No. 20-105

In the Supreme Court of the United States

JOHN J. DAVIS, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

THOMAS HILLIARD, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a claimant seeking disability benefits under the Social Security Act, 42 U.S.C. 301 *et seq.*, forfeits an Appointments Clause challenge to the appointment of an administrative law judge by failing to present that challenge during administrative proceedings.

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OPINIONS BELOW

The opinions of the court of appeals in *Davis* v. *Saul* (Pet. App. 1a-9a) and *Hilliard* v. *Saul* (Pet. App. 10a-14a) are reported at 963 F.3d 790 and 964 F.3d 759. The decision of the district court in *Hilliard* (Pet. App. 15a-18a) is unreported. The orders of the district court in *Davis* (Pet. App. 19a-38a), *Iwan* v. *Commissioner of Social Security* (Pet. App. 39a-60a), and *Thurman* v. *Commissioner of Social Security* (Pet. App. 61a-82a) are not published in the Federal Supplement but are available at 2018 WL 4300505, 2018 WL 4295202, and 2018 WL

4300504. The reports and recommendations of the magistrate judges in *Davis* (Pet. App. 83a-104a), *Iwan* (Pet. App. 105a-131a), and *Thurman* (Pet. App. 132a-159a) are not published in the Federal Supplement but are available at 2018 WL 3600056, 2018 WL 4868983, and 2018 WL 4516002.

JURISDICTION

The judgment of the court of appeals in *Davis* was entered on June 26, 2020. The judgment of the court of appeals in *Hilliard* was entered on July 9, 2020. The petition for a writ of certiorari was filed on July 29, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. Under the Social Security Act, 42 U.S.C. 301 *et seq.*, the Social Security Administration (SSA) administers two federal programs that provide benefits to disabled individuals: Title II and Title XVI. *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1772 (2019). Title II provides disability benefits to insured individuals, regardless of financial need. *Ibid.* Title XVI provides supplemental security income to financially needy individuals who are aged, blind, or disabled, regardless of their insured status. *Ibid.*

SSA regulations establish a four-step administrative process for adjudicating claims for disability benefits and supplemental security income. See *Smith*, 139 S. Ct. at 1772. First, the claimant must seek an initial eligibility determination from the agency. 20 C.F.R. 404.902, 416.1402. Second, if the claimant is dissatisfied with that determination, he may seek reconsideration. 20 C.F.R. 404.908(a), 416.1408(a). Third, if the claimant

remains dissatisfied, he may demand a hearing before an administrative law judge (ALJ). 20 C.F.R. 404.929, 416.1429. Finally, the claimant may seek discretionary review of the ALJ's decision from the agency's Appeals Council. 20 C.F.R. 404.967, 416.1467. Once that administrative process ends, the claimant may seek judicial review of the agency's final decision by filing suit in federal district court. See 42 U.S.C. 405(g).

2. These cases concern the selection of SSA's ALJs—the officials who conduct the third step of the multi-step adjudicatory process just described. The Appointments Clause of the Constitution governs the appointment of "Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. The Clause requires principal officers to be appointed by the President with the advice and consent of the Senate. *Ibid.* The Clause allows Congress to choose among four methods for appointing inferior officers: appointment by the President with the advice and consent of the Senate, by the President alone, by the Heads of Departments, and by the courts of law. *Ibid.* If a person performing governmental functions qualifies as an employee rather than an officer, however, the Clause does not govern his selection. See *United States* v. *Germaine*, 99 U.S. 508, 510 (1879).

Before 2018, SSA treated its ALJs as employees rather than as officers. See *Bandimere* v. *SEC*, 844 F.3d 1168, 1199 (10th Cir. 2016) (McKay, J., dissenting), cert. denied, 138 S. Ct. 2706 (2018). It selected its ALJs through a merit-selection process administered by the Office of Personnel Management, and did not provide for their appointment in a method prescribed by the Appointments Clause. See *O'Leary* v. *OPM*, 708 Fed. Appx. 669, 670 (Fed. Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 2616 (2018).

