No. 19-1442

# In the Supreme Court of the United States

WILLIE EARL CARR AND KIM L. MINOR,
PETITIONERS,

*v.*

COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,
RESPONDENT.

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

## REPLY BRIEF FOR THE PETITIONERS

PAUL F. MCTIGHE, JR.
*6506 South Lewis Ave.*
*Suite 105*
*Tulsa, OK 74136*

LISA S. BLATT
*Counsel of Record*
SARAH M. HARRIS
CHARLES L. MCCLOUD
THOMAS W. RYAN
WILLIAMS & CONNOLLY LLP
*725 Twelfth Street, N.W.*
*Washington, DC 20005*
*(202) 434-5000*
*lblatt@wc.com*

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## REPLY BRIEF FOR THE PETITIONERS

The government agrees that this Court should grant review in this case, and should hold a related, later-filed petition. The government agrees that "[t]his Court's review is warranted to resolve" a "circuit conflict" over whether Social Security claimants must raise Appointments Clause challenges to ALJs' appointments before those very ALJs to preserve those challenges for judicial review. U.S. Br. 7. As the government (at 12) notes, that conflict has only deepened since petitioners filed their petition. The Sixth Circuit just joined the Third Circuit in holding that Social Security claimants need not exhaust Appointments Clause challenges before ALJs, whereas the Eighth and Tenth Circuits hold the opposite. The gov-

ernment agrees "[t]hat circuit conflict is unlikely to resolve itself," and affects a "significant number of cases." U.S. Br. 13. And the government agrees that this petition presents an appropriate vehicle. U.S. Br. 14. When the United States agrees that only this Court can resolve a circuit conflict on a question of national importance, this Court's usual practice is to grant the petition. *E.g.*, *Salinas v. U.S. R.R. Ret. Bd.*, No. 19-199, 140 S. Ct. 813 (2020); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, 140 S. Ct. 427 (2019); *Smith v. Berryhill*, No. 17-1606, 139 S. Ct. 451 (2018). The Court should follow that practice here and grant the petition.

1. The government is correct that *Carr* is the petition to grant. A month after this petition was filed, another set of petitioners filed a materially identical petition seeking review of an Eighth Circuit decision that joined the Tenth Circuit in erroneously requiring claimants to exhaust Appointments Clause challenges before SSA ALJs. *See Davis v. Saul*, No. 20-105 (pet. for cert. filed July 29, 2020). As the government notes (at 12, 14), that petition "presents the same question as this case." But "because the petition in this case was filed first, and ... the government is not of the view that the petition in *Davis* would present a superior vehicle for addressing the question ... the Court may wish to grant only the present petition." U.S. Br. 15. Faced with two mirror-image petitions, granting the first-filed petition is the most logical way to pick which to grant, and discourages gamesmanship.

Granting both petitions would be pointless, if not counterproductive. As the government observes, granting both petitions "does not appear necessary to resolve

the legal issue presented, and it would result in duplicative briefing." U.S. Br. 15.[1] The *Davis* petitioners are similarly situated to the *Carr* petitioners in all material respects. Improperly appointed SSA ALJs adjudicated all of these petitioners' claims well before this Court granted review in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and well before the SSA issued any guidance about Appointments Clause challenges. No petitioner raised Appointments Clause challenges before an ALJ; all raised Appointments Clause challenges in district-court proceedings that happened after *Lucia* issued. If this Court grants *Carr* and holds *Davis*, all *Davis* petitioners would benefit from a favorable ruling. By contrast, granting both *Carr* and *Davis* carries real downsides. Wading through two parallel sets of merits briefs and parsing whether any daylight exists between petitioners' framings would unnecessarily complicate proceedings and waste the Court's time.

2. Granting the *Davis* petition would perversely encourage the raising of spurious vehicle arguments.

a. As the government observes, the *Davis* petition erroneously asserts that the Tenth Circuit's decision in *Carr* created only "an intracircuit conflict" with *Hackett v. Barnhart*, 395 F.3d 1168 (10th Cir. 2005), such that *Carr* lacks precedential force. U.S. *Davis* Br. 13; *Davis* Pet. 16-

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[1] The government is also correct that there is no need to hold this petition for *United States v. Arthrex*, No. 19-1434 (cert. granted Oct. 13, 2020). The Court did not grant *Arthrex* on the question concerning whether litigants must exhaust Appointments Clause challenges to administrative patent judges in proceedings before the U.S. Patent and Trademark Office. In any event, as *Sims* held, "the desirability of a court imposing a requirement of issue exhaustion depends on" the "particular administrative proceeding." *Sims v. Apfel*, 530 U.S. 103, 109 (2000); *see also id.* at 113 (O'Connor, J., concurring).

17. It is the rare petition that tries to downplay the acuteness of a circuit split by refusing to take a court's word that it is parting ways with another circuit. *See* Pet.App.29a (rejecting the Third Circuit's *Cirko* decision as inconsistent with Tenth Circuit precedent). Every court since *Carr*—including the Eighth Circuit in *Davis*—considers *Carr* the law of the land in the Tenth Circuit, as well as the mainstay of a rapidly widening circuit split. *E.g.*, *Davis v. Saul*, 963 F.3d 790, 793 (8th Cir. 2020); *Ramsey v. Comm'r of Soc. Sec.*, 973 F.3d 537, 540 (6th Cir. 2020).

