No. _____

In the Supreme Court of the United States

ELISA ENCARNACION on behalf of ARLENE GEORGE, ANA LORA on behalf of MICHELLE TAVARES, HORTENSIA LACAYO, MATHEW LACAYO, and ROSA VELOZ on behalf of BEN-HEMIR COLLADO,
Petitioners,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Supplemental Security Income (SSI) program provides benefits to disabled children from poor families. Congress has instructed the Commissioner of Social Security to consider "throughout the disability determination process" whether "the combined effect of all of the individual's impairments" is of sufficient severity for the individual to be considered disabled, "without regard to whether any such impairment, if considered separately, would be of such severity," 42 U.S.C. § 1382c(a)(3)(G).

This case concerns one of the primary tests for disability under the SSI program. Under it, a child will be considered disabled only if his medical impairments produce an "extreme" limitation in at least one of six "domains" of functioning, or "marked" limitations in at least two domains. It is the Commissioner's policy not to "combine" findings from different domains; that is, limitations in separate domains cannot be "added up" or otherwise adjusted based on medical impairments that affect other domains, and even serious medical impairments are ignored in the final analysis of disability unless they contribute to a "marked" or "extreme" limitation.

The question presented is whether the Commissioner's "non-combination" policy for assessing disability in children violates Congress's instruction in Section 1382c(a)(3)(G) to consider the combined effect of all of the individual's impairments.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 568 F.3d 72. The opinion of the district court (App., *infra*, 22a-51a) is reported at 491 F. Supp. 2d 453.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. On August 26, 2009, the court of appeals denied a timely petition for panel rehearing and rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1382c(a)(3) provides in pertinent part:

> (C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations . . . .
>
> * * *
>
> (G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments

> without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

The following regulatory provisions are reprinted in pertinent part at App., *infra*, 90a-93a: 20 C.F.R. §§ 416.923, 416.924, 416.924a, and 416.926a.

STATEMENT

Under the Supplemental Security Income (SSI) program enacted by Congress in 1972, disabled children from low-income families are entitled to monthly cash benefits to help their families shoulder the burden of meeting their special needs. See generally 42 U.S.C. §§ 1381, 1381a, 1382, 1382c.[1] Currently about 400,000 SSI child-disability claims are adjudicated each year. See Office of Retirement and Disability Policy & Office of Research, Evaluation, and Statistics, Soc. Sec. Admin., Annual Statistical Report, 2008, at 133 (2009), available at http://www.ssa.gov/policy/docs/statcomps/ssi_asr/2008/ssi_asr08.pdf.

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[1] The program has been recognized as serving four primary purposes: (1) ensuring life's basic necessities to allow the disabled child to live at home or in an appropriate setting; (2) meeting added costs of raising and caring for the child; (3) promoting the child's development; and (4) offsetting the lost income of the parent(s) that must care for the child. NATIONAL COMMISSION ON CHILDHOOD DISABILITY, REPORT TO CONGRESS: THE SUPPLEMENTAL SECURITY INCOME FOR CHILDREN WITH DISABILITIES 40 (1995).

The method by which the Social Security Administration (SSA) determines that a child is disabled for purposes of entitlement to SSI benefits has been the subject of a prolonged tug-of-war between Congress and the agency. In particular, the SSA has historically resisted evaluating children's *function* (as opposed to medically measurable impairments), despite repeated congressional directives – sometimes enforced by the federal courts, including this Court – to do so. The result of that resistance is that legitimately disabled and indisputably needy children have been denied benefits to which Congress clearly thought them entitled.

The latest chapter in this saga began in the 1990s, when the Commissioner adopted his current methods of evaluating disability in children. Under the method at issue here, the Commissioner assesses whether a child has what the SSA regulations describe as a "limitation" in one of six defined "domains" of functioning. To qualify for benefits, a child must have an "extreme" limitation in at least one domain, or "marked" limitations in at least two domains. It is the Commissioner's policy not to "combine" findings from different domains. Limitations in separate domains cannot be "added up" or otherwise adjusted based on impairments that affect other domains. Accordingly, an impairment (no matter how serious) that does not contribute to a "marked" or "extreme" functional limitation plays no role in the ultimate analysis of disability. The Commissioner's policy denies adjudicators discretion to give weight to *all* impairments and find a child disabled based on the totality of the evidence. As a result, thousands of poor, largely unrepresented

children are being denied full and appropriate consideration of their claims.

A. Background: Congress and this Court Insist on an Overall Functional Assessment

The critical statutory provision in this case is 42 U.S.C. § 1382c(a)(3)(G), which directs the Commissioner, in assessing the medical severity of an individual's physical or mental impairments, to "consider the *combined effect* of *all* of the individual's impairments without regard to whether" any of the impairments would, "if considered separately," be sufficiently severe to qualify the individual for benefits (emphasis added). The statute further provides (as relevant here) that "the combined impact of the impairments shall be considered *throughout the disability determination process*" (emphasis added).

Congress enacted Section 1382c(a)(3)(G) in 1984, see Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 4(b), 98 Stat. 1794, 1800 and it did so specifically to reject an earlier regulatory regime that threatened to "preclude realistic assessment of those cases involving individuals who have several impairments which in combination may be disabling," H.R. Conf. Rep. 98-1039, at 30, reprinted in 1984 U.S.C.C.A.N. 3080, 3087-3088. Before the enactment of Section 1382c(a)(3)(G), the SSA's policy[2] towards any individual suffering from

[2] SSA is currently an independent agency, but before 1995, it was part of the Department of Health and Human Services (HHS). At that time, the policies and regulations applicable to SSA were formally promulgated by the Secretary of HHS rather than the Commissioner of Social Security. This petition

multiple impairments had been to consider the combined impact only of impairments that individually qualified as more than *de minimis* – "severe" impairments in the somewhat counter-intuitive parlance of the regulation. Impairments that failed this test were disregarded and not combined with other impairments in assessing overall disability.

Despite the *de minimis* quality of the impairments being disregarded, the 1984 legislation unambiguously rejected SSA's approach. See, *e.g.*, App., *infra*, 58a-61a. Congress thereby confirmed an unbroken line of court of appeals decisions rejecting SSA's non-combination policy. See, *e.g.*, *Johnson* v. *Heckler*, 769 F.2d 1202, 1204 (7th Cir. 1985) (gathering pre-1984 cases). After 1984, courts continued to enforce the combination principle in the face of on-going agency resistance. See, *e.g.*, *Dixon* v. *Shalala*, 54 F.3d 1019, 1031 (2d Cir. 1995).

For children, however, that was not the end of the story. In 1990, this Court by a 7-2 vote rejected the SSA's methods for determining whether a child claimant was eligible because those methods did not provide the kind of "individualized, functional approach" called for by Congress. *Sullivan* v. *Zebley*, 493 U.S. 521, 539 (1990). At that time, the statutory definition of a disabled child was one who "suffers from an impairment of comparable severity" to an impairment that would make an adult "unable to

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nevertheless refers to applicable regulations, policies, and determinations as "SSA's" without regard to whether formal authority lay with the Secretary of HHS or the Commissioner.

engage in any substantial gainful activity," 42 U.S.C. § 1382c(a)(3)(A) (1988). Under the SSA's regulations, an *adult* could qualify by showing (in addition to factors not relevant here) *either* (1) a set of "specific medical signs, symptoms, or laboratory test results," 493 U.S. at 530, that matched, or was "equivalent" to, one of a specified list of impairments developed by the agency, *or* (2) an inability to work. *Id.* at 525-526. By contrast, a *child* could qualify *only* by showing (as relevant here) medical evidence that matched, or was "equivalent" to, one of a specified list of impairments. *Id.* at 526.

In other words, there was no "safety valve" for children, as there was for adults, in the form of a separate inquiry into an individual's *functional* limitations when that individual did not fit within rigid, pre-established medical criteria. See *id.* at 533-536. For adults, the "functioning" in question was vocational. But, as this Court noted, even though a vocational analysis is inapplicable to children, there was no reason why a functional analysis could not be applied to "the normal daily activities of a child of the claimant's age." *Id.* at 539-540.

Relatedly, "equivalen[ce]" to a listed medical impairment meant only that there were medical findings equal in severity to each of the criteria for some listed impairment, *not* that "*the overall functional impact*" of an individual's condition was as severe as that of a listed impairment. *Id.* at 531 (emphasis added). For example, as this Court observed, a child with both (a) a growth impairment slightly less severe than required by the listing and (b) mental retardation that produced an IQ just

above the cut-off set forth in the listing would not qualify, "no matter how devastating the combined impact of mental retardation and impaired physical growth." *Id*. at 531 n.11.

Zebley held that this refusal to give "individualized consideration" to the effect of combinations of impairments violated the statutory directive to consider "the combined impact of [multiple] impairments . . . throughout the disability determination process." *Id.* at 535 n.16. The Court was troubled that the agency would necessarily deny benefits to a child with a combination of unlisted impairments that were not (as defined by the agency) "equivalent" to a listing, "even if their impairments are of 'comparable severity' to ones that would . . . render an adult disabled." *Id*. at 535-536. The Court found it problematic, too, that the agency's system would exclude "children with impairments that might not disable any and all children, but which actually disable *them*, due to symptomatic effects such as pain, nausea, side effects of medication, etc., or due to their particular age, educational background, and circumstances." *Id*. at 535.[3]

Congress revisited SSI benefits for children in 1996, enacting legislation intended to raise the overall level of disability required. However, far

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[3] Following *Zebley*, SSA adopted new regulations that introduced the "domain" concept and provided, generally, that a child claimant would be disabled based on one "marked" plus one "moderate" limitation, or three "moderate" limitations, or any combination of limitations that, practically speaking, compromised overall functioning to an equivalent degree. See 20 C.F.R. § 416.924e (1994).

from ignoring or overruling *Zebley*, Congress confirmed the need to consider overall function by providing that a child is "disabled" if he or she "has a medically determinable physical or mental impairment, which results in marked and severe *functional limitations*." Pub. L. No. 104-193, § 211(a)(4), 110 Stat. 2105, 2188 (emphasis added); 42 U.S.C. § 1382c(a)(3)(C)(i). Indeed, the Conferees expressly reminded the Commissioner to comply with § 1382c(a)(3)(G), and noted *Zebley*'s conclusion that the SSA had previously been "remiss" in failing to "ensure that the combined effects of all the [child's] physical or mental impairments are taken into account" in making the disability determination. H.R. Conf. Rep. 104-725, at 328, reprinted in 1996 U.S.C.C.A.N. 2649, 2716. The Conferees also took care to note that they did "not intend to limit the use of functional information, if reflecting sufficient severity and [if] otherwise appropriate," and they pointed out that "Congress may revisit the definition of childhood disability and the scope of benefits, if deemed appropriate." *Ibid.*

B. The Commissioner's "Non-Combination" Policy

In the late 1990s, the SSA promulgated a series of regulations designed to implement the 1996 legislation. Under the regulations, the SSA asks as a threshold matter whether the child has an impairment (or combination of impairments) that is "severe." If the answer is no, the child is not disabled. If the answer is yes, the SSA then asks whether the impairment (or combination of impairments) either (1) meets or is medically

equivalent to an impairment listed in an appendix to the regulations, or (2) "functionally equals the listings." See 20 C.F.R. § 416.924(a) (2009).

At issue in this case is the latter method of demonstrating disability. For purposes of deciding whether a child's impairment (or combination of impairments) "functionally equals the listings," the SSA has defined six "domains of functioning." They are: (1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for yourself; and (6) health and physical well-being. 20 C.F.R. § 416.926a(b)(1) (2009). Within each domain, the SSA rates the child's limitations as "less than marked," "marked," or "extreme." See *id*. § 416.926a(a), (d). A child's impairments will "functionally equal the listings" only if she has an "extreme" limitation in one domain or "marked" limitations in two domains. See, *e.g.*, 20 C.F.R. § 416.926a(a).

That approach could theoretically be acceptable, except that under an informal "non-combination" policy set out in rulebooks and training manuals, adjudicators may not consider the interaction between the effects of limitations in separate domains in determining the child's overall level of functioning. Specifically, adjudicators cannot adjust the level of limitation in one domain to reflect the cumulative and interactive impact that less-than-marked limitations in *other* domains may have on the overall level of functioning. *E.g.*, App., *infra*, 9a; C.A. App. 1068, 1756-1759. Rather, after adjudicators have considered the impact of all of a claimant's

impairments *within* each particular domain, they assign no weight to – for all practical purposes they forget about – any impairment that does not contribute to at least a "marked" limitation in a particular domain.

For instance, under the regulations, a child whose IQ is accurately measured at precisely 70 is deemed to have a marked limitation in the domain of acquiring and using information. A child with an IQ of 71 is not, absent other impairments that also affect the level of disability in that domain. In assessing overall function, the Commissioner gives no weight to the second child's less-than-marked limitation. He simply treats her as having average intelligence.

The result is that many children will be denied benefits even though they are, on any reasonable understanding, severely impaired. For example, a child whose impairments cause one nearly extreme limitation and five limitations that are just less than marked cannot be found disabled, no matter how devastating the combined impact of these limitations is on the child's overall ability to function at home and in school.

The child plaintiffs in this case exemplify many children with multiple, interactive impairments directly affected by the non-combination policy. Arlene George has learning disabilities, attention deficit hyperactivity disorder ("ADHD"), and severe behavioral problems variously labeled as impulse control disorder, conduct disorder, or oppositional defiant disorder. C.A. App. 305-307. Michelle Taveras has severe learning disabilities, ADHD, and asthma and displays oppositional and aggressive

behavior. C.A. App. 307-309. Mathew Lacayo has learning disabilities, a borderline to low average IQ, and oppositional defiant disorder, conduct disorder, depression, and/or ADHD. C.A. App. 309-312. Ben-Hemir Collado has significant, language-based cognitive deficits, severe ADHD, and asthma. C.A. App. 312-314.

Thus, each of the named child plaintiffs has multiple severe impairments that the Commissioner was statutorily obligated to consider *in combination* throughout the disability determination process. In each case, the interactive and cumulative effects of these multiple impairments are devastating. However, each child's claim was adjudicated by an administrative law judge (ALJ) who had been instructed to assign no weight to any impairment that did not contribute to a marked limitation in a particular domain. As a result, in three cases out of four, the ALJ, constrained by the Commissioner's policy, found a marked limitation in only a single domain. *Encarnacion* v. *Barnhart*, 2003 U.S. Dist. LEXIS 3884, at *2-*3 (S.D.N.Y. 2003) (George); C.A. App. 1832-1837 (Tavares); C.A. App. 498-514 (Lacayo). In the fourth case, Ben-Hemir Collado's, the ALJ found that the child's impairments impacted every domain, but none severely enough to be counted at all in the final, decisive step of the disability determination process. C.A. App. 527-532. Since the ALJs found that the named plaintiffs did not have at least two marked limitations or one extreme limitation, they denied benefits.

The SSA's regulations, however, contemplate – just as Congress did – a more flexible analysis. For

instance, echoing the statute, the SSA promised to "consider the combined effect of all of [a child's] impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity." 20 C.F.R. § 416.923 (2009). And, once the SSA determines (at the earlier step of the inquiry) that the child has a "severe combination of impairments," the SSA guarantees – just as Congress demanded, see 42 U.S.C. § 1382c(a)(3)(G) – that "the combined impact of the impairments will be considered *throughout the disability determination process*." 20 C.F.R. § 416.923 (emphasis added). Similarly, the SSA promises to "look *comprehensively* at the *combined effects* of [the child's] impairments on [his] day-to-day functioning *instead of considering the limitations resulting from each impairment separately*," *id*. § 416.924a(b)(4) (2009) (emphasis added), to "consider the combined effects of *all [of the child's] impairments* upon [his] *overall health and functioning*," *id*. § 416.924(a) (emphasis added), and to assess the "interactive and cumulative effects" of all of the impairments, *id*. § 416.926a(a).

C. Proceedings Below

Petitioners are the parents of the child plaintiffs described above.[4] Their children's claims for SSI disability benefits were denied because of the non-combination policy. Some nine years ago, one of the petitioners filed suit on behalf of herself and all others similarly situated. She and others challenged, as inconsistent with Section 1382c(a)(3)(G), the Com-

[4] The exception is petitioner Mathew Lacayo, who was denied benefits while a child but had reached the age of 18 before this action was filed. Petitioner Hortensia Lacayo is his mother.

missioner's methods of determining whether a child's combination of impairments "functionally equals the listings." The district court dismissed the complaint.

