No. 19-1442

In the Supreme Court of the United States

WILLIE EARL CARR, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE RESPONDENT

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
MARK B. STERN
JOSHUA M. SALZMAN
DANIEL AGUILAR
AMANDA L. MUNDELL
Attorneys

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

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.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Okla.):

Carr v. *Social Security Administration*, No. 18-cv-272 (June 26, 2019)

Minor v. *Social Security Administration*, No. 18-cv-418 (July 24, 2019)

United States Court of Appeals (10th Cir.):

Carr v. *Saul*, No. 19-5079 (June 15, 2020)

Minor v. *Saul*, No. 19-5085 (June 15, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 961 F.3d 1267. The order of the district court in *Carr* v. *Social Security Administration* (Pet. App. 32a-56a) is not published in the Federal Supplement but is available at 2019 WL 2613819. The order of the district court in *Minor* v. *Social Security Administration* (Pet. App. 57a-83a) is not published in the Federal Supplement but is available at 2019 WL 3318112.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2020. The petition for a writ of certiorari was filed on June 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. This case concerns 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. Pet. App. 9a.

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 Willie Earl Carr and Kim L. Minor each applied for Title II disability benefits in 2014. Pet. App. 8a. 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 8a-9a; Gov't C.A. Br. Addendum 19, 56. 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. 9a-10a.

Each petitioner then filed suit in the Northern District of Oklahoma, seeking review of the denial of benefits. Pet. App. 9a. 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 9a-10a.

In each case, the district court reversed the ALJ's decision and remanded the case to the agency for further proceedings. Pet. App. 32a-56a, 57a-83a. As relevant here, the court held in each case that, because the ALJs who had heard petitioners' cases had been appointed in violation of the Appointments Clause, petitioners were entitled to new hearings before different, properly appointed ALJs. *Id.* at 49a-55a, 77a-83a. The court acknowledged that petitioners had failed to raise their Appointments Clause challenges before the agency, but held that claimants need not raise such challenges before the agency in order to preserve them. *Id.* at 55a, 82a.

2. The court of appeals consolidated petitioners' cases and reversed. Pet. App. 1a-31a.

The court of appeals began with the "general rule" of administrative law that "an issue not presented to an administrative decisionmaker cannot be argued for the

first time in federal court." Pet. App. 12a (citations omitted). The court explained that the general rule serves "two main institutional interests": allowing agencies "'to correct their own mistakes'" and "'promot[ing] efficiency' by expediting claims, limiting the number of cases that reach federal courts, and conserving resources." *Id.* at 14a (brackets and citations omitted).

The court of appeals concluded that that general rule applied to petitioners' Appointments Clause challenges. Pet. App. 20a-24a. The court explained that, if petitioners had raised those challenges before the agency, the agency "could have corrected [the] appointment error." *Id.* at 21a. The court noted that, "[e]ven if corrective action was unlikely 'at the behest of a single benefits claimant,'" a series of objections would have put the agency "'on notice of the accumulating risk of wholesale reversals.'" *Ibid.* (brackets and citations omitted). The court also noted that "an exhaustion requirement here would have promoted judicial and agency efficiency." *Id.* at 22a. If the agency had changed its appointment practices in response to a series of objections, it could have "avoided the possibility of having to conduct [new] ALJ merits hearings on [petitioners'] disability benefits claims and those of many others," and the courts could have avoided "the time and expense of this litigation and the scores of similar cases currently on appeal around the country." *Id.* at 22a-23a.

The court of appeals rejected petitioners' reliance on this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000). In *Sims*, this Court had held that a claimant who had failed to raise an issue before SSA's Appeals Council could nonetheless raise the issue in federal court. Pet. App. 15a-20a. But the court of appeals in this case

concluded that "the reasons the *Sims* Court did not require issue exhaustion in petitions to the Appeals Council do not apply to SSA ALJ hearings." *Id.* at 25a. In particular, the court observed that the agency's regulations require the ALJ to notify the claimant of the "specific issues to be decided" at the hearing, and require the claimant to notify the ALJ in writing if he "object[s] to the issues to be decided." *Id.* at 26a (quoting 20 C.F.R. 404.939). The court stated that, by contrast, a claimant "d[oes] not have a similar obligation with respect to Appeals Council review." *Ibid.*

DISCUSSION

Petitioners contend (Pet. 15-28) 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 this case would be an appropriate vehicle for doing so.

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 this case, 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. 24-26) that, under *Sims* v. *Apfel*, 530 U.S. 103 (2000), Social Security claimants need not present their claims to the agency before presenting them in Court. 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 suggest that "Appointments Clause challenges" may be exempt from the general rule requiring claimants to raise issues before the agency before raising them in court. Pet. 16. 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. 27) 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 Eighth Circuit and, in the decision below, the Tenth 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 Pet. App. 4a; *Davis* v. *Saul*, 963 F.3d 790, 791 (8th Cir. 2020), petition for cert. pending, No. 20-105 (filed July 29, 2020). 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 this case, 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).

The petition for a writ of certiorari in *Davis* v. *Saul*, *supra* (No. 20-105)—which presents the same question as this case—discounts (at 16-17) the Tenth Circuit's decision on the ground that it conflicts with 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. 19 n.5. No such independent duty exists with respect to the Appointments Clause challenge at issue

here. In all events, any tension between this case and *Hackett* has no bearing on the reality that the question presented remains 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 *Davis*, 963 F.3d at 793; Pet. App. 29a. 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. 8, *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. This case would be an appropriate vehicle for resolving the question presented. The court of appeals in this case *sua sponte* raised the question whether it had appellate jurisdiction over appeals from the district court's orders remanding petitioners' cases to SSA, see 9/30/2019 Order, but ultimately concluded, correctly, that it did have jurisdiction, see Pet. App. 4a. Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. 1291. Congress also has granted the district courts the power to enter a "judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing," and it has provided that such a judgment "shall be final." 42 U.S.C. 405(g). This Court has held that a district court's judgment of reversal under Section 405(g) is a "final decision" under Section 1291, even if the district court also remands the case to the agency. *Forney* v. *Apfel*, 524 U.S. 266, 269 (1998); *Sullivan* v. *Finkelstein*, 496 U.S. 617, 623-631 (1990). The court of appeals thus had jurisdiction over petitioners' appeals from the district courts' judgments of reversal in this case.

The petition for a writ of certiorari in *Davis*, *supra* (No. 20-105), presents the same question as this case

and would also be an appropriate vehicle for resolving that question. But because the petition in this case was filed first, and because the government is not of the view that the petition in *Davis* would be a superior vehicle for addressing the question, see Gov't Br. at 15, *Davis*, *supra* (No. 20-105), the Court may wish to grant only the present petition. In the alternative, the Court could grant both petitions, although it does not appear to be necessary to resolve the legal issue presented, and it would result in duplicative briefing.

3. The question presented in this case 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 this case and *Davis* 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 *Davis*, 963 F.3d at 793-794, and Pet. App. 24a-30a. 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 *Arthrex* to ensure a comprehensive resolution of the forfeiture issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
MARK B. STERN
JOSHUA M. SALZMAN
DANIEL AGUILAR
AMANDA L. MUNDELL
Attorneys

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