In *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), however, this Court held that ALJs appointed by the Securities and Exchange Commission were officers rather than employees, and that the Appointments Clause accordingly governed their appointment. *Id.* at 2049. The Court also held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to a new hearing, and it directed that the new hearing be held before a different, constitutionally appointed officer. *Id.* at 2055 (citation omitted).

In January 2018, when this Court granted a writ of certiorari in *Lucia*, SSA cautioned its ALJs that they might receive constitutional challenges to their appointments, and it instructed them to acknowledge but not to decide such challenges, because the agency "lacks the authority to finally decide constitutional issues such as these." SSA, *EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process* (Jan. 30, 2018). Then, in July 2018, after the Court decided *Lucia*, the Acting Commissioner of Social Security—the Head of a Department within the meaning of the Appointments Clause—ratified the appointments of the agency's ALJs. See *Carr* v. *Commissioner, SSA*, 961 F.3d 1267, 1270 (10th Cir. 2020), petition for cert. pending, No. 19-1442 (filed June 29, 2020).

The ratification ensured that hearings conducted by SSA's ALJs would comply with the Appointments Clause going forward, but it did not address claims that had already been adjudicated by the ALJs before the ratification date. The agency adopted a new ruling in March 2019 to address that latter issue. See *Social Security Ruling 19-1p; Titles II and XVI: Effect of the*

Decision in Lucia v. Securities and Exchange Commission (SEC) On Cases Pending at the Appeals Council, 84 Fed. Reg. 9582 (Mar. 15, 2019) (*Social Security Ruling 19-1p*). The ruling provides that, if a claimant has raised an Appointments Clause challenge to the appointment of an ALJ before the agency—at either the ALJ level or the Appeals Council level—he will receive a new decision from a properly appointed officer. *Id.* at 9583. But if the claimant fails to raise such a challenge before the agency, he will not be entitled to such relief. *Ibid.*

B. Proceedings Below

1. Petitioners John Davis, Thomas Hilliard, Kimberly Iwan, and Destiny Thurman applied for Social Security benefits between 2013 and 2015. Pet. App. 2a, 10a. Davis, Hilliard, and Iwan sought both Title II disability benefits and Title XVI supplemental security income; Thurman sought only Title XVI supplemental security income. *Id.* at 15a, 20a, 40a, 62a. Each petitioner's case followed the same path at SSA: the agency made an initial determination denying benefits and then denied reconsideration; an ALJ denied benefits after a hearing; and the Appeals Council denied discretionary review. *Id.* at 2a; 19-1169 Gov't C.A. Br. 12. The ALJs that denied petitioners' claims had been chosen under the pre-*Lucia* regime, but petitioners failed to present any challenge to the ALJs' appointments to the agency at the ALJ level, and again failed to do so at the Appeals Council level. Pet. App. 2a, 17a.

Davis, Iwan, and Thurman filed suit in the Northern District of Iowa, and Hilliard in the Southern District of Iowa, seeking review of the denial of benefits. Pet. App. 15a, 19a, 39a, 61a. In briefs filed in district court, they argued for the first time that the ALJs who had denied

their claims had been appointed in violation of the Appointments Clause. *Id.* at 4a, 17a.

In each case, the district court affirmed the ALJ's decision. Pet. App. 15a-18a, 19a-38a, 39a-60a, 61a-82a. As relevant here, the court held in each case that petitioners had forfeited their Appointments Clause challenges by failing to present those challenges at any stage of the agency's proceedings. *Id.* at 17a, 36a-38a, 58a-60a, 79a-81a.

2. The court of appeals consolidated Davis's, Iwan's, and Thurman's cases and affirmed. Pet. App. 1a-9a. The court held that, because petitioners had failed to raise their Appointments Clause challenges before the ALJ, they could not raise those challenges for the first time in federal court. *Id.* at 2a.