Meanwhile, the purported tension between *Carr* and the Tenth Circuit's earlier decision in *Hackett* is invisible to everyone but the *Davis* petition. As the government notes, *Hackett* did not resolve whether Social Security claimants must exhaust Appointments Clause challenges before ALJs as a prerequisite to judicial review. Rather, *Hackett* concerned a narrow and "different issue": whether claimants must exhaust objections that SSA relied on expert evidence at odds with an official government publication, where an SSA ruling required ALJs to consider that issue regardless of whether claimants raised it. U.S. *Davis* Br. 13; *see Hackett*, 395 F.3d at 1175. Thus, after *Hackett*, the Tenth Circuit considered the "ALJ-level waiver question" open. *Rabon v. Astrue*, 464 F. App'x 732, 734 n.3 (10th Cir. 2012); *see also Emma H. o/b/o S.J.M. v. Saul*, No. 18-CV-657-JFJ, 2020 WL 3027202, at *9 (N.D. Okla. June 5, 2020) (finding *Hackett* distinguishable in SSA Appointments Clause context). And the *Davis* petition's suggestion (at 17) that "the *Carr* panel does not appear to have even been aware" of *Hackett* gets it backwards. The *Carr* panel—which included the author of *Hackett*, Judge Hartz—presumably credited arguments in the government's opening brief distinguishing *Hackett*, Gov't C.A. Br. 19 n.5, though the *Davis*

petition does not appear to have even been aware of that brief.[2]

b. As the government explains, the *Davis* petition's claim (at 25-26) to present a superior vehicle because the *Davis* petitioners encompass "claimants who are arguably situated somewhat differently" is legally fallacious. U.S. Br. 15. According to the *Davis* petition, "it could be argued that claimants whose administrative proceedings were still pending in January 2018 had notice of an issue-exhaustion requirement by virtue of SSA's initial guidance to its ALJs following this Court's grant of review in *Lucia*." *Davis* Pet. 5. The *Davis* petition is quick to caution that petitioners themselves do not embrace this pro-government argument; petitioners are just saying that if someone else (say, the government) were to make that argument, three of the *Davis* petitioners might be more entitled to relief than the fourth (Hilliard), whose claims were still pending before the Appeals Council as of January 2018. *Davis* Pet. 25-26. Like Hilliard, both Carr and Minor's claims were also pending before the Appeals Council as of January 2018.

One might wonder how it serves Hilliard's interests for his own brief to cloud his entitlement to relief by floating an argument that the government never made below and rejects now. As the government observes, the question presented concerns whether petitioners had to raise their Appointments Clause challenges *before ALJs* to preserve them—and ALJs adjudicated every petitioner's claims in both *Carr* and *Davis* well before January 2018.

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[2] Social Security cases are restricted, so the public can only review copies of filings in-person at courthouses. Fed. R. Civ. P. 5.2(c). But that is all the more reason to proceed with caution before castigating a court for purportedly lacking awareness of its own precedent.

Pet.App.33a, 58a; *Davis* Pet.App.17a, 30a, 107a, 134a. Whether petitioners had notice of an Appointments Clause violation when their claims were pending *before the Appeals Council* is irrelevant. U.S. *Davis* Br. 15. This Court already held in *Sims v. Apfel*, 530 U.S. 103 (2000), that claimants need not exhaust any issues before the Appeals Council, and the SSA still uses the same forms and instructions that underlay Justice O'Connor's separate opinion. *See* Pet. 7. If the *Davis* petition is suggesting that the SSA's January 2018 message presents some hitherto unlitigated, fact-specific exception to *Sims*, that is a strike against granting *Davis*, not a vehicle problem for *Carr*.

Further, it is unsurprising that the government did not bite at the *Davis* petition's notice argument, because the SSA's January 2018 message could not have put claimants on notice that they should raise Appointments Clause challenges to the Appeals Council. To the contrary, that message instructed: "As challenges of the constitutionality of the appointment of SSA's ALJs are outside the purview of the administrative adjudication, the AC will ***not*** acknowledge, make findings related to, or otherwise discuss the Appointments Clause issue." Soc. Sec. Admin., EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (Jan. 30, 2018) (emphasis original).

Moreover, as the government notes, "the fact that the Appeals Council did not deny review until after January 2018 has no logical bearing on [a claimant's] obligations before that date." U.S. *Davis* Br. 16. Even if claimants should have raised issues before the Appeals Council, that obligation would arise only when claimants requested re-

view—and by January 2018, all the *Carr* and *Davis* petitioners had long since submitted those forms. After that, claimants have no way to raise supplemental issues. *See* Soc. Sec. Admin, Form No. HA-520, Request for Review of Hearing Decision/Order (Jan. 2016), https://www.ssa.gov/forms/ha-520.pdf (instructing claimants requesting review that if they fail to "submit ... legal argument now or within any extension of time the Appeals Council grants," the Appeals Council will not review further submissions).

The government thus agrees that this petition presents a clean vehicle for resolving the question presented, and recommends granting this petition over the materially similar *Davis* petition because *Carr* was first-filed. Granting *Carr* would afford the *Davis* petitioners full relief if their position prevails in *Carr*. There is no point in inviting counterproductive, duplicative merits briefing, and no reason to encourage later-filed petitions to manufacture illusory vehicle issues.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL F. MCTIGHE, JR.
*6506 South Lewis Ave.*
*Suite 105*
*Tulsa, OK 74136*

OCTOBER 13, 2020

LISA S. BLATT
*Counsel of Record*
SARAH M. HARRIS
CHARLES L. MCCLOUD
THOMAS W. RYAN
WILLIAMS & CONNOLLY LLP
*725 Twelfth Street, N.W.*
*Washington, DC 20005*
*(202) 434-5000*
*lblatt@wc.com*