On appeal, the Second Circuit agreed with the plaintiffs that the SSA's methods "would be contrary to the statute if the SSA gave no weight to some of a claimant's impairments in appraising the claimant's level of disability," but held that the SSA's regulations allow for the very flexibility that plaintiffs contended was lacking. App., *infra*, 55a. In his opinion for the panel, Judge Katzmann noted the regulations' instructions to "look comprehensively at the combined effects of [a claimant's] impairments . . . instead of considering the limitations resulting from each impairment separately," and to consider the "interactive and cumulative effects" of all impairments, whether or not severe. *Id.* at 74a. On the panel's understanding, "nothing would preclude SSA from adjusting an otherwise moderate, but nearly marked, limitation in domain A up to fully marked to account for the effect of a limitation in domain B." *Id.* at 77a. The panel thought that this "flexibility to account for cumulative effects . . . is likely essential to a permissible implementation of the Act." *Id.* at 78a.

The court of appeals nevertheless affirmed the dismissal because it read the complaint as failing actually to allege that such flexibility was lacking: "We have searched the Complaint in vain, however, for an allegation that SSA does not, in fact, adjust the level of a claimant's limitation within one or two domains to 'look comprehensively' at the claimant and account for the 'interactive and cumulative

effects' of limitations in other domains." *Id.* at 76a-77a (quoting SSA regulations). The panel did not "intend[] to foreclose Plaintiffs from raising a future challenge" based on such an allegation. *Id.* at 77a n.7.

Petitioners then filed this action. On behalf of themselves and all others similarly situated, they renewed the challenge to the SSA's methods of determining "functional equivalence," but this time more explicitly alleged the existence of the non-combination policy. Petitioners also claimed that the Commissioner's methods produce irrational results by arbitrarily excluding some claimants while paying benefits to others who are no more deserving. C.A. App. 13-15, 37-38. At the summary judgment stage, plaintiffs supported the latter claim with the expert declaration of a nationally recognized school psychologist. He explained that the Commissioner's policy ignores good professional practice and is irrational because it leads to the denial of benefits for many children whom any reasonable clinician would find to be at least as disabled as plenty of other children who qualify under the Commissioner's strict methodology. See C.A. App. 1892-1893, 1902-1903. Judge Swain granted summary judgment for the Commissioner. App., *infra*, 22a-51a.

The court of appeals affirmed. In its view, Judge Katzmann's previous opinion for the court did not actually resolve the permissibility of the non-combination policy because his panel believed (contrary to plaintiffs' current allegations) that there was a real "possibility of cross-domain adjustment." App., *infra*, 13a-14a. The court of appeals also

thought that, to the extent the earlier panel "meant to suggest that the Act required the agency to make cross-domain adjustments, any such comments are dicta." *Id.* at 13a n.1.

The court proceeded to review the non-combination policy. Despite applying diminished deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), Judge McLaughlin's opinion for the court concluded that the policy is consistent with the statutory directive to consider the "combined impact of the impairments . . . throughout the disability determination process" because "the SSA considers all impairments within each domain, the final step of the process as the Commissioner has defined it." App., *infra*, 16a-17a. The court of appeals dismissed *Zebley* in a footnote; it thought that the domain system, despite the non-combination policy, provides the "individualized assessment" of the "combined impact of [all] impairments" that *Zebley* had demanded. *Id.* at 17a n.3. The Second Circuit also believed that the non-combination policy was consistent with congressional "efforts to tighten eligibility," including Congress's rejection of an earlier procedure that "had allowed the SSA greater flexibility to award benefits to children with fewer than two marked limitations." *Id.* at 18a.

In addition, the court of appeals criticized petitioners for failing to offer "an alternative system that would satisfy the statute and be efficiently administered." *Id.* at 19a. Finally, observing that it was "ill-equipped . . . to decide the best method to determine childhood disability," the court chose to reject the school psychologist's testimony and to

defer to the SSA's experience in "administering a complex statute" and attempting to "align [the disability-determination process for children] with congressional purposes." *Id.* at 19a-20a. In that regard, the Second Circuit was impressed that the Commissioner has not "waffled in his interpretation of the statute or regulations." *Id.* at 20a.

The court of appeals denied plaintiffs' petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision upholding the Commissioner's non-combination policy contravenes *Sullivan* v. *Zebley*, 493 U.S. 521 (1990), and violates Congress's plain command that SSI disability claimants are entitled to have the combined effects of *all* of their impairments considered at *every* stage of the disability determination process – not just at most steps. The policy, moreover, leads to irrational results for the same reasons articulated in *Zebley*. Further review is warranted to prevent a severe impact on thousands of needy claimants in a largely unrepresented population.

I. The Court of Appeals' Decision Flies in the Face of *Zebley*

Congress and this Court have repeatedly indicated that the SSA should consider, at *all* stages of the disability determination process, the functional impact of *all* of the impairments experienced by an applicant for disability benefits. The Second Circuit has failed to follow suit.

The Social Security Act has long used a "functional approach to determining the effects of

medical impairments." *Bowen* v. *Yuckert*, 482 U.S. 137, 146 (1987) (citing *Heckler* v. *Campbell*, 461 U.S. 458, 459-460 (1983)); see also *Yuckert*, 482 U.S. at 156-158, 179-180 (five concurring and dissenting Justices agreeing that a purely medical severity criterion cannot be used to screen out claimants without consideration of other factors affecting ability to work); *Bowen* v. *City of New York*, 476 U.S. 467, 473-474 (1986) (describing an invalidated policy in which agency applied a presumption that eliminated steps of its evaluation process designed to determine whether an adult disability claimant is unable to work).

An individual's ability to function is affected by *all* of his impairments, not just some. The 1984 statute at issue in this case, 42 U.S.C. § 1382c(a)(3)(G), was designed to ensure that the SSA would consider impairments that were not individually of sufficient severity to warrant a finding of disability. The 1996 amendments continued that approach; indeed, the Conferees for the legislation expressly indicated their agreement with *Zebley*. Since 1996, moreover, Congress has not altered the statutory language, even though the 1996 Conferees specifically invited "Congress [to] revisit the definition of childhood disability and the scope of benefits, if deemed appropriate." See page 8, *supra*.

There is, accordingly, no doubt that *Zebley* is the law. And *Zebley* unambiguously held that, as part of SSA's mandate to assess "overall functional impact," 493 U.S. at 531, the agency is required under Section 1382c(a)(3)(G) to give "individualized consideration" to the effect of combinations of *all* impair-

ments at *all* stages of the disability determination process. 493 U.S. at 535 n.16. This Court specifically pointed to the example of a child with a nearly disabling growth impairment and nearly disabling mental retardation, and found it unacceptable that the child would not qualify "no matter how devastating the combined impact" on the child's functioning of the two impairments. *Id*. at 531 n.11.

The Commissioner's "non-combination" policy causes the SSA to do precisely what *Zebley* said Congress did not want the SSA to do: fail to factor certain impairments into the overall assessment of disability. The court of appeals' textual defense of the policy and its cursory attempt to avoid *Zebley* do not work. As the earlier Second Circuit panel understood, even given a domain system, the exclusion in the final analysis of sub-marked limitations (and the impairments that produce them) means that the SSA flatly fails to consider "the combined impact" of *all* impairments "throughout the disability determination process," 42 U.S.C. § 1382c(a)(3)(G).

Also impossible to reconcile with *Zebley* are the Second Circuit's other rationales for upholding the non-combination policy. The Second Circuit criticized petitioners for failing to offer "an alternative system" that could be "efficiently administered," but this Court in *Zebley* rejected a very similar argument. See 493 U.S. at 539. In any event, as this Court explained in *Zebley*, *Congress* has instructed the SSA to consider the combined effect of all impairments at all stages. It is the Commissioner's job to figure out how to fulfill his mandate. And sure enough (as Judge Katzmann's opinion recognized),

the Commissioner's own regulations already allow the very discretion that the non-combination policy prohibits.

Finally, the Second Circuit deferred to the SSA's experience and expertise.[5] But the SSA's experience and expertise do not automatically make its policies (even when they have not been the subject of any "wafflf[ing]," App., *infra*, 20a) consistent with the statute, particularly when one considers the agency's history of resisting Congress's prescriptions regarding disability assessments in children. Indeed, even though *Zebley* applied a *more* deferential standard of review than the *Skidmore* standard that the court of appeals used here (see 493 U.S. at 528 (citing *Chevron*)), *Zebley* still concluded that the SSA was not giving effect to § 1382c(a)(3)(G) for children. (Similarly, Judge Katzmann's panel, despite applying *Chevron* deference, had no trouble seeing that a strict non-combination policy would violate the statute.)

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[5] The Second Circuit rejected the testimony of plaintiffs' expert because he used hypothetical examples to illustrate how the non-combination policy produces irrational and arbitrary outcomes. App., *infra*, 20a. But in *Zebley* this Court did the same thing. The core of its analysis (which drew heavily on *amicus* submissions from expert organizations, see 493 U.S. at 531 n.10, 534 n.13, 536 n.17) was based on categories and examples of potential or hypothetical applicants. See *id.* at 531 nn. 10-11, 534 n.13, 535-536 & nn. 16-17. Moreover, the Commissioner here offered nothing but lawyers' arguments to refute plaintiffs' expert, and has cited nothing in the rulemaking record to suggest that any healthcare professional has ever endorsed as rational or consistent with good medical or psychological practice the atomized assessment mandated by the Commissioner's non-combination policy.

II. The Question Presented Frequently Recurs and Is Extremely Important to Families Affected By It

SSI is a critical resource for the impoverished families of children with serious disabilities. Poor children who, because of a constellation of impairments, experience limitations in multiple domains (even if not rising to the very high level of "marked" or "extreme") are particularly at risk of life-long disability. C.A. App. 1901. It is common to find such children. Even if only one of their limitations is at the marked level whereas the others are below it, they are often at least as disabled as children deemed to satisfy the standard by virtue of having one "extreme" or two "marked" limitations. *Id*. at 1902-1903. To find the latter eligible for benefits but disqualify the former is arbitrary and irrational as well as contrary to the governing statute.

For example, 13-year-old Esteban Martinez[6] suffered from severe delays in expressive and receptive language abilities, with communication skills that fell below the first percentile. He also had severe learning disabilities, with reading and writing ability likewise below the first percentile. He received psychiatric counseling for ADHD, despite which he was often restless, impulsive, inattentive, and disruptive at school. Esteban also behaved aggressively towards other children, and demonstrated serious delays in self-care, including occasional encopresis (fecal incontinence). The ALJ found that Esteban was limited in no fewer than five domains

[6] Esteban was a proposed plaintiff in the district court. See App., *infra*, 50a-51a.

(acquiring and using information, attending and completing tasks, interacting and relating with others, caring for yourself, and health and physical well-being), but denied benefits because he determined – probably correctly – that the marked level of limitation had been reached only in a single domain (acquiring and using information). In the end, although Esteban's combination of impairments was far more disabling than that of many children with two marked limitations, he could not qualify for SSI because the only impairments that ultimately counted were those that affected one domain. C.A. App. 322-339.

Esteban's case is hardly exceptional. There is a high degree of "co-morbidity" between certain childhood impairments (*e.g.*, behavioral disorders, learning disabilities, ADHD), such that children, like Esteban, with one marked and multiple less-than-marked limitations are frequently encountered in the real world; they are often more seriously impaired overall than children with a single extreme, or two marked limitations, and they are on a clear trajectory towards truancy, delinquency, substance abuse, and crime. The Commissioner's policy, by intentionally discounting impairments that seriously affect functioning, irrationally treats them as less disabled than they are. C.A. App. 1903.

Reported decisions reflecting this phenomenon of co-morbidity are not uncommon. See, *e.g.*, *R.J.* v. *Astrue*, 2009 U.S. Dist. LEXIS 68455 (S.D. Ind. 2009) (claimant diagnosed with borderline intellectual functioning, ADHD, and conduct disorder); *Bausley* v. *Astrue*, 2009 U.S. Dist. LEXIS 83816 (W.D. Ark.

2009) (borderline IQ, ADHD, depression); *Trayvaughn P.* v. *Astrue*, 2009 U.S. Dist. LEXIS 75483 (E.D. Cal. 2009) (low average intelligence, ADHD, serious behavior problems), but their number likely understates the impact of this issue because, unlike petitioners here, applicants for child-disability SSI benefits typically do not have the legal representation necessary to pursue a claim in the courts. There is a bar that serves adult claimants under SSI (or under the larger and better-known Social Security disability insurance program), but no analogue for child claimants and their families. See *Maldonado* v. *Apfel*, 55 F. Supp. 2d 296, 299-301, 306-307 (S.D.N.Y. 1999) (discussing difficulty of obtaining counsel for child claimants). Accordingly, the question presented, despite the extremely high stakes it involves, is likely to continue to evade review unless the Court decides to hear this case.

* * * * *

To be sure, in this class action, there is no conflict in the circuits, nor is one likely to develop. Rather, the present case is the Court's best opportunity to correct a grievous error affecting thousands of needy children. The confusion reflected in the two decisions of the Second Circuit itself, which point in markedly different directions, is an indication that the issue is difficult and in need of definitive resolution by this Court. Moreover, the unfaithfulness of the decision below to this Court's own 7-2 decision in *Zebley* 19 years ago is itself a traditional basis for a grant of certiorari. See S. Ct. R. 10(c). There is no reason to allow the decision below to stand, and *Zebley* to be dishonored, while thousands

of disabled children are deprived of the benefits to which they are entitled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2009

APPENDIX

APPENDIX A

07-3550-cv
Encarnacion v. Astrue

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: December 11, 2008;
Last Submission: February 24, 2009
Decided: June 4, 2009)

Docket No. 07-3550-cv

----------X

ELISA ENCARNACION, on behalf of
ARLENE GEORGE, ANA LORA, on behalf of
MICHELLE TAVARES, HORTENSIA LACAYO,
MATTHEW LACAYO, and ROSA VELOZ,
on behalf of BEN-HAMIR COLLADO,

Plaintiffs-Appellants,

-v.-

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant-Appellee.

----------X

Before: McLAUGHLIN, WESLEY, and HALL, *Circuit Judges*.

The U.S. District Court for the Southern District of New York (Swain, *J.*) granted summary judgment

to the Commissioner of Social Security, upholding the Commissioner's implementation of the Social Security Act's provisions for determining children's eligibility for Supplemental Security Income Benefits. The plaintiffs appealed. Pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), we hold that the agency's interpretation of the Act is persuasive and therefore should be upheld.

AFFIRMED.

JEFFREY S. TRACHTMAN, Kramer Levin Naftalis & Frankel LLP (Jessica Glass, Kramer Levin Naftalis & Frankel LLP; James M. Baker, Christopher James Bowes, Center for Disability Advocacy Rights; Kenneth Rosenfeld, Matthew J. Chachere, Northern Manhattan Improvement Corporation Legal Services, *on the brief*), New York, New York, *for Plaintiffs-Appellants*.

SUSAN D. BAIRD, Assistant U.S. Attorney (Michael J. Garcia, U.S. Attorney for the Southern District of New York, David S. Jones, Assistant U.S. Attorney, *on the brief*), New York, New York, *for Defendant-Appellee*.

McLAUGHLIN, Circuit Judge:

The plaintiffs represent a putative class of children whose parents claim that the Commissioner of

Social Security (the "Commissioner") has implemented a policy (the "Policy") that excludes some children from eligibility for Supplemental Security Income Benefits ("SSI Benefits") in a manner that violates the Social Security Act (the "Act") and the Commissioner's own regulations. Pursuant to those regulations, childhood disability is determined by evaluating applicants within six domains of functioning, such as the child's ability to acquire and use information. Children are eligible for benefits if they have at least two "marked" limitations on their functioning within these domains or at least one "extreme" limitation. Under the Policy, the combined effect of a child's multiple mental or physical impairments may be deemed a marked or extreme limitation if the limitation occurs within a single domain. But the Policy prohibits the Social Security Administration (the "SSA") from considering the combined effects of limitations in different domains. Thus, the SSA will not adjust a less-than-marked limitation in one domain based on limitations in other domains.

The plaintiffs maintain that the Policy violates the Act's command that the SSA consider the combined effects of a child's impairments "throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(G). They also claim that the Policy violates a nearly identical provision in the Commissioner's regulations. The district court disagreed and granted summary judgment to the Commissioner. We AFFIRM.