The court of appeals explained that, as a general rule, "an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court." Pet. App. 6a (citation omitted). The court observed that, in *Sims* v. *Apfel*, 530 U.S. 103 (2000), this Court had carved out an exception to that general rule allowing Social Security claimants to raise an issue in court even if they had failed to present it to the Appeals Council. Pet. App. 5a. The court explained, however, that *Sims* concerned only the presentation of issues at the Appeals Council stage, not the presentation of issues at the ALJ stage. *Id.* at 5a-6a. The court noted that its precedents "expressly required [the latter] step." *Id.* at 6a (citing *Anderson* v. *Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003)).

The court of appeals rejected petitioners' contention that "constitutional claims" need not be raised before the agency. Pet. App. 7a. The court noted that, in a

previous case, it had held that "[c]onstitutional considerations, no matter how important or 'fundamental,' can be forfeited." *Ibid.* (quoting *NLRB* v. *RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013)).

The court of appeals also rejected petitioners' contention that presentation of the Appointments Clause issue to the agency "would have been futile." Pet. App. 8a. The court explained that, "[e]ven if an individual ALJ was powerless to address the constitutionality of her appointment, the agency head—alerted to the issue by claimants in the adjudicatory process—could have taken steps through ratification or new appointments to address the objection." *Ibid.*

Finally, the court of appeals concluded that this is not "one of those rare cases in which [the court] should exercise [its] discretion" to consider a claim that had not been presented to the agency. Pet. App. 8a (citation omitted). The court explained that, in light of "the practicalities of potentially upsetting numerous administrative decisions because of an alleged appointment flaw to which the agency was not timely alerted," and "the perverse incentives that could be created by allowing claimants to litigate benefits before an ALJ without objection and then, if unsuccessful, to secure a remand for a second chance based on an unexhausted argument," such an exercise of discretion would be unwarranted. *Id.* at 9a.

3. The court of appeals also affirmed in Hilliard's case. Pet. App. 10a-14a. As relevant here, the court, relying on the precedent it had just set in *Davis*, held that the court need not consider Hilliard's Appointments Clause challenge because Hilliard had failed to raise the challenge before the ALJ. *Id.* at 14a.

DISCUSSION

Petitioners contend (Pet. 13-26) that, although they failed to challenge the appointment of the ALJs who denied their Social Security claims before SSA, they may raise such challenges for the first time in federal district court. The court of appeals correctly rejected that contention. The question presented, however, is the subject of a circuit conflict. This Court's review is warranted to resolve that conflict, and both these cases and *Carr* v. *Saul*, petition for cert. pending, No. 19-1442 (filed June 29, 2020), would be appropriate vehicles for doing so. Because the petition for a writ of certiorari in *Carr* was filed first, the Court may wish grant that petition and hold this petition pending the disposition of that case.

A. The Court Of Appeals' Decision Is Correct

1. It is a "general rule" of administrative law that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). That rule is firmly established in this Court's precedents. See, *e.g.*, *Woodford* v. *Ngo*, 548 U.S. 81, 90 (2006); *McCarthy* v. *Madigan*, 503 U.S. 140, 144-145 (1992); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 154-155 (1946); *Hormel* v. *Helvering*, 312 US. 552, 556-557 (1941); *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, 494 (1933); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927); *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U.S. 117, 130-131 (1920).

That general rule serves important public purposes. For example, it protects the authority of the administrative agency by giving the agency an opportunity to address a party's claim before the party hales it into federal court. See *Ngo*, 548 U.S. at 89. It also promotes efficiency by allowing a party's claim to be resolved at the administrative level, potentially rendering judicial proceedings and remands to the agency unnecessary. See *McCarthy*, 503 U.S. at 145. Finally, it discourages sandbagging—*i.e.*, the practice of encouraging the agency to decide a matter, but seeking to undo the agency's proceedings after they conclude if the agency reaches an unfavorable outcome. See *L. A. Tucker*, 344 U.S. at 36.

