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

REPLY BRIEF FOR THE PETITIONERS

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The government concedes that the petition for a writ of certiorari in these cases presents a question that is the subject of a circuit conflict; that the question affects a significant number of cases; and that the Court's review is warranted to resolve the conflict. See Br. 8, 14. The government also concedes that this petition would be an "appropriate vehicle[]" in which to do so. Br. 8.

The sole remaining issue, then, is which of two pending petitions—the petition in these cases, or the petition in *Carr* v. *Saul*, No. 19-1442—is the better vehicle for the Court's review. The government suggests that the Court could grant both petitions, but that it "may wish" to grant only the petition in *Carr* simply because it was the first to be filed. Br. 8.

If the Court grants only one petition, it should grant this one. A first-to-file rule makes no sense where, as here, the Court is considering two petitions at the exact same time. In those circumstances, the Court ordinarily considers whether one petition is substantively a better vehicle than the other, and if neither is, it grants both. The government offers no substantive reason why *Carr* is the better vehicle. In fact, this petition is the better vehicle for two reasons—one of which the government itself identifies, and the other of which the government utterly fails to confront. In the face of those substantive considerations, the government's invocation of a first-to-file rule is so unconvincingly feeble that it suggests the government has a strategic reason for preferring *Carr*.

The Court should not take the bait. The Court should either grant only this petition or grant both petitions and consolidate the cases for oral argument.

A. The Court Should Not Apply A 'First-To-File' Rule Here

The only reason the government offers for preferring *Carr* over these cases is that the petition in *Carr* was filed first. See Br. 8. But any such "first-to-file" rule fell into desuetude long ago. Indeed, we have found only three cases *this century* in which the government has even invoked such a rule—and, in each of those cases, the Court opted for a later-filed petition instead. See Pet. at 7, *United States* v. *Home Concrete & Supply, LLC*, No. 11-

139, cert. granted, 564 U.S. 1066 (2011); U.S. Br. at 4, *Flores-Figueroa* v. *United States*, No. 08-108, cert. granted, 555 U.S. 969 (2008); Pet. at 15, *Apfel* v. *Sigmon Coal Co.*, No. 00-1307, cert. granted, 532 U.S. 993 (2001). In fact, less than a week after it filed its brief in these cases, the government urged the Court to grant its own later-filed petition even though *seven other petitions* raising the "same or related questions" were already pending (at least one of which the government conceded was a suitable vehicle). Pet. at 24, *United States* v. *Gary*, No. 20-444 (filed Oct. 5, 2020).

To be sure, a first-to-file rule may make some sense where the Court is considering a first-filed petition on a question warranting review long before a second: in those circumstances, there may be no upside, and indeed a downside, to waiting for the later petition. But it makes absolutely no sense where, as here, the Court is considering both petitions *at the exact same time*. In such circumstances, the Court should simply decide which petition is a better vehicle on substantive grounds, rather than arbitrarily selecting the lower docket number. And where the Court concludes that neither petition is a better vehicle, its typical practice is to grant both. See pp. 6-7, *infra*.

Applying a first-to-file rule in these circumstances would create perverse incentives for parties to engage in an undignified race to be first to the Court and, in the process, to forgo viable rehearing petitions that could moot the need for this Court's review in their cases. In *Carr*, for example, the petitioners filed their petition in this Court just 14 days after the Tenth Circuit panel issued its opinion, and immediately after the Eighth Circuit issued its initial opinion in these cases. The *Carr* petitioners thereby passed up the opportunity to file a petition for rehearing en banc in the Tenth Circuit—despite a compel-

ling argument that the panel's decision created an intracircuit conflict with *Hackett* v. *Barnhart*, 395 F.3d 1168 (10th Cir. 2005), which categorically held that issue exhaustion before SSA ALJs is not required. See Pet. 17.[1]

B. The Petition In These Cases Is The Optimal Vehicle For The Court's Review

The government offers no substantive reason why the petition in *Carr* would be a better vehicle. To the contrary, the petition in these cases is the optimal vehicle for two reasons.

1. These cases present the Court with the opportunity to consider a broader range of claimants than does *Carr*. In this Court's most relevant decision—*Sims* v. *Apfel*, 530 U.S. 103 (2000)—Justice O'Connor provided the fifth vote in a concurring opinion based on the lack of notice by the SSA of an issue-exhaustion requirement. *Id.* at 113-114; see *Carr* Pet. at 24 (discussing Justice O'Connor's opinion).

Three of the four petitioners in these cases unambiguously lacked fair notice of any requirement that a claimant exhaust an Appointments Clause challenge. The better view is that petitioner Hilliard lacked notice as well, but the government could argue that he had notice by virtue of SSA's initial January 2018 guidance to its ALJs following this Court's grant of review in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018). See Pet. 8, 21, 25-26. All of the claimants in *Carr*, however, are situated like petitioner Hilliard here.

