legal and service rights of Californians with disabilities. Disability Rights California works in partnership with people with disabilities, striving towards a society that values all people and supports their rights to dignity, freedom, choice, and quality of life. Since 1978, Disability Rights California has provided essential legal services to people with disabilities. In the last year, Disability Rights California provided legal assistance on nearly 26,000 matters to individuals with disabilities, including impact litigation and direct representation.

Disability Rights California has extensive policy and litigation experience securing the rights of people with disabilities to public benefits.

The **Disability Rights Education & Defense Fund ("DREDF")**, based in Berkeley, California, is a national non-profit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy, litigation, and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws. A consistent correlation in U.S. Census statistical data and socio-economic analyses shows how disability is both a cause and a consequence of poverty. People with disabilities are disproportionately eligible for legal aid, and disproportionately likely to be among the low-income and disadvantaged parties that comprise the bulk of self-represented litigants. Concerns of relevance to legal aid-eligible and self-represented litigants are thus of particular relevance to people with disabilities.

Disability Rights North Carolina ("DRNC") is North Carolina's designated Protection and Advocacy System ("P&A"). DRNC is authorized by federal law to protect and advocate for the rights of individuals with disabilities. *See* 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.* (2006). Disability Rights NC, as the P&A, must "pursue legal, administrative, and other appropriate

remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State." 42 U.S.C. §§ 15041, 15043 (2014). DRNC, in conjunction with other public interest legal organizations, has participated in a number of large class actions that involve public benefits. *See, e.g.*, *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013); *K.C. v. Shipman*, 716 F.3d 107 (4th Cir. 2013).

The **Judge David L. Bazelon Center for Mental Health Law** is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, training and education, the Center promotes equal opportunities for people with mental disabilities in all aspects of life, including public benefits, health care, employment, education, community living, voting, family rights, and other areas. Class action litigation on behalf of individuals with disabilities is essential to the Center's ability to achieve its mission.

The **Legal Aid Society – Employment Law Center ("LAS-ELC")** is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities. The LAS-ELC has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals

with disabilities, the LGBT community, and the working poor. The LAS-ELC has represented, and continues to represent, clients faced with discrimination on the basis of their disabilities in both individual lawsuits and in class action lawsuits. The LAS-ELC has also filed amicus briefs in cases of importance to persons with disabilities.

Maryland Disability Law Center, Inc. ("MDLC"), a non-profit organization, has been Maryland's designated Protection and Advocacy agency mandated to advance the rights of Maryland residents with disabilities since 1977. MDLC provides free legal advocacy services to people with all types of disabilities and serves low-income and extremely low-income families and individuals. MDLC clients frequently receive Social Security Supplemental Income as their sole source of income, thus surviving at income levels substantially under the federal poverty level. Many clients receive Social Security Disability Income and are also at income levels at or below the federal poverty level. Unfortunately, MDLC is unable to meet the needs of numerous individuals who cannot obtain legal representation for matters related to their SSA benefits. MDLC has an interest in this case because the issues raised affect the rights of thousands of low-income persons with disabilities receiving social security benefits, and many of those individuals will not have access to lawyers and will otherwise be denied a meaningful opportunity to protect their SSA benefits.

The **National Association of the Deaf ("NAD")** was founded in 1880 by deaf leaders and is the oldest national civil rights organization in the United States. The NAD has a mission of preserving, protecting, and promoting the civil, human and linguistic rights of 48 million deaf and hard of hearing people in this country. The NAD was shaped by deaf leaders who believed in the right of the American deaf community to use sign language, to congregate on issues important to them, and to have its interest represented at the national level. The NAD engages in civil rights litigation on behalf of deaf and hard of hearing Americans, advocates for individuals and organizations in furthering its mission, and files amicus briefs in support of the rights of this community.

The **National Federation of the Blind ("NFB")** is the largest organization of blind and low-vision people in the United States. Founded in 1940, the NFB has grown to over fifty-thousand members. The organization consists of affiliates and local chapters in every state, the District of Columbia, and Puerto Rico. The NFB devotes significant resources toward advocacy, education, research, and development of programs to integrate the blind into society on terms of equality and independence, and to remove barriers and change social attitudes, stereotypes and mistaken beliefs about blindness that result in the denial of opportunity to blind people. The NFB actively engages in litigation and advocacy to protect the civil rights of the blind under our nation's laws.