BACKGROUND

This is the second time we have addressed the plaintiffs' claims. We provide an abbreviated version of the extensive background, including the relevant statutory and regulatory history, recounted in our prior decision, *Encarnacion ex rel. George v. Barnhart,* 331 F.3d 78, 80-86 (2d Cir. 2003) ("*Encarnacion I*").

The Act provides for SSI Benefits to disabled children as well as adults. *See* Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1471, 1473 (1972). The Commissioner has authority to promulgate regulations to determine eligibility for SSI Benefits. *See* 42 U.S.C. § 405(a). In 1984, Congress added to the Act a provision that applies to all disability determinations (whether for children or adults), which instructs:

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility [for SSI Benefits], the [Commissioner] shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the [Commissioner] does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 4, 98 Stat. 1794, 1800 (codified at 42 U.S.C. § 1382c(a)(3)(G)). In 1985, the SSA adopted a regulation that repeats this statute nearly verbatim. See Disability Insurance and Supplemental Security Income; Determining Disability and Blindness; Multiple Impairments, 50 Fed. Reg. 8,726, 8,729 (Mar. 5, 1985) (codified at 20 C.F.R. § 416.923). These two provisions are central to the plaintiffs' claims in this case.

The Commissioner's regulations for determining a child's eligibility for SSI Benefits have undergone many amendments. One important change came as a result of the Supreme Court's decision in Sullivan v. Zebley, 493 U.S. 521 (1990). There, the Supreme Court held that the SSA regulations for determining whether a child is disabled, which permitted benefits to children only if their impairments matched or medically equaled specific impairments listed in an appendix to the SSA's regulations, were an impermissible implementation of the Act. See id. at 526, 541. The regulations did not permit a child claimant to show that "the overall functional impact of his unlisted impairment or combination of impairments is as severe as that of a listed impairment." Id. at 531.

In response to *Sullivan,* the SSA amended the regulations to require an "individualized functional assessment" ("IFA") for each child. *See* Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5,534 (Feb. 1, 1991)

(codified at 20 C.F.R. § 416.924). As a result of the new regulations, a child's impairments were evaluated within six domains of childhood activity or functioning. *See Encarnacion I*, 331 F.3d at 83. The amended regulations established a hierarchy of limitations (the effect of an impairment or combination of impairments): "extreme," "marked," "moderate," and "severe." *See id.* The regulations recommended that children be deemed disabled if their impairments caused a marked limitation in one domain and a moderate limitation in another domain, or if a child had three moderate limitations. *See id.*

In 1996, the regime for children's SSI Benefits underwent more changes. Congress amended the Act to define a "disabled" child as one who "has a medically determinable physical or mental impairment, which results in marked or severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211, 110 Stat. 2105, 2188-89 (codified at 42 U.S.C. § 1382c (a)(3)(C)(i)). Congress made clear that children should not qualify for benefits under the new definition unless they have at least two marked limitations, thus making eligibility more restrictive. *See Encarnacion I,* 331 F.3d at 83-84 (citing H.R. Rep. No. 104-725, at 328 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2716). Congress also eliminated the IFA process. Pub. L. No. 104-193, § 211(b)(2), 110 Stat. at 2189.

The Commissioner was charged with promulgating "such regulations as may be necessary to implement" the amendment, id. § 215, 110 Stat. at 2196, and issued regulations pursuant to this statutory authority, *see* 20 C.F.R. § 416.924 *et seq*. The regulations establish a three-step process. First, the child must not be engaged in "substantial gainful activity." *Id.* § 416.924(a). Second, the child "must have a medically determinable impairment(s)" that is "severe" in that it causes "more than minimal functional limitations." *Id.* § 416.924(c). Third, the child's impairment or combination of impairments must medically or functionally equal an impairment listed in an appendix to the regulations. *See id.* § 416.924(d); 20 C.F.R. pt. 404, subpt. P, app. 1 (listing and describing impairments). The plaintiffs' challenge concerns the manner of determining functional equivalence at the third step of this process.

For a child's impairment to functionally equal a listed impairment, the impairment must "result in 'marked' limitations in two domains of functioning or an 'extreme' limitation in one domain." 20 C.F.R. § 416.926a(a). The domains that the regulations establish to determine whether impairments result in marked or extreme limitations are: (1) acquiring and using information, (2) attending and completing tasks, (3) interacting and relating with others, (4) moving about and manipulating objects, (5) caring for oneself, and (6) health and physical well-being. *Id.* § 416.926a(b)(1). The SSA must determine whether an impairment or combination of impairments causes

a "marked" limitation on a child's functioning in at least two of these domains, or an "extreme" limitation in at least one domain. A "marked" limitation is "'more than moderate' but 'less than extreme'" and "interferes seriously with" a child's "ability to independently initiate, sustain, or complete activities." *Id.* § 416.926a(e)(2)(i). An "extreme" limitation is "'more than marked'" and "interferes very seriously with" a child's "ability to independently initiate, sustain, or complete activities." *Id.* § 416.926a(e)(3). The regulations recognize that an impairment or combination of impairments may have effects in more than one domain; thus, the SSA evaluates a child's impairments in any domain in which they cause limitations. *Id.* § 416.926a(c).

The question that the plaintiffs urge us to answer in the affirmative is whether the Act and the regulations require the SSA to consider the combined effects of a child's impairments across domains. In other words, must the SSA consider, for example, whether the effects of impairments that cause a moderate limitation on a child's ability to acquire and use information (domain 1) and a moderate limitation on the child's ability to complete tasks (domain 2) result in a marked limitation? The plaintiffs advocate that the SSA must consider such adjustments to limitation levels to properly take a "comprehensive look" at the applicant. Under its Policy, the SSA does not engage in this sort of analysis.

The Commissioner points to two documents to support the existence of the Policy: an SSA training

manual, see SSA, Office of Disability, Publ'n No. 64-075, Childhood Disability Training: Student Manual, Tab F at 15 (1997), and commentary in the notice of the agency's final rulemaking implementing Congress's 1996 amendments, *see* Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747, 54,763 (Sept. 11, 2000) (codified at 20 C.F.R. pts. 404, 416). The manual provides that "[m]oderate limitations cannot be 'added up' to equal a 'marked' limitation." In the rulemaking notice, the Commissioner explained that permitting a finding of disability based on less-than-marked limitations in multiple domains would improperly reinstate the IFA process, under which a child with three moderate limitations could be considered disabled. *See id.*

In September 2000, the plaintiffs sued the Commissioner in the U.S. District Court for the Southern District of New York (Swain, *J.*), claiming that they were denied benefits because of the Policy and that the Policy violated the Act because it prevented the agency from considering the combined effect of impairments throughout the disability-determination process. The district court upheld the Policy, and we affirmed, reading the SSA regulations to provide sufficient flexibility to "look comprehensively at the combined effects of [a claimant's] impairments." *Encarnacion I,* 331 F.3d at 90 (internal quotation marks omitted). We left open, however, the possibility of a later suit alleging that: (1) the Commissioner did not, in fact, permit the SSA to "adjust the level of a

claimant's limitation within one or two domains to 'look comprehensively' at the claimant and account for the 'interactive and cumulative effects' of limitations in other domains," or (2) the domains insufficiently account for significant aspects of childhood functioning. *See id.* at 89 & n.7 (citations omitted).

The plaintiffs filed this case in September 2003, alleging that the Policy prevents the SSA from adding together less-than-marked limitations from separate domains and prohibits the SSA from adjusting the level of limitation in one domain to reflect the impact of limitations in other domains. In support of their claims, the plaintiffs submitted an expert declaration from Kevin P. Dwyer, a school psychologist. Dwyer opined that the Policy resulted in an "irrational and unscientific" methodology for determining disability and denied benefits to children who were as, or more, disabled than those who had two marked limitations and qualified for benefits.

The district court granted summary judgment to the Commissioner. The court concluded that *Encarnacion I* did not require the Commissioner to engage in cross-domain combination of less-than-marked limitations and that the regulations, as informed by the Policy, adequately took into account the combined effect of a child's impairments. The court also found that Dwyer's general statements, unconnected to any actual cases, were insufficient to defeat summary judgment.

The plaintiffs now appeal.

DISCUSSION

We review de novo the district court's grant of summary judgment. *Guilbert v. Gardner,* 480 F.3d 140, 145 (2d Cir. 2007).

I. Effect of *Encarnacion I*

The plaintiffs contend that *Encarnacion I* dictates a result in their favor. We disagree.

In *Encarnacion I,* the Court gave three reasons for rejecting the plaintiffs' challenge. First, the SSA considers impairments in each domain that they affect. 331 F.3d at 88. Second, the SSA evaluates the combined effects of impairments within each affected domain. *Id.* And third, notwithstanding the Policy, the regulations appeared to the Court to permit "the existence of sub-marked limitations in other domains [to] influence the level of impairment [the] SSA finds in any one given domain," although not in the sense that the SSA would add up less-than-marked limitations to equal a marked limitation. *See id.* at 88, 89. Thus, in the Court's view, the plaintiffs' challenge rested on the incorrect "assumption that after adding together limitations within domains, [the] SSA makes no further adjustments to the level of limitation in each domain." *Id.* at 88.

The Court also noted that "the flexibility to account for cumulative effects . . . is likely essential to a permissible implementation of the Act" because, under *Sullivan v. Zebley,* 493 U.S. 521 (1990), and the

Act's language, an impairment cannot be "assigned zero weight in the ultimate decision whether or not to award benefits." *Id*. at 89, 90. However, based on the record before it, the Court was "satisfied that the agency's policy of considering the combined impact of an impairment within every affected domain but not adding across domains is not a plainly erroneous procedure . . . particularly since SSA regulations are flexible enough to allow [Administrative Law Judges] to look comprehensively at the combined effects of [a claimant's] impairments." *Id.* at 90 (internal quotation marks omitted).

Judge Raggi wrote a separate concurrence to emphasize her view that the Court's opinion permitted, but did not require, the Commissioner to adjust the limitation level within one domain based on limitations in other domains. *See id.* at 92 (Raggi, *J.*, concurring). Judge Raggi noted that "the SSA does not presently engage in across-domain analysis in determining childhood disability," but concluded that the Commissioner's method of evaluating the combined effects of impairments within each domain they affect was a reasonable implementation of the statute. *See id.* at 92-93. With regard to the majority's statement that the flexibility it described was "likely essential to a permissible implementation of the Act," Judge Raggi understood the majority to "refer[ ] both to the flexibility available in the present SSA practice . . . as well as to the flexibility afforded by the alternative across-domain adjustment process." *Id.* (internal quotation marks omitted).

We believe that *Encarnacion I* did not resolve the precise issue before us. Rather, the Court suggested what the plaintiffs assumed did not exist: the possibility of cross-domain adjustment as part of the agency's "comprehensive" look at each applicant. There is now, however, no dispute that the SSA, in practice, does not engage in the sort of cross-domain adjustment that the Court in *Encarnacion I* thought the regulations permitted. Because it believed that the regulations allowed cross-domain adjustments, the Court in *Encarnacion I* did not decide whether the Commissioner could permissibly implement the Act without such analysis.

Like Judge Raggi, we do not read the majority's statement about sufficient flexibility to require the SSA to adjust the limitation level in one domain based on limitations in other domains. *See id.* at 92. Instead, we understand the Court to have meant that the Commissioner's interpretation could not be so inflexible as to assign zero weight to an impairment in the disability-determination process.[1] We know that the Court found sufficient flexibility for the three reasons noted above. We simply do not know, because the Court was not required to decide, whether the Court would have reached the same result absent the third of those three reasons – *i.e.,* that the agency

[1] To the extent that the Court in *Encarnacion I* meant to suggest that the Act required the agency to make cross-domain adjustments, any such comments are dicta and do not free us of the obligation to decide the issue ourselves.

could adjust limitation levels within a particular domain based on a comprehensive look at the claimant. We therefore must decide that issue here.

II. Deference Due the Policy

The plaintiffs allege that the Policy conflicts with both the Act and the regulations. Before addressing the substance of their challenge, we must decide the level of deference due the Commissioner.

Whether a court defers to an agency's interpretation "depends in significant part upon the interpretive method used and the nature of the question at issue." *Barnhart v. Walton,* 535 U.S. 212, 222 (2002). When Congress has entrusted rulemaking authority under a statute to an administrative agency, we evaluate the agency's implementing regulations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See United States v. Mead Corp.,* 533 U.S. 218, 229-30 (2001). A similar deference applies when an agency interprets its own regulations. That interpretation, regardless of the formality of the procedures used to formulate it, is "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (internal quotation marks omitted); *see also Encarnacion I,* 331 F.3d at 86 ("[A]n agency's interpretation of its own regulations is entitled to considerable deference, irrespective of the formality of the procedures used in formulating the interpretation."). Even if neither *Chevron* nor *Auer* applies, an

agency interpretation is still entitled to "'respect according to its persuasiveness'" under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). *Estate of Landers v. Leavitt,* 545 F.3d 98, 107 (2d Cir. 2008) (quoting *Mead Corp.,* 533 U.S. at 221).

The plaintiffs argue that the Policy is not entitled to *Chevron* deference because it is not found in the regulations themselves, but is only expressed, if at all, in informal sources like the training manual.[2] *Cf. id.* at 106 ("[A]gency manuals, as a class, are generally ineligible for *Chevron* deference."). The plaintiffs also argue that the Policy is not entitled to *Auer* deference to the extent that it interprets 20 C.F.R. § 416.923 because that regulation merely parrots the language of 42 U.S.C. § 1382c(a)(3)(G). *Cf.* Gonzales v. Oregon, 546 U.S. 243, 257 (2006) ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). We need not resolve these issues because we conclude that, even applying the less deferential *Skidmore* standard, the Policy must be upheld. *See, e.g., Fed. Express Corp. v. Holowecki,* 128 S. Ct. 1147, 1156 (2008) (avoiding questions as to application of *Chevron* and *Auer*

[2] The plaintiffs contend that the training manual and commentary to the 2000 rulemaking contain only "sparse and inconclusive references" to the Policy, and that the Commissioner has fully articulated the Policy only in this litigation.

deference and upholding agency interpretation under *Skidmore*).

III. Application of *Skidmore*

The weight we give an interpretation under *Skidmore* depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore,* 323 U.S. at 140. To gauge the persuasiveness of the Commissioner's interpretation, we begin with the text of the Act and regulation, both of which require the SSA to consider the combined impact of a claimant's impairments "throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(G); 20 C.F.R. § 416.923.

It is undisputed that the "disability determination process" is the sequential process that the Commissioner has established under his broad statutory authority. *See, e.g.,* 42 U.S.C. § 405(a) (authorizing the Commissioner to promulgate regulations to determine eligibility for benefits); Pub. L. No. 104-193, § 215, 110 Stat. at 2196 (authorizing the Commissioner to implement the amended definition of childhood disability). The requirement that the combination of impairments be considered throughout the process must therefore be measured with reference to the "process" the Commissioner has created. We suggested in *Encarnacion I* that "the Act appears to require that each of a claimant's impairments be

given at least some effect during each step of the disability determination process." 331 F.3d at 90. The Commissioner's interpretation satisfies this test because the SSA considers all impairments within each domain, the final step of the process as the Commissioner has defined it. The SSA "will consider a single impairment in every domain it affects, no matter the degree[,][and] will assess the cumulative impact of all impairments relevant to a particular domain in assessing a child's cumulative functional limitation in that domain." *Id.* at 88. Thus, the Policy complies with the statutory language by mandating consideration of the combined impact of all impairments within each domain that the impairments affect. Contrary to the plaintiffs' argument, therefore, the Commissioner's interpretation does not assign "zero weight" to any impairment or combination of impairments.[3]

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[3] This case is unlike *Sullivan v. Zebley,* where the Supreme Court concluded that the childhood-disability regulations did not allow for consideration of all impairments throughout the process. *See* 493 U.S. at 535 n.16. The Court explained, however, that if children were given the same level of individualized consideration as adults, the regulations would comply with the statute. *See id.* For adults, the agency did not merely focus on the type of impairments, but evaluated the effect of all impairments on a claimant's functioning. *See id.* at 535-36 & 535 n.15. Within the domain system, the SSA provides an individualized assessment of the combined impact of a child's impairments; it does not merely look at the type of impairments in an objective fashion, but analyzes the effect of the impairments on the specific child claimant.