The scale of the Social Security hearing system underscores the importance of that general rule. SSA is "probably the largest adjudicative agency in the western world." *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omitted). On its own, it "employ[s] more ALJs than all other Federal agencies combined." *Social Security Ruling 19-1p*, 84 Fed. Reg. at 9583. Each year, it receives about 2.3 million initial disability claims, completes over 760,000 ALJ hearings, and pays about $203 billion in disability benefits and supplemental security income payments to over 15 million people. SSA, *Annual Performance Report, Fiscal Years 2019-2021*, at 4, 44, 46 (2020). That system would become unworkable if claimants could go through the agency's multi-step administrative process without ever raising an objection, raise the objection for the first time in district court, and then compel the agency to redo that process in order to resolve the objection.

In these cases, petitioners had the opportunity to object to the selection of SSA's ALJs at both the ALJ level

and the Appeals Council level. Yet at each level, they failed to raise any Appointments Clause challenge. Under settled principles of administrative law, they may not raise the challenge for the first time in district court.

2. Petitioners' contrary arguments lack merit.

a. Petitioners principally argue (Pet. 19-21) that, under *Sims* v. *Apfel*, 530 U.S. 103 (2000), the general rule requiring claimants to present their arguments to the agency before going to court does not apply to SSA. That is incorrect.

In *Sims*, the Court acknowledged the general rule that a claimant must raise an issue before an agency before he may raise it in court, but carved out an exception to that general rule for a Social Security claimant who fails to present an issue to the Appeals Council. 530 U.S. at 110-112 (plurality opinion); *id.* at 112-114 (O'Connor, J., concurring in part and concurring in the judgment). The Court's decision rested on a variety of factors, including regulations and administrative materials that indicated to claimants that the Appeals Council will consider issues even if the claimants do not raise them. See *id.* at 111-112 (plurality opinion); *id.* at 113-114 (O'Connor, J., concurring in part and concurring in the judgment). The Court, however, expressly limited its holding to the Appeals Council stage, stating that "[w]hether a claimant must exhaust issues before the ALJ [wa]s not before [it]." *Id.* at 107 (majority opinion); see *id.* at 117 (Breyer, J., dissenting) ("I assume the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ.").

As multiple courts of appeals have correctly held, neither *Sims*' holding nor its reasoning extends to a failure to present an issue to the ALJ, rather than to the Appeals Council. See *Mills* v. *Apfel*, 244 F.3d 1, 8 (1st Cir. 2001), cert. denied, 534 U.S. 1085 (2002); *Anderson* v. *Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003); *Shaibi* v. *Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017). The regulations governing ALJ proceedings do not "affirmatively suggest that specific issues need not be raised." *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment). Quite the opposite, the agency's regulations inform each claimant that the ALJ will notify him of the "specific issues to be decided" at the hearing, and they instruct the claimant that, if he "object[s] to the issues to be decided," he "must notify the administrative law judge in writing at the earliest possible opportunity" and "must state the reason(s) for [those] objection(s)." 20 C.F.R. 404.938-404.939, 416.1438-416.1439.

b. Petitioners also argue (Pet. 21) that "a structural constitutional challenge to the ALJ's appointment under the Appointments Clause" is exempt from the general rule requiring claimants to raise issues before the agency before raising them in court. That is incorrect. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." *Yakus* v. *United States*, 321 U.S. 414, 445 (1944). This Court accordingly held in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), that "'one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Id.* at 2055 (quoting *Ryder* v. *United States*, 515 U.S. 177, 182-183 (1995)) (emphasis added).

The Court also explained that the litigant in *Lucia* had "made just such a timely challenge" because he "contested the validity of [the ALJ's] appointment *before the [agency]*, and continued pressing that claim in the Court of Appeals and this Court." *Ibid.* (emphasis added). This Court's precedents thus establish that constitutional claims, including Appointments Clause claims, remain subject to ordinary preservation rules, and that a party who fails to raise a timely Appointments Clause challenge before the agency may not raise the challenge for the first time in federal court.

c. Finally, petitioners argue (Pet. 23) that it would have been futile to raise Appointments Clause challenges before the ALJs who heard their claims for benefits, because the agency issued a directive in January 2018 instructing ALJs to note, but not to address, any Appointments Clause challenges. That argument is incorrect. This Court has held that an agency's "predetermined policy on [a] subject" does not establish futility where the agency "is obliged to deal with a large number of like cases" and "[r]epetition of the objection in them might lead to a change in policy" or at least put the agency on notice of "the accumulating risk of wholesale reversals." *L. A. Tucker*, 344 U.S. at 37. If the hundreds of claimants who are now challenging the appointments of SSA's ALJs in court had raised those challenges before the agency, the repetition of the objection would have demonstrated to the agency the accumulating risk of reversal and could have led the agency to change its policy.