Protection and Advocacy for People with Disabilities, Inc. ("P&A") is South Carolina's designated Protection and Advocacy System. P&A receives federal funding for the Protection and Advocacy for Beneficiaries of Social Security ("PABSS") grant to represent beneficiaries with disabilities who need advocacy or other services to secure, maintain, or regain gainful employment. 42 U.S.C. § 1320b-21(b)(2) (2000). P&A frequently represents beneficiaries who have work-related overpayments, sometimes tens of thousands of dollars, but who cannot understand the overpayment system to contest the amount or seek a waiver.

Amici are profoundly concerned about the impact of the district court's decision to dismiss this case and the incentive that it creates for the Social Security Administration ("SSA") to avoid accountability for unlawful policies and practices, such as the mishandling of alleged overpayments. By simply waiving or withdrawing its claims for overpayments when confronted with class action litigation, SSA and other similarly situated defendants can continue unconscionable behavior without the threat of class action challenges. The Court should not allow SSA and others to escape scrutiny in this way.

INTRODUCTION AND SUMMARY OF ARGUMENT

In October 2011, SSA amended its regulations to eliminate the ten-year statute of limitation for collecting debts (including alleged benefit overpayments) through withholding of federal tax refunds. *Grice v. Colvin*, No. GJH-14-1082,

2016 WL 1065806, at *1 (D. Md. Mar. 14, 2016) ("*Grice II*"). The amended regulation states that SSA "will refer overpayments to the Department of the Treasury for offset against Federal tax refunds regardless of the length of time the debts have been outstanding." 20 C.F.R. § 404.520(b). Between 2012 and 2014, SSA referred more than 250,000 individuals with alleged benefit overpayments that were *ten years old or older* to the Treasury Department for withholding of federal tax refunds.[2] The average value of these very old alleged debts is approximately $2,100. [3]

At the time an overpayment is discovered, SSA is required to notify the beneficiary, who can then either: (1) appeal the determination in an administrative review process, or (2) acknowledge the overpayment and apply for a waiver from repayment. Plaintiffs-Appellants Denise Hart et al. challenge a series of failures in SSA's notification and review process, including lack of adequate notice of overpayments, a practice of collecting overpayments from those other than the actual recipients of Social Security benefit payments, and failure to provide explanation or evidence supporting the alleged overpayments. Appellants' Br. 17-

[2] OFFICE OF THE INSPECTOR GEN., U.S. SOC. SEC. ADMIN., A-04-14-14104, THE SOCIAL SECURITY ADMINISTRATION'S USE OF THE TREASURY OFFSET PROGRAM 4 (2015), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-04-14-14104_0.pdf ("SSA referred 264,558 [10-year and older delinquent debts], totaling about $564 million, to Treasury for TOP [Treasury Offset Program].") [hereinafter *July 2015 OIG Report*].

[3] *Id.*

18. These systemic issues are particularly egregious because many recipients of Social Security benefits are low-income and face great difficulty in obtaining legal representation to assist in challenging the alleged overpayments.

Ms. Hart and others filed an Amended Complaint in this matter that included class claims and also filed early motions for class certification. Although the waiver applications of Ms. Hart and the other named plaintiffs had been pending for at least a year, it was only *after* SSA had failed in its first motion to dismiss (based on refunds of the seized federal tax refunds but without waiver of the underlying overpayment claim) that it issued the individual waivers for the named plaintiffs. Shortly after issuing the waivers, SSA moved a second time to dismiss the case for mootness. The district court granted the second motion to dismiss, finding that SSA's waiver of the named plaintiffs' overpayments mooted their claims.

Amici write in support of Plaintiffs-Appellants because SSA and other defendants in a similar position should not be permitted to moot representative plaintiffs' individual or class claims by unilateral action, thus avoiding judicial inquiry into their ongoing policies and practices. *Amici* write separately to emphasize the economic vulnerability of those affected by SSA's ongoing policies and practices, and the importance of preserving access to class actions as a way to address these issues in a systemic fashion. Class actions ensure judicial economy

and efficiency by aggregating individual claims, and are the only meaningful way to challenge SSA's methods of recouping decades-old overpayments. Absent a class action, putative class members are unlikely to pursue individual litigation and SSA's deficient policies and procedures will not be addressed and remedied on a systemic basis. The district court's order dismissing the case on this basis should be reversed.

ARGUMENT

I. Social Security Beneficiaries—Seniors, People with Disabilities, and Surviving Spouses and Children—Often Have Limited Resources and Depend on Social Security Benefits for Their Survival.