We also believe that the Commissioner's interpretation is consistent with the statutory changes Congress made in 1996. As we have noted, Congress intended the changes in the definition of childhood disability to ensure that only those children with at least two marked limitations within particular domains qualified for SSI Benefits. *See id.* at 83-84. Moreover, in its efforts to tighten eligibility, Congress rejected the IFA process, which had allowed the SSA greater flexibility to award benefits to children with fewer than two marked limitations. *See id.* at 84. We find persuasive the Commissioner's view that adjusting limitations in one domain based on limitations in another domain would result in benefits to children who did not satisfy the more restrictive standard Congress sought to impose, and would be too close to the IFA process Congress eliminated.

The Commissioner's interpretation – focusing on combined impairments within each domain – is easily understood and applied in a reasonably transparent manner. In contrast, we have difficulty understanding how the plaintiffs' interpretation of the statute would function in practice. *Cf. Fed. Express Corp.,* 128 S. Ct. at 1157 (rejecting challenge to agency's interpretation under *Skidmore* because "[n]o clearer alternatives are within [the Court's] authority or expertise to adopt").

Because the plaintiffs do not challenge the Commissioner's use of the domains to determine functional equivalence, any interpretation they offer must account for the domains. While the plaintiffs' briefs

and expert declaration are replete with condemnations of the Policy, they offer nothing in the way of an alternative system that would satisfy the statute and be efficiently administered, using the domains. For example, the plaintiffs' expert opines that the Commissioner's Policy fails to consider, in the ultimate benefits determination, certain impairments that do not lead to marked limitations in any particular domain. He explains that "no competent clinician would fail to include [those impairments] as a highly relevant variable in the equation." *How* the SSA would consider impairments as a "relevant variable" outside the domains, in a system overseen by administrative law judges, not clinicians, is unexplained. The plaintiffs' briefs are similarly unenlightening. We are left with vague arguments that the Commissioner could have designed a better regulatory system to effectuate Congress's general marching orders. But "[w]here ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives." *Id.* at 1158.

Apart from the text, congressional purpose, and practical considerations, other factors point in favor of the Commissioner's interpretation. The SSA has substantial expertise and is charged with administering a complex statute. The agency's considerable efforts to refine the disability-determination process for children and align it with congressional purposes has led to "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. at 1156 (internal quotation

marks omitted). And the plaintiffs do not contend that the Commissioner has waffled in his interpretation of the statute or regulations; rather, his interpretation has been consistent since the agency implemented the 1996 amendments. *See Alaska Dep't of Envtl. Conservation v. EPA,* 540 U.S. 461, 488 (2004) (upholding agency's "longstanding, consistently maintained interpretation" under *Skidmore*).

Finally, the plaintiffs inordinately rely on the Dwyer declaration to argue that the Policy "violates accepted clinical standards for the evaluation of children and leads to irrational results." We lack the authority and are ill-equipped, in contrast to the Commissioner, to decide the best method to determine childhood disability. Nor does the plaintiffs' expert declaration (unaccompanied by any evidence as to actual children who are adversely affected by the Policy or a concrete alternative to the Commissioner's interpretation) overcome the Commissioner's reasonable, consistent application of the statute. We will not reject the agency's otherwise persuasive interpretation on the say-so of a single expert armed only with hypotheticals.

We therefore conclude that the Commissioner's interpretation of the Act and implementing regulations, embodied in the Policy, is entitled to deference under *Skidmore.*

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FOR PUBLICATION

ELISA ENCARNACION o/b/o ARLENE GEORGE, et al.,
Plaintiffs,
-v-
MICHAEL J. ASTRUE, Commissioner of Social Security,
Defendant.

No. 03 Civ. 6620 (LTS) (THK)

OPINION AND ORDER

(Filed Jun. 22, 2007)

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LAURA TAYLOR SWAIN, United States District Judge

Defendant Michael J. Astrue, Commissioner of the Social Security Administration ("Commissioner," and "SSA," respectively),[1] moves the Court for summary judgment in his favor in this action challenging the Commissioner's interpretation of regulations promulgated under the Social Security Act and relating to the determination of disabilities in children for the purpose of awarding benefits under the Social Security Income for the Aged, Blind, and Disabled Program, 42 U.S.C. §§ 1381-1383f ("SSI"). Defendant also moves for dismissal of Plaintiff Arlene George's claim on the basis of a lack of subject matter jurisdiction, for the dismissal of Plaintiff Michelle Tavaras' claim as untimely and as moot, for the dismissal of Plaintiff Hortensia Lacayo's claim on the basis of a lack of jurisdiction and mootness, and of Plaintiff Ben-Hemir Collado's claim on the basis of lack of

[1] Commissioner Astrue is hereby substituted for former Commissioner Barnhart as the party defendant, pursuant to Fed. R. Civ. P. 25(d)(1).

jurisdiction. Plaintiffs Arlene George, Michelle Tavaras, Hortensia Lacayo, Mathew Lacayo, and Ben-Hemir[2] (collectively, "Plaintiffs") have filed a cross-motion for summary judgment, as well as a motion for leave to file an amended class action complaint. Plaintiffs have also filed a motion for class certification. In this opinion, the Court will address each of the motions.

The Court has jurisdiction of Plaintiffs' claims pursuant to 42 U.S.C. § 405(g). Familiarity with the Court's March 22, 2002, opinion in *Encarnacion v. Barnhart,* 191 F. Supp. 2d 463 (S.D.N.Y. 2002) (hereinafter, "*Encarnacion I*"), and the Second Circuit's May 28, 2003, opinion in *Encarnacion v. Barnhart,* 331 F.3d 78 (2d Cir. 2003) (hereinafter, "*Encarnacion II*"), is assumed.

BACKGROUND

This is not the first time that the broad issues raised in this case have come before this Court. On September 1, 2000, Plaintiff George and others filed a complaint raising substantially similar claims concerning the Commissioner's interpretation of the provisions of the Act and SSA regulations governing childhood disability determinations, and thereafter

[2] As the parties have done in their papers, the Court refers to the named Plaintiffs here by reference to the persons on whose behalf the underlying benefit applications have been made.

moved for class certification, while Defendant cross-moved for judgment on the pleadings. The Court granted Defendant's motion for judgment on the pleadings, finding that the Commissioner's interpretation was reasonable despite the fact that the Commissioner's policy of not combining limitations across functional domains in making disability determinations was not expressly stated in the regulations. *Encarnacion I,* 191 F. Supp. 2d at 474. The Court found *Chevron* deference to the Commissioner's interpretation warranted.[3] *Id.* at 472. The Court denied the plaintiffs' motion for class certification.

On appeal, the Second Circuit affirmed *Encarnacion I,* finding the Commissioner's functional domain-based framework for considering the impact of impairments in connection with disability determinations consistent with the requirements of the Act and regulations. *Encarnacion II,* 331 F.3d at 80.

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[3] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984) (holding that "considerable weight [is] afforded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principal of deference to administrative proceedings has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulation") (citation and quotation marks omitted); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481, 491 (2d Cir. 2001).

Specifically, the Circuit Court found that the SSA's domain-focused methodology and interpretation is not violative of the statute or regulations on its face because it leaves room for consideration of impairments in multiple domains and for the final assessment of the level of limitation in a particular domain to be influenced by the impact of an impairment, even if that impairment only resulted in a less than marked limitation in another domain. Reviewing the Commissioner's policy with considerable deference, the Circuit Court held that the Commissioner's interpretation of his own regulations "is not contrary to law if there are other reasonable methods of giving effect to the 'combined impact' mandate *other than by adding limitations across domains." Id.* at 86 (emphasis supplied).

However, the *Encarnacion II* Court made clear "that each of a child SSI claimant's impairments must be taken into account in SSA's bottom-line assessment of the child's disability." *Id.* at 92. The Court of Appeals explicitly left open the opportunity for further litigation on the factual issue of whether the Commissioner's implementation of the regulations fails as a practical matter to "look comprehensively" at a childhood disability benefit claimant and account for the "interactive and cumulative effects" of the claimant's impairments and related functional limitations, as contemplated by the relevant regulations. *See* 20 C.F.R. §§ 416.924a(A)(4), 416.926a; *Encarnacion II,* 331 F.3d at 86 (observing that the complaint in that action might have survived the pleading stage

dismissal motion had the plaintiffs alleged that: (1) the Commissioner's policies, or any other alternative "combined impact" method, "are ineffective either on their face or as applied;" or (2) that "examiners are [not] in fact free to account for the 'interactive and cumulative' effects of all the claimant's impairments").

In the instant Complaint, Plaintiffs allege principally that the Commissioner in fact prevents disability adjudicators from "look[ing] comprehensively at the claimant, and account[ing] for the interactive and cumulative effects of limitations in other domains." (Compl. ¶ 57.)

Plaintiffs' factual proffers in support of their summary judgment motion consist of an expert witness declaration by school psychologist, and numerous SSA regulations and procedural materials that were also addressed in the prior litigation. Plaintiffs request relief in the form of a declaratory judgment confirming their right "under the Act and regulations, to have all of their impairments and their resulting functional limitations considered throughout the disability determination process and not just those impairments that impose limitations that are 'marked' or 'extreme.'" (Compl. ¶ 5.) Plaintiffs also seek an injunction preventing the Commissioner from continuing to deny and/or terminate the applications of children seeking SSI benefits without full and proper consideration of the combined effects of impairments across domains. (*Id.* ¶ 6.)

Plaintiffs also move, pursuant to Federal Rule of Civil Procedure 23, for certification of a class of plaintiffs defined as:

> all children who were denied SSI disability benefits on or after August 22, 1996 as a result of an application of the [Social Security] Commissioner's policy of forbidding adjudicators to assign any weight in the final determination of disability to impairments imposing "less than marked" functional limitations, or whose benefits were terminated based on such an application, or who may hereafter have their benefits denied or terminated based on such an application.

(Pls.' Mot. for Class. Cert. 5.) The parties' substantially simultaneous class certification and summary judgment motion practice was fully briefed in 2005.

The Court has carefully and thoroughly considered all of the extensive briefing in this case. For the following reasons: (1) Plaintiffs' motion for class certification is denied; (2) Defendant's motion for summary judgment is granted; (3) Plaintiffs' motion for summary judgment is denied; and (4) Plaintiffs' motion for leave to file an amended class action complaint is denied.

DISCUSSION

Defendant's Application to Dismiss Certain Plaintiffs' Claims

In his cross-motion for summary judgment, Defendant argues that the claims of each of the named Plaintiffs should be dismissed on procedural grounds. Specifically, Defendant argues that: the claims of Arlene George ("George") should be dismissed for lack of exhaustion of remedies; the claims of Michelle Tavares ("Tavares") should be dismissed as untimely and moot; the claims of Mathew Lacayo ("Lacayo") should be dismissed based on a lack of the Court's jurisdiction and mootness; and the claims of Ben-Hemir Collado ("Collado") should be dismissed based on a lack of the Court's jurisdiction.

Relating to the Defendant's mootness argument, all four lead Plaintiffs' claims have been remanded to the Commissioner for rehearing on the issue of disability. *See Encarnacion v. Barnhart,* 00 Civ. 6597(LTS), 2003 WL 1344903 (S.D.N.Y. Mar. 19, 2003) (Arlene George); *Lora v. Barnhart,* 03 Civ. 9942(LTS) (Docket Entry No. 10, Aug. 16, 2004) (Michelle Tavares); *Lacayo v. Halter,* 01 Civ. 2295(RMB) (Docket Entry No. 12, Dec. 1, 2004) (Mathew Lacayo); *Veloz v. Massanari,* 01 Civ. 4776(NB) (Docket Entry No. 7, Feb. 19, 2002) (Ben-Hemir Collado). However, as Defendant acknowledges, in a putative class action suit, the parties' claims will not become moot until such time as the Commissioner provides them with their benefits. Furthermore, "[w]here class claims

are inherently transitory, 'the termination of a class representative's claim does not moot the claims of the unnamed members of the class.'" *Robidoux,* 987 F.2d at 939 (quoting *Gerstein v. Pugh,* 420 U.S. 103, 110 n.11 (1975)). Class claims are considered transitory where, as here, the Commissioner "will almost always be able to [offer review on remand] before a plaintiff can obtain relief through litigation." *Id.* at 939 (referring to litigation involving the Vermont Department of Social Welfare's delay in reviewing public assistance benefits applications). In addition, "[e]ven where the class is not certified until after the claims of the individual class representatives have become moot, certification may be deemed to relate back to the filing of the complaint in order to avoid mooting the entire controversy." *Id.* Thus, the remands of the named Plaintiffs' benefit claims do not preclude their pursuit of the class claims asserted here.

Lacayo and Collado

Defendant argues that the undersigned lacks jurisdiction of the class claims asserted by Lacayo and Collado because those plaintiffs' individual benefit claims are not before the undersigned but, rather, are before Judges Berman and Buchwald of this District, respectively. Defendant argues that, because the claims of Lacayo and Collado are pending before other judges within this District, their respective claims in this case should be dismissed. Jurisdiction of the claims lies, however, within the Southern District of New York, and it is not limited to any one

particular judge. "Individual judges of a single court do not have 'jurisdiction' of matters before the court. The Court as a whole does." *United States v. Armstrong,* 2003 WL 21436503, at *1 (S.D.N.Y. June 20, 2003). Moreover, the interests of consistency and judicial economy are served by consideration of their class claims in this litigation, as the undersigned is thoroughly familiar with the issues raised by their class claims. Accordingly, the fact that Lacayo and Collado have individual claims pending in this District before other judges does not warrant dismissal of their claims asserted in this case, and Defendant's motion for summary judgment is denied insofar as it seeks dismissal of the claims of these two named Plaintiffs' claims.

Because two of the Plaintiffs' class claims are viable as a procedural matter and, for the reasons explained below, the class certification motion will be denied and summary judgment will be granted in Defendant's favor on the merits of the action, the Court declines to address Defendant's arguments for dismissal of the class claims asserted by the remaining named Plaintiffs.

Plaintiffs' Motion for Class Certification

Plaintiffs move the Court to certify this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2). The Second Circuit "has specifically held that it is within a district court's discretion to reserve decision on a class certification

motion pending disposition of a motion to dismiss." *Benfield v. Mocatta Metals Corp.,* 1993 WL 148978, at *2 (S.D.N.Y. May 5, 1993), *citing Christensen v. Kiewit-Murdock Investment Corp.,* 815 F.2d 206, 214 (2d Cir. 1987). The Second Circuit's ruling in *Christensen* logically must also apply to a district court's discretion to reserve decision on a class certification motion pending disposition of summary judgment motions.

For the reasons explained below in the discussion of the parties' arguments on the summary judgment motion practice, the Court finds that Plaintiffs have failed to raise a triable issue as to the fundamental premise both of their Complaint and of their proposed class definition, namely that the Commissioner violates the rights of applicants for childhood disability benefits by failing entirely to consider, throughout the disability determination process, the cumulative and interactive effects of impairments that produce only moderate functional limitations within a particular domain. In light of this failure, the class as proposed to be defined, even if certified, would have no members. Under this rather unique set of circumstances, class certification would be futile and, accordingly, Plaintiffs' class certification motion is denied.

Summary Judgment Motions

Standard of Review

Summary judgment is to be granted in favor of a moving party where the "pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing that there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). A fact is considered material to summary judgment "if it 'might affect the outcome of the suit under the governing law,'" and an issue of fact is a genuine one where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Holtz v. Rockefeller & Co. Inc.,* 258 F.3d 62, 69 (2d Cir. 2001) (quoting *Anderson,* 477 U.S. at 248). The Second Circuit has explained, however, that "[t]he party against whom summary judgment is sought . . . 'must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.'" *Caldarola v. Calabrese,* 298 F.3d 156, 160 (2d Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986)).

When cross-motions for summary judgment are filed, "the standard is the same as that for individual motions for summary judgment." *Natural Res. Def. Council v. Evans,* 254 F. Supp. 2d 434, 438 (S.D.N.Y. 2003). "The court must consider each motion independently of the other and, when evaluating each, the court must consider the facts in the light most favorable to the non-moving party." *Id.* (citing

Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001)).

Res Judicata

Defendant first argues that the doctrine of *res judicata* (claim preclusion) bars the Court's consideration of Plaintiffs' claims in this case because *Encarnacion I* precludes relitigation of the same claim in this action. However, in light of the Second Circuit's explicit statement leaving open the opportunity for further litigation on the factual issue of whether the Commissioner's implementation of the regulations fails as a practical matter to "look comprehensively" at a childhood disability benefit claimant and account for the "interactive and cumulative effects" of the claimant's impairments and related functional limitations, as contemplated by the relevant regulations, *res judicata* does not bar the instant action. *See Encarnacion II,* 331 F.3d at 89 n. 7.