B. The Question Presented Warrants This Court's Review

1. Although the court of appeals' decision is correct, the question presented warrants this Court's review. The question has divided courts of appeals. Two courts

of appeals—the Tenth Circuit and, in the decision below, the Eighth Circuit—have held that a claimant for Social Security disability benefits forfeits his Appointments Clause challenge to the appointment of an ALJ by failing to raise the challenge before the agency. See *Carr* v. *Commissioner, SSA*, 961 F.3d 1267, 1268 (10th Cir. 2020), petition for cert. pending, No. 19-1442 (filed June 29, 2020); Pet. App. 2a. In contrast, two other courts of appeals—the Third Circuit and, in a decision rendered after the filing of the petition for a writ of certiorari in these cases, the Sixth Circuit—have held that a claimant for Social Security disability benefits may raise an Appointments Clause challenge to the appointment of the ALJ in district court even if he failed to raise the challenge before the agency. See *Cirko* v. *Commissioner of Social Security*, 948 F.3d 148, 151 (3d Cir. 2020); *Ramsey* v. *Commissioner of Social Security*, No. 19-1579, 2020 WL 5200979, at *1 (6th Cir. Sept. 1, 2020).

Petitioners discount (Pet. 16-17) the Tenth Circuit's decision in *Carr* on the ground that it contradicts that court's previous decision in *Hackett* v. *Barnhart*, 395 F.3d 1168 (2005), allowing a claimant to raise an issue in court even though he had not raised it before the ALJ in SSA. *Hackett*, however, involved a different issue—namely, reliance on expert evidence that allegedly conflicted with an official government publication. *Id.* at 1174-1175. Under an SSA ruling, the ALJ had an independent duty to address that particular issue even if the claimant had not raised it. See *id.* at 1175; Gov't C.A. Br. at 19 n.5, *Carr*, *supra* (No. 19-5079). No such independent duty exists with respect to the Appointments

Clause challenge at issue here. In any event, even setting *Carr* aside, the question presented would still be the subject of a circuit conflict.

That circuit conflict is unlikely to resolve itself without this Court's intervention. After the Third Circuit became the first court of appeals to address the question presented, the Commissioner filed a petition for rehearing en banc, but the Third Circuit denied that petition. See Order, *Cirko*, *supra*, No. 19-1772 (Mar. 26, 2020). The next two courts of appeals to address the question presented, the Eighth and Tenth Circuits, acknowledged the Third Circuit's decision in *Cirko*, but found that decision to be unpersuasive. See *Carr*, 961 F.3d at 1275; Pet. App. 4a. The Sixth Circuit, in turn, acknowledged the Third, Eighth, and Tenth Circuits' conflicting decisions and sided with the Third Circuit. See *Ramsey*, 2020 WL 5200979, at *2.

The question presented also affects a significant number of cases. As already noted, SSA receives millions of disability claims, conducts hundreds of thousands of ALJ hearings, and pays out hundreds of billions of dollars in disability benefits and supplemental security income payments each year. See p. 9, *supra*. Hundreds of claimants have filed suit in district court seeking new hearings on the ground that the ALJs who conducted their previous hearings had been appointed in violation of the Appointments Clause. See Gov't Pet. for Reh'g En Banc at 2, *Cirko*, *supra*, No. 19-1772 (Mar. 9, 2020). And appeals raising the question presented are now pending in every regional circuit, apart from the D.C. Circuit and the circuits that have already resolved the question. See, *e.g.*, *Sosa* v. *Saul*, appeal pending, No. 20-1780 (1st Cir. filed Aug. 11, 2020);