Social Security benefits are "essential to the economic well-being of millions of individuals."[4] Social Security beneficiaries—older adults, people with disabilities, and surviving spouses and children—often have limited resources and depend heavily on various types of Social Security benefits to meet their basic needs.

Nine out of ten people age 65 or older receive Social Security benefits, the "major source of income for most of the elderly."[5] The average monthly benefit for

[4] OFFICE OF RET. AND DISABILITY POL'Y, OFFICE OF RES., EVALUATION, AND STAT., U.S. SOC. SEC.ADMIN., SOC. SEC. PUBL'N. NO. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 9 (Apr. 2016), https://www.ssa.gov/policy/docs/statcomps/supplement/2015/ supplement15.pdf [hereinafter *2015 Stat. Supp.*].

[5] U.S. Soc. Sec. Admin., *Fact Sheet Social Security*, (Oct. 13, 2015), https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf.

a retired worker is $1,346.72.[6] For more than half of people age 65 or older, Social Security benefits are at least half of their total income. *2015 Stat. Supp.* at 9. In this age group, Social Security benefits contribute 90 percent or more of income for 21 percent of married couples and 46 percent of unmarried people. *Id.*

Social Security is also a crucial source of income for people receiving benefits based on disability, including more than 8.9 million people who can no longer work due to disability and receive Disability Insurance ("DI"). *Id.* at 2. The average monthly DI benefit is $1,166.13. *Apr. 2016 Snapshot* at tbl.2. More than half of DI beneficiaries rely on these benefits for at least 75 percent of personal income.[7] More than a third of DI beneficiaries rely on these benefits for 100 percent of their income, *Bailey & Hemmeter* at tbl.2, and more than a third of households receiving DI benefits rely on food stamps, *id.* at tbl.3. Approximately three in ten DI beneficiaries have a family income below 125% of the poverty threshold. *Id.* at tbl.5.

Finally, more than 8.3 million people, including nearly 7.2 million people who are blind or otherwise have a disability, receive Supplemental Security

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[6] U.S. Soc. Sec. Admin., *SSI Monthly Statistics, April 2016*, tbl.2 (Apr. 2016), https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot [hereinafter *Apr. 2016 Snapshot*].

[7] MICHELLE STEGMAN BAILEY & JEFFREY HEMMETER, U.S. SOC. SEC. ADMIN., RES. AND STAT. NOTE NO. 2015-02, CHARACTERISTICS OF NONINSTITUTIONALIZED DI AND SSI PROGRAM PARTICIPANTS, 2013 UPDATE, tbl.2 (Sept. 2015), https://www.ssa.gov/policy/docs/rsnotes/rsn2015-02.html [hereinafter *Bailey & Hemmeter*].

Income ("SSI"), another important source of support administered by SSA. *2015 Stat. Supp.* at tbl.7.A1. Only 3.1% of all SSI recipients have earned income, *id.* at tbl.7.D1, and individuals are generally not eligible for SSI if their resources (excluding certain enumerated items) exceed $2,000, *id.* at 20. The maximum 2016 federal benefit rate is $733 per month (for an individual living in his or her own household).[8] More than half of SSI recipients have a family income below 125% of the federal poverty threshold. *Bailey & Hemmeter* at tbl.12. More than six out of ten recipients live in a household receiving food stamps. *Id.* at tbl.9.

II. Many Social Security Recipients Have Difficulty Finding Representation in Cases Involving Overpayments.

Despite the crucial role that Social Security payments play in the economic security of recipients, obtaining representation when those payments are reduced or when federal tax refunds are seized is very difficult. Because successful plaintiffs obtain relatively small recoveries—forgiveness of an alleged debt owed to SSA and return of a seized federal tax refund—recipients of payments from SSA often have little incentive or ability to find a representative with the necessary knowledge or expertise willing to assist them in challenging an overpayment determination or seeking an overpayment waiver.

[8] U.S. Soc. Sec. Admin., *Understanding Supplemental Security Income SSI General Information – 2016 Edition* (2016), https://www.ssa.gov/ssi/text-general-ussi.htm.