Applicability of *Chevron* Deference

In *Encarnacion I,* this Court held that what Plaintiffs have termed the Commissioner's "non-combination policy" (*i.e.,* analyzing the severity of limitations within, rather than by combining, functional domains) is "patent" in its regulations and thus entitled to *Chevron* deference. Plaintiffs now assert that *Encarnacion II* "overrule[d]" the Court's *Chevron* deference holding by finding that the Commissioner's

non-combination policy was not readily apparent. (Pls.' Mem. at 38.) Alternatively, Plaintiffs make the conclusory argument that *Chevron* deference may not be afforded to Defendant because the SSA's non-combination policy is illegal and irrational. (*Id.*) Suffice it here to say, as to Plaintiff's argument that this Court's *Chevron* deference holding was overruled by the Second Circuit, that the appellate opinion in *Encarnacion II* recognized that the SSA "focus[es] on the combined effects of impairments *within* domains" *and* held *Chevron* deference appropriate. *Encarnacion II,* 331 F.3d at 87 (emphasis supplied).

As to Plaintiffs' argument that deference is inappropriate because the "non-combination" policy is irrational and illegal, the Court notes that Plaintiffs' argument assumes that the Commissioner's interpretation is illegal. It is up to the Court to determine whether the Commissioner's interpretation is illegal, and *Chevron* deference merely "provides the appropriate legal lens through which to [determine] the legality of the Agency interpretation . . . at issue." *Barnhart v. Walton,* 535 U.S. 212, 222 (2002).

Plaintiffs' Claims in this Litigation

Encarnacion II, while upholding the dismissal of Plaintiff's challenge to the SSA's childhood disability determination regulations because the Circuit Court found the regulations "open to a reading in which examiners are in fact free to account for the 'interactive and cumulative' effects of all of the claimant's

impairments," left open the opportunity for further litigation on the factual issue of whether the Commissioner's implementation of the regulations fails as a practical matter to look comprehensively at a childhood disability benefit claimant and account for the interactive and cumulative effects of the claimant's impairments and related functional limitations, as contemplated by the relevant regulations. In their current Complaint, Plaintiffs allege, *inter alia,* that

> [w]ith respect to . . . determinations of functional equivalence, the Commissioner has adopted an informal policy or interpretation of her regulations that forbids adjudicators to assign any weight in the final determination of disability, to impairments that impose 'less than marked' functional limitations.

(Compl. ¶4.) Tracking an element of the Second Circuit's discussion in *Encarnacion II,* Plaintiffs acknowledge that the Commissioner's policy forbids adjudicators "to add together less than marked limitations from separate domains when determining whether a child satisfies the one extreme or two marked limitation standard of disability," *see* 331 F.3d at 86, and further allege that

> [t]he Commissioner . . . forbids adjudicators to adjust the level of limitation in any domain in any other manner in order to reflect the impact that other less than marked limitations may have on a child's overall level of functioning. As a result, in many cases, the Commissioner assigns zero

> weight, in the ultimate decision whether or not to award benefits, to many impairments that significantly affect the child's overall level of functioning.

(*Id.*); *cf. Encarnacion II,* 331 F.3d at 88-90. Similarly, Plaintiffs allege that

> [i]t has been the Commissioner's practice and policy to deny her adjudicators the power to adjust the level of a claimant's limitation within one or two domains to look comprehensively at the claimant, and account for the interactive and cumulative effect of limitations in other domains

(Compl. ¶57); *cf. Encarnacion II,* 331 F.3d at 89; and that

> [a]s a result of the Commissioner's practices and policies, . . . the Commissioner has denied benefits to thousands of children who do not have one extreme or two marked functional limitations but whose overall functional limitations are equally disabling and who are therefore eligible for benefits.

(Compl. ¶58.)

In support of their new factual contentions, Plaintiffs proffer the declaration of Kevin P. Dwyer, a nationally certified school psychologist. Mr. Dwyer opines that "[t]he Commissioner's method of determining functional equivalence, which ignores as 'less than marked' the supposedly 'minor' effects of some impairments, is irrational and unscientific"; that the

Commissioner's definition of "marked" limitation "has set the bar so high that it excludes the effects of impairments that any clinician or diagnostician would consider anything but minor or dismissable"; and that "[c]onsequently, the Commissioner's method of determining functional equivalence undoubtedly results in the denial of benefits to many children who are as disabled, or more disabled, than some children who meet the 'two marked' or 'one extreme' functional limitation standard." (Dwyer Decl. ¶14.)

To the extent Mr. Dwyer's declaration, and Plaintiffs' allegations concerning invalidity of the Commissioner's domain-based methodology for determining functional equivalence, are intended to relitigate the issue of the facial validity of the Commissioner's policy under which, "once the examiner has assessed the level of limitation in each of the claimant's domains, moderate limitations drop out of the equation, and the number of marked or extreme limitations is counted to determine whether the claimant is eligible" for statutory disability benefits, *Encarnacion II,* 331 F.3d at 85, Plaintiffs' efforts are misplaced. The Circuit Court's opinion in *Encarnacion II* addressed the facial validity of the policy, found *Chevron* deference appropriate to analyzing its validity, and upheld it as sufficient to permit "reasonable methods of giving effect to the 'combined impact' mandate other than by adding limitations across domains." *Encarnacion II,* 331 F.3d at 86.

To the extent Plaintiffs' intention is, by means of the Dwyer declaration, to frame genuine issues of fact

as to whether the Commissioner's methods "are ineffective either on their face or as applied," *id.* at 86, their effort fails because Mr. Dwyer's conclusions concerning the SSA's practices lack a competent factual basis in the record. Plaintiffs have failed to present evidence of the SSA's application of the challenged interpretations in actual cases, and the generalized opinions presented in the Dwyer declaration as to the insufficiency of the SSA's regulations and policy to identify "disabled" children and as to the numbers of such children likely excluded by the challenged policy are not tied to any demonstration that the definition of "disability" on which Mr. Dwyer's conclusions are based is consistent with the SSA's regulations or, indeed, with the statutory standard that the SSA is required to implement.

Mr. Dwyer acknowledges in the opening portion of his Declaration that his opinions are based on his "understanding of how the Commissioner of Social Security makes determinations of functional equivalence in children's SSI cases," and that his understanding is derived, not from analysis of actual SSI cases or a study of the testimony of SSA officials but, rather, "from [his] conversations with plaintiffs' counsel and [his] own review of the Commissioner's regulations and other published materials." (*Dwyer* Decl. ¶6.) Plaintiffs' counsel are not fact witnesses. Rather, they are advocates who have pressed their interpretation of the Commissioner's regulations and their understanding of the impact of the challenged policies before this Court and on appeal in the prior

litigation. The policies were upheld as against those arguments and the Second Circuit left open the door for consideration of a factual case concerning the SSA's actual practices. An opinion based on an advocate's hearsay account of an opponent's practices does not a factual case make.

Nor is Mr. Dwyer's reliance on his own reading and interpretation of the Commissioner's regulations and materials any more efficacious to respond to the question left open by the Circuit. The interpretation of the impact and breadth of such legal materials is for the courts; indeed, the *Encarnacion II* opinion makes it quite clear that the Circuit Court had studied carefully the relevant regulations and policy materials in reaching its determination as to the facial scope of the regulations and the permissibility of the Commissioner's policies.

Furthermore, as demonstrated in the Commissioner's opposition papers to Plaintiffs' cross-motion, Mr. Dwyer misinterprets the manner in which the SSA regulations operate in connection with childhood disability determinations. (*See* Mem. of Law in Opp. to Pls.' Cross-Motion, at 30-35.)

Mr. Dwyer's argument that "the presumption that impairments causing less than marked functional limitations have no effect on a child's overall functioning is demonstrably unscientific" both assumes the existence of a "presumption" that is contradicted by the SSA's regulations and ignores the fact that the SSA is working within a statutory framework and

deals with determinations of disability for a specific and limited, albeit very important, purpose. The regulations clearly take into account impairments that cause less than marked functional limitations. That they do so within domains of functioning may mean that, in the final analysis, a domain in which the functional limitation (whether attributable to a single impairment, or to the cumulative and interactive effects of several impairments) is less than marked will not support a finding of disability does not mean that the impairments are ignored. *See* 20 C.F.R. § 416.926a(b). Mr. Dwyer's further discussion of, for instance, the impact of what he posits to be a borderline intelligence level that would not produce a marked limitation in the area of acquiring and using information, even when combined with other cognitive problems, may reflect legitimate and serious medical and policy concerns as to where definitional lines ought to be drawn in decision making as to the allocation of public resources for the benefit of disabled children. However, neither Mr. Dwyer's declaration nor Plaintiffs' arguments demonstrates that the standards on which he bases his opinion are consistent with Congress' policy choices in crafting the Act.

The Dwyer declaration thus fails to demonstrate Plaintiffs' entitlement to judgment as a matter of law, or even to frame a genuine issue of fact as to whether the Commissioner's actual practices fail to take into account properly the "interactive and cumulative effects of all of the impairments for which we have

evidence, including any impairments . . . that are not 'severe,'" and consider such impairments "throughout the disability determination process" in making functional equivalence determinations under the regulations. *See* 20 C.F.R. §416.926a(a) (2004);[4] 42 U.S.C.A. § 1382c(a)(3)(G) (West Supp. 2007).

The Commissioner must, in determining whether a child applying for SSI benefits has an impairment which causes the child to exhibit marked and severe functional limitations, "consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity." 42 U.S.C.A. § 1382c(a)(3)(G) (West 2007). However, "[i]f the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process." *Id.* Plaintiffs argue that the plain language of this provision demonstrates that it is not enough that the Commissioner simply acknowledge the existence of an impairment that produces only a moderate limitation, but rather that the Commissioner must give the impairment significant effect throughout the disability determination process. Plaintiffs, focusing on

[4] The "functional equivalence for children" regulation has been amended since the commencement of this litigation. As the parties' arguments and the prior litigation focused on the pre-amendment provisions the Court refers to the version of the regulation as published in 2004, for clarity, in this opinion.

one passage of the *Encarnacion II* opinion, further argue that they are entitled to summary judgment because, as the Commissioner acknowledges in his papers, the SSA's adjudicators are not permitted to "adjus[t] an otherwise moderate, but nearly marked, limitation in domain A up to fully marked to account for the effect of a limitation in domain B." *See Encarnacion II*, 331 F.3d at 89; (Mem. In Supp. Of Comm.'s Cross-Motion at 3); (Compl. ¶57). Plaintiffs argue, in essence, that this statement, which is followed by a statement at the beginning of the next section of the *Encarnacion II* opinion that "the flexibility to account for cumulative effects we have just described is likely essential to a permissible interpretation of the Act," is in effect a holding that the sort of cross-domain combination of less than marked limitations that Plaintiffs advocate is required.

This Court has studied carefully the parties' arguments, the *Encarnacion II* majority and concurring opinions and the underlying regulations whose implementation is the subject matter of this litigation. Having done so, the Court concludes that reading the sentence cited by Plaintiffs as embodying the holding of *Encarnacion II* – and thus interpreting the decision as requiring a layer of cross-domain combination to validate the domain-based analytical system created under the regulations – is inconsistent with the analysis carefully laid out by the Circuit in that opinion. Notably, the Circuit Court ruled that, "although SSA may choose not to add together moderate limitations across domains to create the

equivalent of a marked limitation, it does not necessarily follow that those impairments underlying the omitted moderate limitations are 'not considered throughout the disability determination process.'"[5] The Circuit held that it was not necessary for the Commissioner to conduct a cross-domain analysis if there were an opportunity for consideration and recognition of the relevant underlying impairment(s) in the Commissioner's current domain-based functional limitation determination, which is designed to consider the cumulative impact, within each separate domain, of all of a child's impairments. *Encarnacion II*, 331 F.3d at 89.

Two key terms, defined by the Circuit in *Encarnacion II* – are central to a proper understanding of the regulations and policy at issue here, as well as of the holding of *Encarnacion II*. As the *Encarnacion II* Court explained:

> The new regulations . . . introduced a new set of terminology, which it will be useful for the reader to distinguish throughout the remainder of this opinion. An 'impairment' is

[5] The Circuit did suggest that the Commissioner's refusal to conduct a cross-domain analysis could be an unlawful interpretation of the regulations "if plaintiffs could demonstrate that the defined domains omitted some significant aspect of pertinent juvenile functioning, and that there was no flexibility to account for the omission within other domains." *Encarnacion II*, 331 F.3d at 89. However, Plaintiffs make no such evidentiary proffer and disclaim any such argument in this case. (*See* Pls. Reply Mem. at 7.)

> the physical ailment affecting the applicant. *See* 42 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. § 416.921-23. A 'limitation' is the functional consequence of an impairment or combination of impairments. *See* 42 U.S.C. § 1382c(a)(3)(C)(i); 20 C.F.R. § 416.924.

Id., 331 F.3d at 83 n.2. The regulation and policies at issue here concern the determination of "whether [an] impairment, alone or in combination with another impairment, 'medically equals, or functionally equals'" the severity of conditions listed in an appendix to the regulations. *See id.* at 84 (citation omitted) and n.3. The regulations provide for the determination of functional equivalency by reference to the severity of the *limitations* arising from an applicant's *impairments* "'in terms of six domains'" of functioning. *Id.* (citation omitted); *see* 20 C.F.R. § 416.926a. The *Encarnacion II* Court recognized that, under the Commissioner's policy that is again challenged here, "two or more moderate *limitations* in different domains of functioning cannot be treated as the equivalent of, or 'added up to equal[,] a "marked" limitation'" and that, "[i]n effect, once the examiner has assessed the level of *limitation* in each of the claimant's domains, moderate *limitations* drop out of the equation, and the number of marked or extreme limitations is counted to determine whether the claimant is eligible [for SSI benefits]." *Encarnacion II*, 331 F.3d at 85 (citations omitted; emphasis supplied). The Commissioner reasoned, as the *Encarnacion II* Court noted, "that 'to revise the disability standards to include children with *impairments* of less than listing-level

severity (*e.g.*, one marked and one moderate limitation or three moderate limitations in "crucial" areas) would, in essence, result in the same level of severity we used when we performed an IFA under the prior law.' " *Id.* (citation omitted; emphasis supplied).

Against this background explanation of the challenged policy, the *Encarnacion II* Court stated that it "read the Commissioner's regulations and policy to give some effect to each of a claimant's *impairments* throughout the disability determination process," noting that the agency "will consider a single impairment in every domain it affects, no matter the degree" and "will assess the cumulative impact of all *impairments* relevant to a particular domain in assessing a child's cumulative functional *limitation* in that domain." *Id.* at 88 (emphasis supplied). This consideration of all of the effects of each impairment led the court to observe that, as contemplated by the regulations, "the existence of submarked *limitations* [arising from an impairment] in other domains may influence the level of *impairment* SSA finds in any one given domain." *Id.* (emphasis supplied). In this last description of the regulation provision, the court seems inadvertently to have referred to a finding of "impairment" in a domain rather than "limitation" in a domain. Its earlier definitions of the relevant terms and painstaking explanation of the regulations and policies lead this Court to conclude that the intended meaning of the statement was to acknowledge that, under the Commissioner's policy, an impairment that may produce only a less than marked limitation in a

particular domain may, when its interactive effects are considered in combination with other impairments affecting another domain, contribute to a marked or greater finding in that other domain. This appears to be the thrust of the Circuit's later comment that "it appears that the regulations permit SSA to increase a non-marked limitation up to marked to reflect the impact that other non-marked impairments may have on the claimant's overall level of functioning," in that the concept of a "non-marked impairment" is anomalous under the nomenclature established by the regulations. *See id.*

A similarly anomalous statement appears on page 89 of the *Encarnacion II* opinion, where the court stated: "Thus, we conclude that under current SSA regulations ALJs retain the power to account for the existence of *non-marked limitations* in the disability determination process notwithstanding the formal bar on combining *non-marked impairments.*" *Id.* (emphasis supplied). The interchange of the terms "impairment" and "limitation" in the court's discussion appears to have led Plaintiffs to believe that *Encarnacion II*, despite its affirmance of the district court decision and its recognition that the Commissioner's policy precludes the combination of sub-marked limitations in unrelated domains to support a finding of disability, nonetheless mandated just such a cross-domain combination methodology.