Pichardo Suarez v. *Berryhill*, No. 20-1358 (2d Cir. Appellant's Br. filed Aug. 13, 2020); *Probst* v. *Saul*, No. 19-1529 (4th Cir. argued Sept. 10, 2020); *Hernandez* v. *Saul*, No. 20-50418 (5th Cir. Appellee's Br. filed Aug. 28, 2020); *Hekter* v. *Saul*, No. 20-1855 (7th Cir. Appellee's Br. filed Aug. 20, 2020); *Salas* v. *Saul*, No. 20-35233 (9th Cir. Appellee's Br. filed Sept. 21, 2020); *Lopez* v. *Commissioner*, appeal granted, No. 19-11747 (11th Cir.) (oral argument scheduled for Oct. 27, 2020).

2. The petition for a writ of certiorari in *Carr* v. *Saul*, No. 19-1442 (filed June 29, 2020), presents the same question as these cases. *Carr* was the earlier-filed petition, and it presents an appropriate vehicle for resolving the question presented. The Court therefore may wish to grant the petition there, and hold this petition pending the disposition of that case. In the alternative, the Court could grant both petitions, although it does not appear that that course of action would be necessary to resolve the legal issue presented, and it would result in duplicative briefing.

Petitioners argue (Pet. 25) that these cases present "an unusually attractive vehicle" for resolving the question presented because they involve "claimants who are arguably situated somewhat differently." In particular, they emphasize (Pet. 26) that petitioner Hilliard's Appeals Council proceedings concluded after, and the Appeals Council proceedings of the other petitioners in this case concluded before, SSA's issuance of a directive in January 2018 instructing ALJs to note but not to address any Appointments Clause challenges. See p. 4, *supra*. The question, presented, however, focuses (Pet. I) on a claimant's failure to raise an Appointments Clause challenge at the ALJ stage rather than at the Appeals Council stage, and Hilliard received his ALJ

decision review long before the issuance of that directive. See Pet. App. 17a n.1. What is more, Hilliard filed his request for Appeals Council review before January 2018, see 19-1169 Gov't C.A. Br. 12, and the fact that the Appeals Council did not deny review until after January 2018 has no logical bearing on Hilliard's obligations before that date.

3. The question presented in these cases overlaps with one of the questions presented in *United States* v. *Arthrex, Inc.*, petition for cert. pending, No. 19-1434 (filed June 25, 2020). In that case, the Federal Circuit held that administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the advice and consent of the Senate, rather than inferior officers who may be appointed by the Head of a Department. See *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 941 F.3d 1320, 1325 (2019), petition for cert. pending, No. 19-1434 (filed June 25, 2020), and petition for cert. pending, No. 19-1458 (filed June 30, 2020). The Federal Circuit further held that litigants may present challenges to the appointment of administrative patent judges for the first time in court, even after failing to present such challenges to the agency. See *id.* at 1340. The United States has filed a petition for a writ of certiorari seeking review of both the Appointments Clause holding and the forfeiture holding. See Pet. at I, *United States* v. *Arthrex*, *supra* (No. 19-1434).

Despite that overlap, this Court should not hold the petitions in these cases and *Carr* for the final disposition of *Arthrex*. The circuits that have allowed Social Security claimants to raise Appointments Clause challenges for the first time in district court have reasoned that

distinctive characteristics of Social Security proceedings justify that outcome. Compare *Ramsey*, 2020 WL 5200979, at *2-*5, and *Cirko*, 948 F.3d at 153, with *Carr*, 961 F.3d at 1274-1275, and Pet. App. 5a-7a. Because *Arthrex* involves patent proceedings rather than Social Security proceedings, the Court should grant certiorari in one or both of these Social Security cases as well as in *Arthrex* to ensure a comprehensive resolution of the forfeiture issue.

CONCLUSION

The petition for a writ of certiorari should be held pending the final disposition of *Carr* v. *Saul*, petition for cert. pending, No. 19-1442 (filed June 29, 2020), and then disposed of as appropriate. In the alternative, the Court should grant certiorari in these cases as well as in *Carr*.

Respectfully submitted.

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