Lawyers and other advocates who represent individuals before SSA generally focus on people *applying* for disability benefits. But, despite the availability of limited attorneys' fees from retroactive disability benefit payments awarded to successful applicants,[9] even those applying for disability benefits often have difficulty securing representation. SSA's own data have shown that approximately one-half of all Social Security claimants are unable to obtain attorney representation and one-third are unable to secure any representation at all in SSA proceedings.[10]

Individuals seeking to challenge alleged overpayments, such as the ones at issue in this case, have even less ability and incentive to obtain legal representation. To the extent there is any recovery to be had through the return of seized federal tax refunds, the returned amounts are relatively small. The average amount of a current overpayment is approximately $1,815, and the average amount

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[9] 42 U.S.C. § 406 (2012); 20 C.F.R. §§ 404.1730, 416.1530; SSA, Programs Operations Manual System ("POMS") GN 03943.005 (July 10, 2009).

[10] Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1294 (1997) [hereinafter *Dubin*]; *see also* Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131, 133 n.12 (2008) ("Even in SSI cases, where attorney's fees for representation at administrative hearings are recoverable from back awards of benefits, 40% of claimants came to hearings without attorney representation.") (citing Social Security Advisory Board, *Disability Decision Making: Data and Materials* 78 (May 2006), http://www.ssab.gov/Portals/0/OUR_WORK/REPORTS/Chartbook_Disability%20Decision%20Making_2006.pdf).

of a ten-year or older overpayment is approximately $2,131.[11] In the present matter, the named plaintiffs' alleged overpayments ranged from $723 to $3,066, amounts typical of those facing SSA overpayment claims.[12] Even when benefits themselves are at issue, many individuals pursue their cases before the SSA *pro se* because most middle- and low-income individuals simply cannot afford to pay fees to a lawyer or other representative out-of-pocket. *Dubin* at 1294.

Those who attempt to obtain free legal services from legal aid programs funded by the federal Legal Services Corporation ("LSC") or other independent civil legal aid programs often come up empty because of the lack of adequate civil legal services.[13] There is no right to counsel in public benefits cases. According to a 2009 report from the LSC, low-income individuals are able to find representation from private attorneys or civil legal services programs for only about one-fifth of their legal problems, and—for each client served by an LSC-funded program—at least one person who sought help was turned away because of a lack of program

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[11] OFFICE OF THE INSPECTOR GEN., U.S. SOC. SEC. ADMIN., COST-BENEFIT ANALYSIS OF PROCESSING LOW-DOLLAR OVERPAYMENTS 2 (2015), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-14-14065.pdf (In an examination of nearly 1 million overpayments from all programs with a debt detection date during FYs 2008 through 2013, SSA's Office of Inspector General found a total of $1.8 billion overpayments, averaging approximately $1,815 per overpayment.); *July 2015 OIG Report* at 4.

[12] Appellants' Br. 11-17; *Grice v. Colvin*, 97 F. Supp. 3d 684, 693 (D. Md. 2015) ("*Grice I*").

[13] *Number of Attorneys for People in Poverty*, Justice Index 2016, http://justiceindex.org/2016-findings/attorney-access/ (last visited June 23, 2016).

resources.[14] "In the absence of assistance from LSC and the paid professionals of the legal profession, claimants are left either to their own devices or to the sporadic assistance of individual practitioners willing to assist claimants on a pro bono basis." *Ford v. Shalala*, 87 F. Supp. 2d 163, 174 (E.D.N.Y. 1999), *judgment entered sub nom, Ford v. Apfel*, No. CV-94-2736 (CPS), 2000 WL 281888 (E.D.N.Y. Jan. 13, 2000).

All of these factors mean that those who are receiving or have received benefits from SSA often do not secure representation when faced with an allegation that they have been overpaid by SSA, leaving them vulnerable to the issues identified by Plaintiffs-Appellants. *See* Appellants' Br. 17-18.

III. Without Legal Representation, Claimants Often Have Great Difficulty Navigating Administrative Appeals and Requests For Waivers.

Without an attorney or other representative to guide them through the administrative overpayment appeal or waiver processes, individual beneficiaries often struggle to understand and follow arcane internal SSA processes. These challenges are compounded for beneficiaries with disabilities, who face additional barriers to navigating SSA's procedures on their own.

[14] Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* 12-16 (2009), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf.