Plaintiffs similarly misconstrue the *Encarnacion II* Court's discussion of *United States v. Zebley*, 493 U.S. 521 (1990), as indicative of a finding that failure

to cross-combine sub-marked limitations from different domains constitutes affording "zero weight" to impairments that produce less than marked limitations in one or more domains. In *Zebley,* the Supreme Court struck down an SSA disability determination modality that examined only medical equivalence and precluded consideration of functional equivalence in assessing disability, such that an impairment that produced only a functional limitation, rather than one listed in a medical equivalent checklist, was given "no effect at all" in the disability determination. The *Zebley* Court held that the challenged practice did not "sufficiently 'consider the combined effect'" of such impairments. *Encarnacion II*, 331 F.3d at 90. The *Encarnacion II* Court, invoking *Zebley*, stated that it "[could] not accept an interpretation of 'consider the combined effect' where the impairment is assigned zero weight in the ultimate decision whether or not to award benefits" and that such an approach would fail to comply with the statutory mandate to consider "'the combined impact of [all of the claimant's] impairments *throughout* the disability determination process.'" *Id.* (quoting 42 U.S.C. § 1382c(a)(3)(G)).

Plaintiffs reiterate their position that the aspect of the Commissioner's policy in which, as the *Encarnacion II* Court put it, "moderate limitations drop out of the equation" after the limitations in each functional domain have been assessed[6] is as violative

[6] *Encarnacion II*, 331 F.3d at 85.

of the statutory mandate as was the SSA policy at issue in *Zebley*. *Encarnacion II* holds to the contrary, however:

> [W]e are satisfied that the agency's policy of considering the combined impact of an impairment within every affected domain but not adding across domains is not a plainly erroneous procedure for identifying children who suffer from the sort of 'marked and severe functional limitations' that render them disabled, 42 U.S.C. § 1382a(3)(C)(i), particularly since SSA regulations are flexible enough to allow ALJs to 'look comprehensively at the combined effects of [a claimant's] impairments,' 20 C.F.R. § 416.924a(a)(4) (2002).

Encarnacion II, 331 F.3d at 90.

Thus, while it is true that, as alleged in the Complaint, the Commissioner does not permit ALJs to "adjust the level of a claimant's limitation within one or two domains to . . . account for the interactive and cumulative effect of limitations in other domains," (Compl. ¶57), Plaintiffs are not entitled to judgment as a matter of law because neither the Act nor *Encarnacion II* requires such a cross-domain adjustment. What the law requires is that the SSA account for the interactive and cumulative effect of all of the claimant's *impairments*, and that it give weight to all of a claimant's *impairments* in its final determination of disability. While the Commissioner's methodology holds moderate limitations, and the

absence of two marked limitations, insufficient to meet the statutory definition of disability, the SSA's practices as described in *Encarnacion II* and in the record indicate that the SSA evaluates each impairment and weighs each impairment's interactive and cumulative effect in making its final disability assessment, as required by law. Plaintiffs' proffered evidence fails to frame any genuine issue of fact as to whether the SSA violates these requirements in practice. For the same reasons, Plaintiffs have also failed to demonstrate the existence of the class they seek to represent, namely one composed of persons denied benefits by reason of the application of a "policy of forbidding adjudicators to assign any weight in the final determination of disability to impairments imposing 'less than marked' functional limitations . . . "

Accordingly, Plaintiffs' cross-motion for summary judgment is denied, and the Commissioner's cross-motion for summary judgment is granted.

Plaintiffs' Motion for Leave to File an Amended Class Action Complaint

Pursuant to Federal Rule of Civil Procedure 15(a), Plaintiffs move the Court for leave to file an amended class action complaint. The proposed pleading differs from the existing Complaint only insofar as it would add Ana Serrano o/b/o Esteban Martinez as an additional class representative to the case. Plaintiffs also seek to have Ms. Martinez

formally added as a moving party on Plaintiffs' pending motion for class certification. Because, as explained above, the proposed class has no members and the action fails on its merits, the proposed amendment would be futile. Accordingly, the motion is denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification (Docket entry No. 6) is denied. Defendant's cross-motion for summary judgment (Docket entry No. 31) is granted insofar as it seeks dismissal of the Complaint on the merits. Plaintiffs' cross-motion for summary judgment (Docket entry No. 46) is denied. Finally, Plaintiffs' motion for leave to file an amended class action complaint (Docket entry No. 21) is denied.

The Clerk of Court is respectfully requested to enter judgment in Defendant's favor and close this case.

SO ORDERED.

Dated: New York, New York
June 22, 2007

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

Argued: February 26, 2003 Decided: May 28 , 2003

Docket No. 02-6192

ELISA ENCARNACION o/b/o Arlene George, a minor; ANA FELIPE o/b/o Victoria Felipe, MARGARITA GUZMAN o/b/o Eric Garcia, and SANDRA PEREZ o/b/o Maurice Perez, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

– v. –

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Before: STRAUB, KATZMANN, AND RAGGI, *Circuit Judges.*

Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York (Laura Taylor Swain, *J.*) granting the motion to dismiss of Defendant, the Commissioner of Social Security. Plaintiffs assert that the Commissioner's alleged practice of discounting the effects of less than

"marked" limitations in appraising whether a child is eligible for Supplemental Security Income Disability benefits is an unreasonable interpretation of the Social Security Benefits Reform Act of 1984, Pub. L. No. 98-460, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, and implementing regulations.

Affirmed.

Circuit Judge Reena Raggi concurs in a separate opinion.

JEFFREY S. TRACHTMAN, Kramer Levin Naftalis & Frankel LLP, New York, NY; (James M. Baker, Christopher J. Bowes, Michelle R. Duran, Kenneth Rosenfeld, Center for Disability Advocacy Rights, Inc, New York, NY; Matthew J. Chachere, Northern Manhattan Improvement Corp. Legal Services, New York, NY, on the brief) *for Plaintiffs-Appellants Elisa Encarnacion o/b/o Arlene George*; *Ana Felipe o/b/o Victoria Felipe*; *Margarita Guzman o/b/o Eric Garcia*; *Sandra Perez o/b/o Maurice Perez*; *and all others similarly situated*.

SUSAN D. BAIRD, Assistant United States Attorney (James B. Comey, United States Attorney for the Southern District of New York, Gideon A. Schor, Assistant United States Attorney, on the brief) *for Defendant-Appellee Jo Anne B. Barnhart, Commissioner of Social Security*.

Richard P. Weishaupt, Jonathan M. Stein, Robert Lukens, Community Legal Services, Inc., Philadelphia, PA; Ira Burnim, Jennifer Mathis, Judge David L. Bazelon Center for Mental Health Law, Washington, D.C.,*for Amici Curiae American Psychiatric Association, National Mental Health Association, National Alliance for the Mentally Ill, American Orthopsychiatric Association, Children's Defense Fund, Children's Rights Inc., & New York State Association of School Psychologists*.

KATZMANN, *Circuit Judge*.

The Plaintiffs are parents, appearing on behalf of their own minor children as well as a proposed class of similarly situated children, all of whom have sought and were denied benefits under the federal Supplemental Security Income for the Aged, Blind, and Disabled program, 42 U.S.C. §§ 1381-1383f (2000) ("SSI"). The Social Security Administration ("SSA") administers the SSI program and issues regulations setting out guidelines for determining eligible claimants. SSA's regulations currently provide that claimants under the age of 18 shall be analyzed according to how well the child is capable of performing, relative to other children of comparable age, in six distinct "domains" of functioning. Only claimants who exhibit "marked" limitations in two domains, or an "extreme" limitation in a single domain, may be found eligible. The parties agree that SSA has an informal policy, essentially an

interpretation of its own regulations, under which multiple limitations, each of which are less severe than "marked," cannot be added together across domains to serve as the equivalent of a single "marked" or "extreme" limitation. The complaint below alleged that, as a result of this policy, SSA failed to find that the plaintiffs suffered from two marked or one extreme limitation. The plaintiffs allege further that the SSA's interpretation is an unreasonable reading of the statute; specifically, that it is contrary to a statutory provision directing that "the combined impact of [all of the claimants's] impairments shall be considered throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(G). We agree with the plaintiffs that the SSA's policy would be contrary to the statute if the SSA gave no weight to some of a claimant's impairments in appraising the claimant's level of disability. Because, however, we determine that the regulations provide sufficient consideration of "the combined impact" of multiple impairments within individual domains, we affirm.

BACKGROUND

The Statute and Regulations Prior to 1996

Congress's 1972 overhaul of the Social Security Act produced the Supplemental Security Income ("SSI") program, an ambitious network of transfer payments to needy individuals who, for various reasons, were unable to work. Pub L. No. 92-603, § 301, 86 Stat. 1329, 1465 (1972) ("the Act"). Although

the predominant focus of the legislation was benefits for adults, Congress included a provision making disabled children eligible for SSI payments, as well. *Id.,* 86 Stat. at 1471.

The 1972 statute defined "disability" slightly differently for children and adults. An adult would be "considered to be disabled for the purposes of [SSI] if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." *Id.* (codified as amended at 42 U.S.C. § 1382c(a)(3)(A)). A child under 18 would be considered disabled, however, "if he suffers from any medically determinable physical or mental impairment of comparable severity" to that which would disable an adult. *Id.*

The Social Security Administration, which was charged with administering SSI, designed a multistage process for determining whether an adult was disabled under the statute. *See Bowen v. Yuckert,* 482 U.S. 137, 140 (1987). In general, the Commissioner first asked whether the applicant was engaged in any substantial gainful activity. *Id.* If so the applicant was statutorily ineligible for benefits. The Commissioner then attempted to determine whether the claimant's disability was "below a threshold level of medical severity," *id.* at 149 n.3, such that it could not plausibly leave an applicant unable to engage in

gainful activity. *Id.* at 141, 153. The Supreme Court described the remaining stages of the process:

> If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity. [20 C.F.R. §§ 404.1520(d), 416.920(d) (1986)]. If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment is not one that is conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents the claimant from performing work he has performed in the past. If the claimant is able to perform his previous work, he is not disabled. [*Id.* §§ 404.1520(e), 416.920(e)]. If the claimant cannot perform this work, the fifth and final step of the process determines whether he is able to perform other work in the national economy in view of his age, education, and work experience. The claimant is entitled to disability benefits only if he is not able to perform other work. [*Id.* §§ 404.1520(f), 416.920(f)].

Yuckert, 482 U.S. at 141-42.

After a delay of several years, SSA at length issued regulations for identifying disability in children. *See Sullivan v. Zebley*, 493 U.S. 521, 537 n.19 (1990); *see also* S. Rep. No. 94-1265, at 24-25, *reprinted in* 1976 U.S.C.C.A.N. 5997, 6018-19 (discussing SSA's failure to issue meaningful regulations for childhood disability). Its formulation was "an abbreviated version of the adult test." *Zebley*, 493 U.S. at 526. After screening for gainful activity and non-severe impairment, the SSA asked only whether the child's impairments "matche[d] or medically equal[ed]" its listing of impairments that would presumptively disable a child. *Id.* (citing 20 C.F.R. §§ 416.924(b)(2), (3) (1989)). If a child did not qualify under those listings, he or she was denied benefits. *Id.*

SSA's disability-determination process for children underwent a pair of significant changes prior to 1996. The first arose out of Congress's response to SSA's policy towards individuals suffering from multiple impairments. In a regulation enacted in 1982, the Secretary announced that where a claimant had multiple impairments, SSA would consider whether those impairments in combination prevented the claimant from working only if each one of the impairments individually was above the "severe" threshold. *See Kolodnay v. Schweiker*, 680 F.2d 878, 880 (2d Cir. 1982) (citing 20 C.F.R. § 416.922 (1982)). At the same time, the SSA ruled that it would not find that a claimant was "severely" disabled unless he or she had

at least one impairment that in itself was severe.[1] *See Dixon v. Heckler*, 589 F. Supp. 1494, 1508 (S.D.N.Y. 1984) (citing Soc. Sec. Ruling 82-55). The effect of the two decisions was that SSA gave no consideration to individual impairments that were less than "severe." Congress ultimately rejected both regulations, finding that "[SSA's] policy may preclude realistic assessment of those cases involving individuals who have several impairments which in combination may be disabling." H.R. Conf. Rep. 98-1039, at 30, *reprinted in* 1984 U.S.C.C.A.N. 3080, 3087-88. It therefore enacted a new provision, providing that:

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether such impairment, if considered separately, would be of such severity. . . . [T]he combined impact of the impairments shall be considered throughout the disability determination process.

42 U.S.C. § 1382c(a)(3)(G) (2000).

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[1] SSA's child disability assessment did not include a "severity" step until 1991. *See* Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5534, at 5538 (Feb. 11, 1991) (codified at 20 C.F.R. § 416.924).

SSA's second major revision followed the Supreme Court's decision in *Zebley,* in which the Court held that SSA's child disability regulations failed to "carry out the statutory requirement that SSI benefits . . . be provided to children with 'any . . . impairment of comparable severity' to an impairment that would make an adult 'unable to engage in any substantial gainful activity.'" 493 U.S. at 541 (quoting 42 U.S.C. § 1382c(a)(3)(A) (1988)). The Court observed that, although the adult evaluation process included an individualized functional analysis of each claimant, children were limited to demonstrating that their impairments were medically equivalent to one of the Secretary's finite set of presumptively disabling impairments. *Id.* at 526. An adult claimant could prevail at the individualized functional analysis stage by showing that his or her impairments prevented him or her from engaging in substantial gainful activity. *Id.* at 534-35. By contrast, the Secretary's listings of presumptively disabling childhood disabilities were comprised of impairments that would prevent *any* gainful activity. Thus, the practical effect of holding children only to the listings was that they were required to show that they were more disabled than an eligible adult. *Id.* at 535-36. The listings also were not comprehensive, so that many unlisted impairments or combinations of impairments were not recognized as disabling, even when it was "obvious" that the claimant should have been eligible. *Id.* at 533-34. Indeed, the Court suggested that the absence of a functional assessment step would often frustrate the purpose of the 1984 amendment requiring the

Secretary to consider the combined effect of all of the claimant's disabilities. *Id.* at 535 & n.16. As a result, many children with disabilities of "comparable severity" to those that would disable adults were ruled ineligible. *Id.* at 537-38.

In response, SSA amended its child disability regulations to ensure that children would be better able to demonstrate that they were entitled to benefits under the statute. *See* Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5534 (Feb. 11, 1991) (codified at 20 C.F.R. §§ 416.924, 416.926). Because most children do not work, SSA could not simply install a new step in its process asking whether the child's impairments prevented the child from engaging in substantial gainful activity. *Id.* at 5535. Instead, SSA attempted to determine whether the child's impairments "so limit[ ] his or her physical or mental abilities to function independently, appropriately, and effectively in an age-appropriate manner that the limitations are comparable in severity to those which would disable an adult." *Id.* at 5538.

In order to assist its examiners in making that judgment, SSA implemented a new procedure, the "individualized functional assessment," or "IFA." *Id.*; *see generally Hickman v. Apfel*, 187 F.3d 683, 687-88 (7th Cir. 1999) (describing four-step process for analyzing child disability prior to 1996 amendments). The hallmark of the IFA was that it identified six (or in the case of infants and toddlers, five) categories of childhood activity, which the regulations called

"domains" of functioning. *See* 20 C.F.R. § 416.924c (1992). The regulations established non-binding guidelines for using the domains to find functional disability. In most cases, the regulations said, a child is disabled if he or she suffers from "marked" limitations in his or her ability to carry out the functions described in one of the domains, plus "moderate" limitations in his or her functioning in any other domain.[2] *See Quinones v. Chater*, 117 F.3d 29, 34 (2d Cir. 1997) (citing 20 C.F.R. §§ 416.924d(c), (h), 416.924e(c)(2)(i), (ii) (1996)). Alternately, three moderate limitations could also constitute disability. *Id.* There was a hierarchy of limitations, with "extreme" being almost totally non-functioning, "marked" somewhat more functional than that, continuing to "moderate," from there to "severe," which is defined as "more than minimal," *see* 20 C.F.R. § 416.924(c) (2002), and down to unnamed limitations less disabling than "severe."

The 1996 Amendments

Congress revisited the subject of SSI benefits for children in 1996 with the enactment of the Personal

[2] The new regulations thus also introduced a new set of terminology, which it will be useful for the reader to distinguish throughout the remainder of this opinion. An "impairment" is the physical ailment afflicting the applicant. *See* 42 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. § 416.921-23. A "limitation" is the functional consequence of an impairment or combination of impairments. *See* 42 U.S.C. § 1382c(a)(3)(C)(i); 20 C.F.R. § 416.924.

Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 211 to 212, 110 Stat. 2105, 2188-94 (1996) (the "Welfare Reform Act"). The Welfare Reform Act's new definition provides that a child under eighteen years of age is "disabled" if the child "has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i) (2000). The thrust of the legislation was most certainly to tighten eligibility. *See* H.R. Conf. Rep. No. 104-725, at 261, *reprinted in* 1996 U.S.C.C.A.N. 2649, 2649 (noting that the Welfare Reform Act aimed to "reform[ ] the [SSI] disability program to strengthen eligibility requirements . . . for . . . children"). A House Budget Committee Report on an early draft of the 1996 legislation indicated that "the committee expects no less than marked limitations in no fewer than two domains or extreme limitations in at least one domain as the standard of qualification." H.R. Rep. No. 104-651, at 1385 (1996). After some revisions to the pertinent statutory language, the Conference Report accompanying the new legislation noted that "[i]n those areas . . . that involve domains of functioning, the conferees expect no less than two marked limitations as the standard for qualification." *Id.* at 328, *reprinted in* 1996 U.S.C.C.A.N. at 2716. Moreover, the Conference Report explained that the statutory term "severe" was intended "in its common

sense meaning" rather than in the technical sense SSA applied in its regulations. *Id.*

Additionally, Congress directed SSA to discontinue the IFA procedure, *see* Pub. L. No. 104-193 § 211(b)(2), 110 Stat. at 2189, but noted in the Conference Report that it did "not intend to limit the use of functional information, if reflecting sufficient severity and . . . otherwise appropriate." H.R. Conf. Rep. No. 104-725, at 328, *reprinted in* 1996 U.S.C.C.A.N. at 2716. In emphasizing their expectation that SSA would "ensure that the combined effects of all the physical or mental impairments of an individual under age 18 are taken into account," the conferees observed that "the 1990 Supreme Court decision in *Zebley* established that SSA had been previously remiss in this regard." *Id.*

In response to the legislation, SSA issued a new set of regulations reconstituting the procedures for determining childhood disability. *See* Supplemental Security Income; Determining Disability for a Child Under Age 18, 62 Fed. Reg. 6408 (Feb. 11, 1997) (codified at 20 C.F.R. Parts 404 and 416). SSA's new rules set up a three-step process, under which the administrative law judge ("ALJ") or other examiner must determine (1) that the child is not engaged in substantial gainful activity; (2) that the child has an impairment or combination of impairments that is severe; and (3) that the child's impairment meets or equals an impairment listed in Appendix 1, Subpart P of 20 C.F.R. § 404.

In making the third determination—whether a child's impairment meets or equals a listed impairment—the ALJ must consider whether the impairment, alone or in combination with another impairment, "medically equals, or functionally equals the listings."[3] Functional equivalency means that the impairment is of "listing-level severity; i.e., it must result in 'marked' limitations in two domains of functioning or an 'extreme' limitation in one domain. . . ." 20 C.F.R. § 416.926a(a). A marked limitation is one that interferes seriously with the child's "ability to independently initiate, sustain, or complete activities." *Id.* § 416.926a(e)(2)(i). The ALJ considers how a child functions in his activities "in terms of six domains": "(i) Acquiring and using information; (ii) Attending and completing tasks; (iii) Interacting and relating with others; (iv) Moving about and manipulating objects; (v) Caring for yourself; and, (vi) Health and physical well-being." *Id.*

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[3] SSA amended its regulations again, effective January 2, 2001, to essentially eliminate medical equivalence proceedings and to analyze all children under a functional equivalence rubric. *See* Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747, 54,755 (Sept. 11, 2000) (codified at 20 C.F.R. Part 416). The definitions and testing results for marked and extreme disabilities, however, have not changed. *See id.* at 54,756. Most importantly for our purposes, the Commissioner has not changed her interpretation of the functional limitation regulations, which are the subject of the Plaintiff's challenge.

§ 416.926a(b)(1).[4] The regulations provide that a child must be found to be disabled if he or she has an impairment or impairments of "listing-level severity," that is, an "extreme" limitation in one of these domains, or "marked" limitations in two or more domains. 20 C.F.R. § 416.926a(a).

The Commissioner's Interpretation

The Plaintiffs' challenge in this case focuses not on the regulations themselves but a particular interpretation of the regulations issued by the Commissioner. The Report of the Committee on Conference accompanying the Welfare Reform Act, as we noted, indicated that Congress expected "no less than two marked limitations as the standard for qualification." H.R. Conf. Rep. No. 104-725, at 328, *reprinted in* 1996 U.S.C.C.A.N. at 2716. On its face, this language appears to leave open the possibility that limitations of differing degrees might be substitutable for one another at some rate of exchange, so that more than two less-than-marked limitations might nonetheless be the equal of two marked. Indeed, the SSA apparently adopted a similar logic in concluding that

[4] The 2001 regulations made two changes to the list of functional domains. They first added the last category, "health and physical well-being." Second, they changed two old categories, "cognition" and "communication," distributing communications deficits among each of the other categories, and renaming cognition as "acquiring and using information." *See* 65 Fed. Reg. at 54,755.

a single "extreme" limitation, 20 C.F.R. 416.926a(a), is "no less than two marked," H.R. Conf. Rep. No. 104-725, at 328, *reprinted in* 1996 U.S.C.C.A.N. at 2716. According to the Commissioner, however, two or more moderate limitations in different domains of functioning cannot be treated as the equivalent of, or "added up to equal[,] a 'marked' limitation." Social Security Administration, Childhood Disability Training: Student Manual, Pub. No. 64-075, at Tab F p. 15. The Commissioner reasoned that "to revise the disability standard to include children with impairments of less than listing-level severity (e.g., one marked and one moderate limitation or three moderate limitations in 'crucial' areas) would, in essence, result in the same level of severity we used when we performed an IFA under the prior law." *See* Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747, 54,763 (Sept. 11, 2000) (codified at 20 C.F.R. Part 416). In effect, once the examiner has assessed the level of limitation in each of the claimant's domains, moderate limitations drop out of the equation, and the number of marked or extreme limitations is counted to determine whether the claimant is eligible.

Parties and Procedural History

The lead named Plaintiff, Arlene George, applied for and was denied SSI disability benefits. On September 1, 2000, she filed suit (through her mother, Elisa Encarnacion) in the United States District Court for the Southern District of New York (Laura

Taylor Swain, *J.*) to challenge the adverse determination of the SSA. Encarnacion then filed an Amended Complaint, joining a new Plaintiff, Victoria Felipe (by her mother, Ana Felipe). The Amended Complaint alleged both individual factual and procedural deficiencies in the SSA's rulings on both Plaintiffs' claims, as well as a putatively class-wide claim that the SSA was improperly administering the statute and regulations. Encarnacion and Felipe moved for class certification. Felipe then received a favorable determination from the SSA Appeals Council, and the District Court dismissed her individual claim as moot, but allowed her to remain as a class representative. In addition, the Plaintiffs filed a Second Amended Complaint, adding two more named plaintiffs, Eric Garcia (via Margarita Guzman) and Maurice Perez (through Sandra Perez). The SSA agreed to grant benefits to Garcia and Perez, so that the District Court again dismissed their individual claims, but retained both as class representatives.

Ultimately, the District Court rejected the Plaintiffs' substantive class-wide claims. Ruling on the Defendant's Motion for Judgment on the Pleadings, the District Court held that the Commissioner's interpretation was entitled to *Chevron* deference. *See Encarnacion v. Barnhart*, 191 F. Supp. 2d 463, 472-75 (S.D.N.Y. 2002). Although the court acknowledged that the regulations do not expressly contain the non-combination policy, it found that such a reading

was a "reasonable, obvious construction of the language of the regulation." *Id.* at 472. Alternatively, it noted that even if the regulation were not a "legislative" rule, it would still be entitled to deference under *Christensen v. Harris County*, 529 U.S. 576 (2000). *Encarnacion*, 191 F. Supp. 2d at 475. In addition, the District Court denied the Plaintiffs' motion for class certification, essentially ruling that it would defer consideration of that question pending the result of this appeal. *Id.* at 469.

This appeal followed. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1361. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

I.

A.

The scope of our review in this case is limited by the allegations of the complaint below. The Plaintiffs' principal argument is that the Commissioner's interpretation, which forbids adding "moderate" limitations across domains to equal a "marked" or "extreme" limitation, is contrary to the Act because it prevents ALJs from "consider[ing] the combined effects of all of the individual's impairments," 42 U.S.C. § 1382c(a)(3)(G), as the statute now requires. The Commissioner argues, and we agree, that her interpretation is not contrary to law if there are other reasonable methods of giving effect to the "combined

impact" mandate other than by adding limitations across domains. Because we read the regulations, and the Commissioner's accompanying interpretation, to leave open such other routes, and because the Complaint does not allege that these alternatives are ineffective either on their face or as applied, we are compelled to affirm the district court's decision to dismiss the complaint.[5]

To begin with, we recognize that an agency's interpretation of its own regulations is entitled to considerable deference, irrespective of the formality of the procedures used in formulating the interpretation. *See Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 779-80 (2d Cir. 2002) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *LaFleur v. Whitman*, 300 F.3d 256, 277 (2d Cir. 2002). We defer to an agency's interpretation of its own regulations because we "presume that the power authoritatively to interpret [the agency's] own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991). Because it would make no sense to presume that Congress had the general intent to delegate to an agency the power to contradict Congress's clearly expressed specific intent in some other matter, we will not defer when an interpretation is clearly

[5] We review *de novo* the district court's decision to dismiss pursuant to Fed. R. Civ. P. 12(c). *See, e.g., Patel v. Searles*, 305 F.3d 130, 134-35 (2d Cir. 2002).

contrary to any statute. *See N.Y. Currency Research Corp. v. CFTC*, 180 F.3d 83, 87, 92 (2d Cir. 1999).

Therefore, as a reviewing court, we are not free to substitute our policy judgment for that of Congress or of an agency. Even if we were to prefer the plaintiffs' methodology, we are without authority to decree it if the Commissioner's interpretation is not "plainly erroneous." *Taylor*, 313 F.3d at 780. In this case, we cannot conclude that SSA's use of functional domain-based analysis and its focus on the combined effects of impairments within functional domains is inconsistent with Congress's intent to restrict eligibility. We defer to the Secretary's view that it is not required in a mechanical way to add impairments across domains, largely because we read SSA regulations and policy to envision that limitations in domains less than marked will be "considered throughout the disability determination process," 42 U.S.C. § 1382c(a)(3)(G).

The Plaintiffs argue that the Commissioner's interpretation is not entitled to deference because it contradicts the statutory mandate that the "combined impact of [all the claimant's] impairments shall be considered throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(G). The plain language of this provision, they argue, indicates that it is not enough that SSA merely acknowledge the existence of, or appraise the significance of, an impairment that produces only a moderate limitation. Rather, SSA must give the impairment meaningful effect throughout the disability assessment process,

including those portions of the process that follow SSA's conclusion that the impairment results only in a moderate limitation in a domain that does not overlap with any other impairment. Because SSA refuses to add together moderate impairments in different domains, the Plaintiffs say, it follows that they have failed to "consider the combined impact" of the moderate impairments that are not added.

The Commissioner disputes the premise of the Plaintiffs' argument, averring that she would meet the terms of the "combined impact" provision simply by recognizing that a claimants' level of limitation within any given domain might arise out of more than one impairment. In a sense, then, SSA "combines" limitations, albeit only within domains. She argues that an impairment that produces only moderate limitations, where the moderate limitations cannot be combined with those resulting from another impairment, are still "considered," because they have the *potential* to be combined with other limitations.

An example may help to clarify the parties' respective positions. Suppose a claimant who suffers from three potentially disabling impairments, say, A, B, and C. Impairment A produces moderate limitations in domains one and two; B results in moderate limitations in domains two and three, and C causes a moderate limitation in domain four. The effect of A and B together is to create a marked limitation in domain two. If SSA makes no further adjustments to the level of limitation in each domain, the claimant is

not eligible for benefits, because she has only one marked limitation and three moderate limitations. The Plaintiffs argue that SSA has not "consider[ed]" the combined effect of impairment C, because it was, literally, never combined. Furthermore, they claim, when SSA reaches the end of its process and counts up how many limitations there are of each type, they completely ignore the effects of C, because it failed to result, either singly or in intra-domain combination, in a marked impairment. SSA, on the other hand, maintains that it "considered the impact" of C, because it attempted to determine whether C resulted in a marked limitation.

This discussion illustrates that the crux of the Plaintiffs' argument rests on the assumption that after adding together limitations within domains, SSA makes no further adjustments to the level of limitation in each domain. Under the Plaintiffs' reasoning, the SSA unlawfully neglects the impact of impairments, such as impairment C in our example, that produce less then marked limitations in domains not affected by any other impairment. If, however, the Commissioner gives weight to such impairments throughout the disability determination process in a way other than by "adding" across domains, it would be very difficult for the Plaintiffs to maintain that the Commissioner has given the impairments no meaningful effect. In that case, the Commissioner's decision to exclude moderate limitations would simply be one of many reasonable interpretations of the statute and her own regulations.

As we indicated at the outset, we read the Commissioner's regulations and policy to give some effect to each of a claimants' impairments throughout the disability determination process. The regulations on their face instruct the ALJ to "look comprehensively at the combined effects of [a claimant's] impairments on [the claimant's] day-to-day functioning instead of considering the limitations resulting from each impairment separately." 20 C.F.R. § 416.924a(a)(4) (2002). That is, in determining a child's functional abilities, the agency will consider a single impairment in every domain it affects, no matter the degree. Further, it will assess the cumulative impact of all impairments relevant to a particular domain in assessing a child's cumulative functional limitation in that domain. The regulations indicate that, although SSA ultimately does not permit moderate limitations to give rise to a finding of eligibility, the existence of sub-marked limitations in other domains may influence the level of impairment SSA finds in any one given domain. *See* 20 C.F.R. § 416.926a(a) (2002) ("When we make a finding regarding functional equivalence, we will assess the interactive and cumulative effects of all of the impairments for which we have evidence, including any impairments you have that are not 'severe.' "); *id.* § 416.926a(e)(1)(i) ("When we decide whether you have a 'marked' or an 'extreme' limitation, we will consider your functional limitations resulting from all of your impairments, including their interactive and cumulative effects."). Thus, it appears that the regulations permit SSA to increase a non-marked limitation up to marked to

reflect the impact that other non-marked impairments may have on the claimant's overall level of functioning.

SSA's remarks accompanying its issuance of the new regulations in 1997 also suggest strongly that it believes the new regulations preserve the flexibility it enjoyed prior to the Welfare Reform Act. In a preamble to the Interim Final Rules, SSA stated that "we are retaining our prior policies on determining functional equivalence."[6] Supplemental Security Income; Determining Disability for a Child Under Age 18, 62 Fed. Reg. 6408, 6413 (Feb. 11, 1997). Under the "prior policies," as we have mentioned, the Commissioner used the degree of impairment in the

[6] Although the Welfare Reform Act directed SSA to discontinue the Individualized Functional Assessment, *see* Pub. L. No. 104-193 § 211(b), 110 Stat. 2105, 2189 (1996), we agree with SSA that Congress did not also intend to put an end to functional equivalence analysis of child claimants. Indeed, the Conference Committee report explicitly stated that "where appropriate, the conferees remind SSA of the importance of the use of functional equivalence disability determination procedures," H.R. Conf. Rep. No. 104-725, at 328, *reprinted in* 1996 U.S.C.C.A.N. 2649, 2716. Nor do we think SSA's reading leaves the statutory clause deleting the IFA purposeless. The elimination of the IFA indicated that, in Congress's view, the Act ought not require that an individualized functional assessment be carried out in every case. But Congress clearly expected that functional equivalence, or something like it, would still be utilized where appropriate. *See id.* ("[T]he conferees do not intend to suggest by this definition of childhood disability that every child need be especially evaluated for functional limitations. . . . Nonetheless, the conferees do not intend to limit the use of functional information, if reflecting sufficient severity and i[f] otherwise appropriate.")

functional domains only as a guideline. *See Quinones v. Chater*, 117 F.3d 29, 34 (2d Cir. 1997). The regulations emphasized that the applicant was to be viewed as a whole, and that "[e]ach case must be evaluated on its own merits using the principles and guidelines of all the regulations addressing childhood disability." *Id.* (quoting 20 C.F.R. § 416.924e(c)(2) (1993)); *see also id.* at 37 (remanding to ALJ for consideration whether "[applicant's] impairments, taken together, amount to a qualifying disability"). Therefore, we think that when SSA announced it was "retaining [its] prior policies," it indicated that it would have the same flexibility in determining a claimant's overall level of disability, although with a somewhat more demanding minimum threshold for disability. Thus, we conclude that under current SSA regulations ALJs retain the power to account for the existence of non-marked limitations in the disability determination process, notwithstanding the formal bar on combining non-marked impairments.