SSA alleged 4,869 overpayments in Fiscal Years 2008 through 2012, not counting the over 250,000 overpayment claims triggered by the lifting of the ten-year statute of limitations in 2011.[15] In many of the 2008-12 cases, SSA suspended recovery activities when the individual filed an appeal or waiver request.[16] However, a recent study conducted by SSA's Office of the Inspector General ("OIG") found that SSA failed to resolve appeals and waiver requests in a timely fashion, leaving thousands of low-income families in financial limbo for extended periods. As of September 2015, beneficiaries had been waiting an average of *41 months* since filing their appeals or waiver requests, without any resolution. *Sept. 2015 OIG Report* at 5. In projecting the sample results to the entire population of SSA overpayments, the OIG estimated that SSA had failed to resolve over $172 million in pending overpayments where an individual had filed an appeal or waiver. *Id*. at 6. And these were delays for overpayment appeals and waiver applications that had already been entered into SSA's system. Due to

[15] OFFICE OF THE INSPECTOR GEN., U.S. SOC. SEC. ADMIN., OLD-AGE, SURVIVOR AND DISABILITY INSURANCE OVERPAYMENTS PENDING COLLECTION 3 (2015), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-02-15-35001.pdf [hereinafter *Sept. 2015 OIG Report*].

[16] *Id.* at 5; SSA, POMS GN 02210.006 (1) (2012), https://secure.ssa.gov/poms.nsf/lnx/0202210006.

understaffing, SSA local office staff regularly fail to enter appeals or waivers into the system accurately, and often lose these forms and supporting materials.[17]

Even when waiver applications are properly entered into the system, local SSA offices vary widely in their treatment. In a study of overpayment waiver requests processed by local offices in Fiscal Years 2012 and 2013, the OIG analyzed 833 offices, which had collectively processed approximately 176,000 requests over the two-year period.[18] The overall approval rate was 69 percent, yet the approval rates among individual offices varied between 19 and 100 percent.[19]

In addition, the challenges of accessing SSA's appeal procedures can be compounded for beneficiaries with disabilities. For example, people who are deaf or hard of hearing experience a lack of communication access, and often encounter difficulty in understanding SSA materials due to the failures of the education system.[20] People who are blind or have low vision must take additional steps to

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[17] *See generally* Rachel Gershon & Gerald A. McIntyre, *Goldberg on Life Support in the Social Security Administration*, 46 CLEARINGHOUSE REV. J. POVERTY L. & POL. 51 (2012); Kate Lang, *Why SSI Needs an Appeal Process that Works*, Justice in Aging (Sept. 2013), http://nsclcarchives.org/wp-content/uploads/2013/09/Final-Why-SSI-Needs-an-Appeal-Process-That-Works.pdf.

[18] OFFICE OF THE INSPECTOR GEN., U.S. SOC. SEC. ADMIN., OVERPAYMENT WAIVER REQUESTS PROCESSED BY FIELD OFFICES IN FYS 2012 AND 2013 *B-1* (2015), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-15-35031.pdf.

[19] *Id.* at 3.

[20] *See, e.g.*, Sara Schley et al., *Effect of Postsecondary Education on the Economic Status of Persons Who Are Deaf or Hard of Hearing*, 16 J. DEAF STUDIES & DEAF EDUC. 524, 525-26 (2011) (describing national demographics of

receive full access to SSA print materials in an alternative format that they can independently review.[21] Beneficiaries with intellectual disability can have difficulty handling the complex administrative, legal, and financial issues involved in accessing SSA appeal and waiver procedures, which are challenging for people without disabilities[22].

The systemic failures of the overpayment notification and review processes apply to every SSA office in the country and threaten any individual who has received benefits, or has family members who have received benefits on his or her behalf. Leaving putative class members on their own in the current system is unfair and inefficient—exactly the situation that Federal Rule of Civil Procedure 23 is designed to remedy.

IV. Class Actions Provide a Valuable Mechanism for Efficient Resolution of Aggregate Individual Claims.

In contrast to the limited options available in individual proceedings, class actions provide "vindication of the rights of groups of people who individually

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people who are deaf or hard of hearing, including attainment in education and employment).

[21] *Am. Council of the Blind v. Astrue*, No. C 05-04696 WHA, 2009 WL 3400686, at *27-29 (N.D. Cal. Oct. 20, 2009) (issuing injunction requiring SSA to issue alternative formats of notices and other correspondence to people who are blind or have visual impairments).

[22] *See, e.g.*, *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014) ("[T]he medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.").

would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotation marks omitted). As the Supreme Court has observed, class actions are a vehicle for individuals to remediate unlawful conduct when they might not have any other opportunity for redress:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980). This Court also has long acknowledged that "certification as a class action serves important public purposes." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003); *see also Broussard v. Meineke Disc. Muffler Shops*, Inc., 155 F.3d 331, 343 (4th Cir. 1998) ("We recognize that a class action may be the most economical and efficient means of litigation in many circumstances . . . .").

Following *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), courts in the Fourth Circuit and across the country have continued to certify class actions to provide remedies to plaintiffs who would otherwise not be able to litigate their claims. Courts have considered the underlying claims and the make-up of the putative class in weighing the value of certifying a class in a particular instance,

including whether putative class members would be likely to have access to justice or whether practical difficulties might prevent plaintiffs from bringing individual suits, absent class certification.

For example, in *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015), this Court recently found that the district court erred in decertifying a class of African American steel workers alleging discrimination in promotion practices and racial hostility in the workplace, *id.* at 921-22. The Court asserted that "Rule 23 provides wide discretion to district courts, in part, to promote the systemic class action virtues of efficiency and flexibility." *Id*. The Court explained that class certification would move the plaintiffs towards reaching "simple justice":

> At bottom, the workers seek nothing more than the chance to speak with one voice about the promotions discrimination they allegedly suffered as one class on account of one uniting feature: the color of their skin. The dissent would deny them that chance while leading this Court down a different road—a road that would further weaken the class action as a tool to realize Title VII's core promise of equality.

Id. at 922.

Other circuits similarly recognize the ability of class actions to enforce rights that may go unheeded if those harmed are required to proceed on an individual basis. In *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), the First Circuit affirmed the certification of a multidistrict class action of consumers and third-party payers against drug manufacturers for antitrust violations involving generic heartburn medication, *see id*. at 32. The Court emphasized that failure to

certify a class would deprive the plaintiffs of the only realistic mechanism to litigate their claims because the possible recoveries were "too small to warrant individual litigation." *Id.* at 23.

The Supreme Court has noted that class actions are particularly well-suited to overcome the dilemma of addressing cases where any potential recovery is too low to warrant an individual action:

> [T]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.

Amchem, 521 U.S. at 617 (citation omitted). After all, as Judge Posner remarked in *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir. 2004), the "*realistic* alternative" to a class action with small recoveries is not numerous individual suits, but "zero individual suits, as only a lunatic or a fanatic sues for $30," *id.* at 661. Although the seized federal tax refunds generally exceed $30, few—if any—warrant the effort and expense of pursuing individual legal action.

This Circuit and others have employed class actions not only to promote judicial economy and efficiency, but also to "afford aggrieved persons a remedy if it is not economically feasible to obtain relief through the traditional framework of multiple individual damage actions." *Gunnells*, 348 F.3d at 424 (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.02 (3d ed.1999)). In *Gunnells v. Healthplan Servs., Inc.*, this Court affirmed a conditional class of

purchasers and beneficiaries of a healthcare plan against the claims administrator for their plan's collapse. *Id.* at 446. The Court observed that the claims were "uneconomic if brought in an individual action," and consequently "it appears likely that in the absence of class certification, very few claims would be brought." *Id.* at 426. Thus, the Court reasoned, "the adjudication of [the] matter through a class action . . . [is] superior to no adjudication of the matter at all." *Id.* (quoting 5 MOORE'S FEDERAL PRACTICE § 23.48[1] (1997)).

Similarly, in *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267 (4th Cir. 2010), a Fourth Circuit panel found that the district court abused its discretion in denying certification of a class of customers who received receipts from retail stores owned by the defendant in violation of the Fair and Accurate Credit Transaction Act ("FACTA"), *see id.* at 275. Pursuant to FACTA, damages of successful claims could range from $100 to $1,000. *Id.* at 268. The panel deemed that a class action was the superior method of adjudication in this circumstance because "the low amount of statutory damages available means no big punitive damages award on the horizon, thus making an individual action unattractive from a plaintiff's perspective." *Id.* at 274. Also, in *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004), the First Circuit affirmed class certification for a class of arrestees challenging a jailhouse strip search practice and explained that class treatment was

beneficial because "the vast majority of claims would never be brought unless aggregated because provable actual damages are too small," *id*. at 7.