At oral argument, the Plaintiffs contended vigorously that the question of whether SSA actually exercises this power in a meaningful way is a fact question not suitable for resolution in a motion under Fed. R. Civ. P. 12(c). We agree, of course, that we must treat all of the allegations of the Complaint as true. *See, e.g.*, *Patel v. Searles*, 305 F.3d 130, 134-35 (2d Cir. 2002). We have searched the Complaint in vain, however, for an allegation that SSA does not, in fact, adjust the level of a claimant's limitation within one or two domains to "look comprehensively" at the

claimant, 20 C.F.R. § 416.924a(a)(4) (2002), and account for the "interactive and cumulative effects" of limitations in other domains, *id. § 416.926a*(e). Nor is there an allegation that the domains themselves are designed in a way that would frustrate the SSA's ability to "consider" the "combined impact" of all of a claimant's impairments—as might be the case, for example, if plaintiffs could demonstrate that the defined domains omitted some significant aspect of pertinent juvenile functioning, and that there was no flexibility to account for the omission within other domains.[7]

We conclude that, although SSA may choose not to add together moderate limitations across domains to create the equivalent of a marked limitation, it does not necessarily follow that those impairments underlying the omitted moderate limitations are not "considered throughout the disability determination process." Under our understanding, nothing would preclude SSA from adjusting an otherwise moderate, but nearly marked, limitation in domain A up to fully marked to account for the effect of a limitation in domain B.

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[7] Nothing we say in this opinion is intended to foreclose Plaintiffs from raising a future challenge to SSA's practices in these regards.

B.

We pause to note that the flexibility to account for cumulative effects we have just described is likely essential to a permissible implementation of the Act. As we explained earlier, the Supreme Court's opinion in *Sullivan v. Zebley*, 493 U.S. 521 (1990) invalidated the SSA's then-existing procedure for assessing child disability. *Id.* at 541. The Court's main objection to SSA's scheme was that, by limiting children to demonstrating that their impairments were the medical equivalent of one of a finite list of presumptively disabling ailments, the regulations elevated the level of severity needed, and failed to recognize the great variability among individuals. *Id.* at 534-35, 539. The Court also noted that exclusive use of medical equivalence failed to "fulfill the statutory mandate" of the "combined impact" provision, as well. *Id.* at 535 n.16. That is, the regulations did allow the list of symptoms that would establish medical equivalence to a single listing to be drawn from more than one impairment. But, again, the listings did not account for all possible combinations of impairments. Therefore, although SSA "considered" combined effects, in the sense that it analyzed the effects of more than one impairment to determine whether they together resulted in medical equivalence, that consideration was not "of value . . . to children," because the practical result was that "within the confines of the equivalence determination" the combined effect was usually zero. *Id.* The Court applied the same logic in a related observation, noting that "[t]he fact that

some of the listed impairments are defined in terms of functional criteria is small comfort to child claimants who do not have one of those impairments and who fail to qualify for benefits." *Id.* at 540 n.21 (emphasis added).

In short, *Zebley* held that SSA does not sufficiently "consider the combined effect" of an impairment when it merely looks to see whether the impairment contributes an item in the medical equivalence checklist, and, if not, gives the impairment no effect at all. Thus, as with the medical equivalence test in *Zebley,* we cannot accept an interpretation of "consider the combined effect" where the impairment is assigned zero weight in the ultimate decision whether or not to award benefits. Nor can this approach be reconciled with the statutory requirement that the Commissioner consider "the combined impact of [all of the claimaint's] impairments *throughout* the disability determination process." 42 U.S.C. § 1382c(a)(3)(G) (emphasis added).

Accordingly, we conclude that the Act appears to require that each of a claimant's impairments be given at least some effect during each step of the disability determination process. A contrary interpretation of either the statue or the implementing regulations which fails to provide for the meaningful assessment of multiple impairments may not be due the same deference we accord to the SSA in this case. We emphasize, however, that the SSA has considerable flexibility in determining how best to "consider the impact" of a given impairment in

assessing eligibility. For the reasons already stated, we are satisfied that the agency's policy of considering the combined impact of an impairment within every affected domain but not adding across domains is not a plainly erroneous procedure for identifying children who suffer from the sort of "marked and severe functional limitations" that render them disabled, 42 U.S.C. § 1382c(a)(3)(C)(i), particularly since SSA regulations are flexible enough to allow ALJs to "look comprehensively at the combined effects of [a claimant's] impairments," 20 C.F.R. § 416.924a(a)(4) (2002).

C.

Finally, we must account for the Plaintiffs' contention that the Commissioner's interpretation is contrary not only to the "combined impact" provision, but also to the very purposes of the SSI statute. In other words, Plaintiffs ask that we construe the 1996 statute that sought to tighten eligibility standards in the context of the general purposes of the SSI program. In the past, we and other courts have rejected as arbitrary and capricious some of the SSA's choices regarding how best to appraise the combined effect of multiple impairments, largely because the SSA's view was inconsistent with the statutory purpose of identifying and compensating adults who could not work. *See Johnson v. Sullivan*, 922 F.2d 346, 352 (7th Cir. 1991) (en banc); *McDonald v. Sec'y of Health & Human Servs.*, 795 F.2d 1118, 1127 (1st Cir. 1986); *Cutler v. Weinberger*, 516 F.2d 1282, 1285 (2d Cir.

1975); *Landess v. Weinberger*, 490 F.2d 1187, 1190 (8th Cir. 1974); *Colwell v. Gardner*, 386 F.2d 56, 74 (6th Cir. 1967); *Dillon v. Celebrezze*, 345 F.2d 753, 757 (4th Cir. 1965); *Farley v. Celebrezze*, 315 F.2d 704, 707-08 (3d Cir. 1963); *Dixon v. Heckler*, 589 F. Supp. 1494, 1508 (S.D.N.Y. 1984), *aff'd,* 785 F.2d 1102 (2d Cir. 1986), *rev'd on other grounds sub nom. Bowen v. Dixon*, 482 U.S. 922 (1987); *Champion v. Califano*, 440 F. Supp. 1014, 1017-18 (D.D.C. 1977).

Our analysis in this regard is complicated by the fact that Congress has never clearly established the precise purposes of SSI for children.[8] The official legislative history of the 1972 Act states:

> [D]isabled children who live in low-income households are certainly among the most disadvantaged of all Americans and . . . they are deserving of special assistance in order to help them become self-supporting members of our society. Making it possible for disabled children to get benefits under this program, if it is to their advantage, rather than under the programs for families with children, would be appropriate because their needs are often greater than those of nondisabled children. The bill, accordingly, would include disabled children under the new program.

[8] This gap, we respectfully suggest, may explain much of the SSA's long history of struggle with the definition of childhood disability. Better guidance might do much to reduce public, judicial, and administrative confusion over the proper direction for the regulations.

> Parents' income and resources would be taken into account. . . .

H.R. Rep. No. 92-231, at 147-48, *reprinted in* 1972 U.S.C.C.A.N. 4989, 5133-34. Some highly respectable authorities have understood this passage to indicate that Congress simply wanted to pay for the "special health care expenses . . . arising out of the child's medical disability." *Zebley*, 493 U.S. at 546 (White, J., dissenting). We think that several other possibilities are equally plausible. For the reasons that follow, however, we need not now determine the precise objectives of the Act.

The Plaintiffs' argument appears to be that under any plausible purpose, the Commissioner must "give each claimant a personalized appraisal, accounting for the totality of his or her symptoms." Thus, this argument proceeds, just as it might defy "common sense" to ignore the combined effects of two impairments in determining whether an adult can carry out substantial gainful activity, *Johnson*, 922 F.2d at 352, it might defy common sense not to look at the whole child in assessing the costs of his or her care, or the likelihood that the child will ever be able to be gainfully employed in the future. This argument must go the way of the plaintiffs' first: To the extent that SSA's procedures do already allow consideration of all of the factors that are relevant to the statutory purposes, the plaintiffs have no cause for complaint. And, as we have already held, there is no allegation that SSA under its regulations cannot, or in actual cases does not, do so. Nor do the Plaintiffs allege that,

in appraising the extent of a child's limitation, SSA improperly considers factors that would frustrate the statutory purpose.

Therefore, because we conclude that SSA's interpretation of the statute is permissible, and because Plaintiffs did not challenge the SSA's actual implementation of its regulations, we need not determine whether the methods utilized by SSA in assessing childhood disability are contrary to the purposes of the Act.

II.

In sum, we hold that each of a child SSI claimant's impairments must be taken into account in SSA's bottom-line assessment of the child's disability. Because SSA's current regulations are open to a reading in which examiners are in fact free to account for the "interactive and cumulative" effects of all of the claimant's impairments, and the Plaintiffs have not alleged otherwise, we agree with the District Court that the Plaintiffs have failed to state a claim upon which relief can be granted.

Accordingly, the decision of the District Court is hereby Affirmed.

RAGGI, Circuit Judge, concurring.

I agree with my colleagues that we should affirm the district court's judgment of dismissal in this case.

I write separately only to emphasize my understanding that the across-domain adjustment process that we today recognize as *permitted* by relevant SSA regulations does not equate to a process *mandated* by that part of 42 U.S.C. § 1382c(a)(3)(G)(2002) that states, "the combined impact of [all of the claimant's] impairments shall be considered throughout the disability determination process."

After carefully reviewing SSA regulations, my colleagues observe that nothing therein "would preclude SSA from adjusting an otherwise moderate, but nearly marked, limitation in domain A up to fully marked to account for the effect of a limitation in domain B." *See ante* at 89. I agree that SSA regulations could be interpreted by the agency to support across-domain adjustments of a claimant's limitations. Further, I agree that such an interpretation would be one way to ensure that the combined impact of a claimant's impairments is considered throughout the disability determination process. The record before us, however, suggests that the SSA does not presently engage in across-domain analysis in determining childhood disability. Instead, it considers the combined impact of a claimant's impairments only within specified domains of childhood functions. In light of this reality, I think it is important to clarify that though we consider across-domain adjustments to be permitted by SSA regulations, we do not interpret 42 U.S.C. § 1382c(a)(3)(G) to require this particular approach to childhood disability determinations.

Precisely because § 1382c(a)(3)(G) does not specify how its mandate to consider an individual's impairments "throughout the disability determination process" should be implemented by the SSA, our review of the administering agency's interpretation of the statute is deferential. *See Chevron*, *U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

In an effort to identify those children whose "marked and severe functional limitations" render them disabled pursuant to 42 U.S.C. § 1382c(A)(3)(C)(i) (2000), the SSA has chosen to work within a system of six function domains. *See* 20 C.F.R. § 416.926a(b)(1)(i)-(vi); *see ante* at 84.[1] SSA regulations provide that a child with an "extreme" limitation in any one of these domains or "marked" limitations in two or more domains must be found disabled. *See* 20 C.F.R. § 416.926a(a).[2] In an effort to apply § 1382c(a)(3)(G) to its evaluation of childhood disability claims, SSA considers every impairment a child has within every domain that the impairment limits, to whatever degree. Thus, the agency recognizes that even a single moderate impairment, e.g., in hearing, might adversely affect a child in a number of function

[1] As the majority notes, appellants do not contend that the domains are deficient in identifying all pertinent aspects of juvenile functioning. *See ante* at 89.

[2] The majority outlines how this regulation derives from language contained in congressional reports relevant to the 1996 legislation. *See ante* at 89.

domains: the ability to acquire and use information (domain 1), the ability to attend and complete tasks (domain 2), the ability to interact with others (domain 3), the development of motor skills (domain 4), etc. Moreover, the SSA recognizes that the limiting effect of a single impairment cannot be viewed in isolation. The effect of a minor impairment might well be aggravated by other impairments affecting the same domains. For example, a minor hearing loss together with a below-average IQ could together yield a marked limitation in the child's ability to acquire and use information. Similarly, a minor hearing loss together with a mild speech defect could together result in a marked limitation in a child's ability to interact with others. An approach that thus permits impairments to be considered within multiple domains, and that then combines all impairments affecting a particular domain to determine the total level of a child's limitation in that area of functioning, is sufficiently flexible and inclusive to avoid the concerns raised by the Supreme Court in *Sullivan v. Zebley,* 493 U.S. 521 (1990) (invalidating former SSA practice of determining childhood disability claims by reference only to certain listed impairments without regard to effect on childhood functioning).

At the start of subpart B of the majority opinion, my colleagues note that "the flexibility to account for cumulative effects we have just described is likely essential to a permissible implementation of the Act," ante at 90. My understanding is that the court refers

both to the flexibility available in the present SSA practice of considering the combined effect of impairments within every affected domain as well as to the flexibility afforded by the alternative across-domain adjustment process that we identify as a permissible interpretation of the agency's own regulations. It is with this understanding that I join in the court's opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of August, two thousand and nine,

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Elisa Encarnacion, on behalf of Arlene George, Ana Lora, on behalf of Michelle Tavares, Hortensia Lacayo, Mathew Lacayo, and Rosa Veloz, on behalf of Ben-Hemir Collado,

Plaintiffs-Appellants,

v.

Michael J. Astrue, Commissioner of Social Security,

Defendant-Appellee.

ORDER
Docket Number: 07-3550-cv

(Filed Aug. 26, 2009)

Plaintiffs-Appellants Elisa Encarnacion, on behalf of Arlene George, Ana Lora, on behalf of Michelle Tavares, Hortensia Lacayo, Mathew Lacayo, Rosa Veloz, on behalf of Ben-Hemir Collado having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the

appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By /s/ Frank Perez
Frank Perez, Deputy Clerk

APPENDIX E

20 C.F.R. § 416.923 provides in pertinent part:

§ 416.923 Multiple impairments.

In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, the combined impact of the impairments will be considered throughout the disability determination process. If we do not find that you have a medically severe combination of impairments, we will determine that you are not disabled (see §§ 416.920 and 416.924).

* * *

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20 C.F.R. § 416.924 provides in pertinent part:

§ 416.924 How we determine disability for children.

(a) * * * [W]e consider all relevant evidence in your case record when we make a determination or decision whether you are disabled.

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20 C.F.R. § 924a provides in pertinent part:

§ 416.924a Considerations in determining disability for children.

* * *

(b) *Factors we consider when we evaluate the effects of your impairment(s) on your functioning –*

* * *

(4) *Combined effects of multiple impairments.* If you have more than one impairment, we will sometimes be able to decide that you have a "severe" impairment or an impairment that meets, medically equals, or functionally equals the listings by looking at each of your impairments separately. When we cannot, we will look comprehensively at the combined effects of your impairments on your day-to-day functioning instead of considering the limitations resulting from each impairment separately. (See §§ 416.923 and 416.926a(c) for more information about how we will consider the interactive and cumulative effects of your impairments on your functioning.)

* * *

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20 C.F.R. § 416.926a provides in pertinent part:

§ 416.926a Functional equivalence for children.

(a) *General.* If you have a severe impairment or combination of impairments that does not meet or

medically equal any listing, we will decide whether it results in limitations that functionally equal the listings. By "functionally equal the listings," we mean that your impairment(s) must be of listing-level severity; *i.e.*, it must result in "marked" limitations in two domains of functioning or an "extreme" limitation in one domain, as explained in this section. We will assess the functional limitations caused by your impairment(s); *i.e.*, what you cannot do, have difficulty doing, need help doing, or are restricted from doing because of your impairment(s). When we make a finding regarding functional equivalence, we will assess the interactive and cumulative effects of all of the impairments for which we have evidence, including any impairments you have that are not "severe."

* * *

(c) *The interactive and cumulative effects of an impairment or multiple impairments.* When we evaluate your functioning and decide which domains may be affected by your impairment(s), we will look first at your activities and your limitations and restrictions. Any given activity may involve the integrated use of many abilities and skills; therefore, any single limitation may be the result of the interactive and cumulative effects of one or more impairments. And any given impairment may have effects in more than one domain; therefore, we will evaluate the limitations from your impairment(s) in any affected domain(s).

* * *

(e) *How we define "marked" and "extreme" limitations* – (1) *General.* (i) When we decide whether you have a "marked" or an "extreme" limitation, we will consider your functional limitations resulting from all of your impairments, including their interactive and cumulative effects.

* * *