Cases like *Gunnells*, *Stillmock*, and *Tardiff* demonstrate the importance of access to the class action vehicle to aggregate small claims challenging unlawful policies and practices. It is particularly important to maintain access to class actions against SSA, in order to litigate claims that can protect the rights and preserve the income of hundreds, if not thousands, of similarly situated beneficiaries. *See, e.g.*, *Clark v. Astrue*, 602 F.3d 140 (2d Cir. 2010) (challenging SSA practice of suspending Old-Age, Survivor, and Disability Insurance and SSI benefits based on probation or parole violations); *Am. Council of the Blind v. Astrue*, No. C 05-04696 WHA, 2008 WL 1858928 (N.D. Cal. Apr. 23, 2008) (challenging SSA's failure to provide visually impaired individuals with information in an accessible format). For the same reasons, a class action is the most effective and efficient way to challenge SSA's practice of collecting overpayments through seizure federal tax refunds without proper notice or evidentiary support. *See* Appellants' Br. 34.

In the present case, Plaintiffs-Appellants are pursuing class certification in order to obtain systemic remedies to the unlawful conduct. They seek declaratory and injunctive relief to preserve benefit recipients' due process rights in the collection of SSA overpayments. *Grice II*, 2016 WL 1065806, at *1. Hundreds of

thousands of individual appeals addressing the same arguments and defenses for challenging seizure of tax refunds to satisfy decades-old overpayments alleged by SSA are *not* more efficient than a single class action. This is particularly true in a case such as this, where the putative class of Social Security beneficiaries generally includes the elderly, people with disabilities, and children—often in low-income households—who are unable to bear the costs of bringing individual actions. Such a scenario leaves these individuals less likely to pursue and vindicate their rights.

V. The District Court's Opinion, if Allowed to Stand, Obstructs Justice by Allowing Defendants to Evade Class-Wide Liability by Unilaterally Mooting Class Representatives' Claims.

Given that putative class members likely will not litigate their claims individually due to the challenges highlighted above, Plaintiffs-Appellants should be afforded a fair opportunity to seek class certification. Here, the district court permitted SSA to evade judicial inquiry into its policies and practices by issuing waivers for three of the named plaintiffs while their class certification motion was pending. These waivers came only after SSA lost its first attempt to moot the claims by returning the amounts withheld from their tax refunds without waiving the underlying debt. *See id.* at *2. If the district court's approach in this case is affirmed, class claims arising from debts owed by plaintiffs to defendants can be unilaterally mooted by defendants' forgiveness of the debt of just the named

plaintiffs. *See id.* at *4 (explaining that "until a class action is certified, if the individual's claim becomes moot, the entire suit becomes moot").

The Supreme Court recently addressed the issue of mooting individual claims to avoid class-wide liability in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), *as revised* (Feb. 9, 2016). In that case, the Court held that the plaintiff's complaint was not rendered moot by an unaccepted settlement offer made before the plaintiff's deadline to file a motion for class certification. *See id.* at 672. The Court warned that allowing such a tactic could "place the defendant in the driver's seat." *Id.*

The Supreme Court's valid concern over defendants "in the driver's seat" is heightened for claims that are unlikely to be brought absent a class action. In *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*, the Supreme Court rejected the defendant's attempt to moot a class action involving small financial claims by tendering to each class representative the maximum amount he or she could have recovered. *See* 445 U.S. at 339-40. In reaching this finding, the Court highlighted the fact that class treatment for these plaintiffs was important to "motivate them to bring cases that for economic reasons might not be brought otherwise." *Id*. at 338. The two class representatives had damages totaling $1,006, and "[s]uch plaintiffs would be unlikely to obtain legal redress at an acceptable cost." *Id.* at 338 n.9.

The Ninth Circuit recently became the first appellate court to review the question of mootness in the context of a putative class action after *Campbell-Ewald Co.* In *Chen v. Allstate Insurance Co.*, 819 F.3d 1136 (9th Cir. 2016), the Ninth Circuit held "even if the district court entered judgment affording [the plaintiff] complete relief on his individual claims for damages and injunctive relief, mooting those claims, [he] would still be able to seek class certification," *id.* at 1138 (citing *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011)). The Court further recognized that "a claim becomes moot when a plaintiff *actually receives* complete relief on that claim," but also:

> Assuming arguendo a district court could enter a judgment according complete relief on a plaintiff's individual claims over the plaintiff's objections, thereby mooting those claims, such action is not appropriate here. As the Supreme Court said in *Campbell–Ewald*, 136 S.Ct. at 672, "[w]hile a class lacks independent status until certified, *see Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." Because [the plaintiff] has not yet had a fair opportunity to move for class certification, we will not direct the district court to enter judgment, over [his] objections, on his individual claims.

Id. at 1138-39.

In the present case, the district court concluded that SSA's waiver of the overpayment and return of seized federal tax refunds was sufficient to moot both individual and class claims, even though Plaintiffs-Appellants' Amended Complaint requested both injunctive and declaratory relief, including an injunction

requiring SSA "to take steps to modify [its] policy to ensure no similar violations will occur in the future." *Grice I*, 97 F. Supp. 3d at 695. The systemic relief requested by Plaintiffs-Appellants is crucial to addressing the flawed policies challenged by the putative class action, and was not addressed when SSA issued the refunds and waivers to the individual plaintiffs. The district court's finding of mootness was in error and undermines the ability of individuals to bring collective actions to remedy unlawful government or corporate policies and practices.

The district court's standing analysis ignores the fact that, absent a class action, the underlying issue of SSA's ongoing policies and practices may never receive judicial review. Plaintiffs-Appellants seek to challenge systemic issues that have affected thousands of individuals across the country and cannot be effectively addressed in an individual action. The present case is ideally suited for class treatment. To preserve the availability of class actions for these plaintiffs, the district court's order of dismissal should be reversed.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the district court's order finding that Defendant-Appellee's return of seized federal tax refunds and forgiveness of Plaintiffs-Appellants' overpayments was sufficient to moot their claims and motion for class certification.

Dated: June 24, 2016

Respectfully submitted,

/s/

DANIEL F. GOLDSTEIN
CHELSEA J. CRAWFORD
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202
T: (410) 962-1030
F: (410) 385-0869
dfg@browngold.com
ccrawford@browngold.com

KATHRYN R. LANG*
ANNA RICH*
JUSTICE IN AGING
1444 Eye Street NW, Suite 1100
Washington, DC 20005
T: (202) 289-6976
klang@justiceinaging.org
arich@justinginaging.org

JOCELYN LARKIN*
LINDSAY NAKO*
LYNNETTE MINER*
IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
T: (510) 845-3473
jlarkin@impactfund.org
lnako@impactfund.org
lminer@impactfund.org

* Not admitted to practice in this Court.

JULIE WILENSKY*
CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER
2120 University Avenue
Berkeley, CA 94704
T: (510) 431-8484
jwilensky@creeclaw.org

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(s) Chelsea J. Crawford

Attorney for Amicus Curiae

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On June 24, 2016, I served a copy of the Brief of *Amici Curiae* Justice in Aging, Impact Fund and Civil Rights Education and Enforcement Center in Support of Plaintiffs-Appellants and Supporting Reversal upon all counsel of record via this Court's electronic-filing system:

Andrew Neil Friedman
Agnieszka Maria Fryszman
Cohen, Milstein, Sellers & Toll, PLLC
1100 New York Avenue, NW
Suite 500
Washington, DC 20005-3965
afriedman@cohenmilstein.com
afryszman@cohenmilstein.com

William Ernest Havemann
Charles W. Scarborough
U. S. Department of Justice
950 Pennsylvania Avenue, NW
Room 7515
Washington, DC 20530
William.E.Havemann@usdoj.gov
Charles.Scarborough@usdoj.gov

Steven A. Skalet
Mehri & Skalet, PLLC
1250 Connecticut Avenue, NW
Suite 300
Washington, DC 20036
sskalet@findjustice.com

Robert Lawrence Vogel
Vogel, Slade & Goldstein, LLP
1718 Connecticut Avenue, NW
7th Floor
Washington DC 20009
rvogel@vsg-law.com

/s/
CHELSEA J. CRAWFORD

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

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COUNSEL FOR: Justice in Aging, The Impact Fund & Civil Rights Education and Enforcement Center as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

_____
(signature)

Daniel F. Goldstein
Name (printed or typed)

410-962-1030
Voice Phone

Brown Goldstein & Levy, LLP
Firm Name (if applicable)

410-385-0869
Fax Number

120 East Baltimore St., Ste. 1700

Baltimore, Maryland 21202
Address

dfg@browngold.com
E-mail address (print or type)

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COUNSEL FOR: Justice in Aging, The Impact Fund & Civil Rights Education and Enforcement Center as the

(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

_____

(signature)

Chelsea J. Crawford
Name (printed or typed)

410-962-1030
Voice Phone

Brown Goldstein & Levy, LLP
Firm Name (if applicable)

410-385-0869
Fax Number

120 East Baltimore St., Ste. 1700

Baltimore, Maryland 21202
Address

ccrawford@browngold.com
E-mail address (print or type)

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