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[1] The government suggests that *Hackett* was limited to its factual context: namely, the context of "reliance on expert evidence that allegedly conflicted with an official government publication," where the ALJ "had an independent duty" to address the issue. Br. 13. But the Tenth Circuit in *Hackett* did not identify that fact as a limitation on its categorical holding that "a plaintiff challenging a denial of disability benefits * * * need not preserve issues in the proceedings before the Commissioner or her delegates." 395 F.3d at 1176.

Given the possibility that fair-notice concerns could be dispositive (as they were for Justice O'Connor in *Sims*), the petition in these cases is a superior vehicle because it includes claimants who plainly lacked fair notice—ensuring that the Court will conclusively resolve the question presented for all of the hundreds of affected claimants. See Pet. 24.

The government contends that the presence of two classes of claimants here is immaterial, asserting that the Appeals Council's denial of review in Hilliard's case after January 2018 "has no logical bearing" on his "obligations before that date." Br. 16. But that presupposes the government's preferred answer to the question presented: namely, that a claimant has an unfailing obligation to raise an Appointments Clause challenge before an ALJ. If the issue-exhaustion requirement were instead to apply as long as a claimant has fair notice at some point during administrative proceedings, see *Sims*, 530 U.S. at 114 (O'Connor, J., concurring in part and concurring in the judgment), the government could argue that claimants such as Hilliard and the *Carr* petitioners lost the right to press the Appointments Clause challenge in the district court by failing to raise it before the Appeals Council. Perhaps that explains why the government would prefer *Carr* as a vehicle: as a strategic matter, it might opt for a case in which it could argue that all of the claimants had notice over one in which it could not.

2. In addition, as the government concedes (*Carr* Br. at 14), *Carr* presents a threshold jurisdictional question that these cases do not, because it involves a remand to the SSA. The Tenth Circuit *sua sponte* ordered the government to address whether the court had appellate jurisdiction over the district court's remand orders, noting the familiar principle that "[o]rdinarily a remand to an admin-

istrative agency for further proceedings is not immediately appealable." Order of Sept. 30, 2019, *Carr* v. *Commissioner*, No. 19-5079 (10th Cir.). After the government filed a brief contending that there was appellate jurisdiction, see *Carr* Gov't C.A. Supp. Br. at 1-5, the Tenth Circuit ordered the *Carr* petitioners to file a response. See Order of Oct. 11, 2019, *Carr*, *supra*. The *Carr* petitioners argued (at least initially) that there was no appellate jurisdiction, see *Carr* Pet. C.A. Supp. Br. at 3-4; but see *Carr* Pet. C.A. Br. at 13, prompting the Tenth Circuit to direct the government to file a reply brief, see Order of Oct. 28, 2019, *Carr*, *supra*.[2] After that extensive briefing, the Tenth Circuit seems to have been satisfied of its jurisdiction, so stating in its opinion. See *Carr* v. *Commissioner*, 961 F.3d 1267, 1268 (10th Cir. 2020).

The better view appears to be that, notwithstanding the general rule, the remand orders in *Carr* constituted appealable final judgments. See *Carr* U.S. Br. at 14. But the very presence of a threshold jurisdictional question serious enough to warrant supplemental briefing below raises vehicle concerns, given the Court's responsibility to ensure its own jurisdiction. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 95 (1998). The petition in these cases, by contrast, presents no such question.

C. In The Alternative, The Court Should Grant Both Petitions

Finally, in the event the Court were to conclude that the two petitions are equally good vehicles for review, it should simply grant both. The government itself proposes that option as an alternative to granting review only

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[2] The *Carr* petitioners did not mention the supplemental briefing or otherwise flag the jurisdictional question in their petition for certiorari, instead stating that "[t]here are no jurisdictional or procedural barriers to this Court's review." *Carr* Pet. at 2.

in *Carr*. See Br. 8, 17. And this Court routinely grants multiple petitions presenting the same question where one petition is not a substantively preferable vehicle to the other. See, *e.g.*, *AMG Capital Management, LLC* v. *FTC*, cert. granted, No. 19-508 (consolidated with *FTC* v. *Credit Bureau Center, LLC*, cert. granted, No. 19-825); *Chiafalo* v. *Washington*, 140 S. Ct. 2316 (2020) (decided with *Colorado Department of State* v. *Baca*, 140 S. Ct. 2316 (2020)); *DHS* v. *Regents of the University of California*, 140 S. Ct. 1891 (2020) (consolidated with *Trump* v. *NAACP*, No. 18-588, and *Wolf* v. *Vidal*, No. 18-589). The government's suggestion that the Court should deviate from that practice here, on such a flimsy ground, is simply inexplicable.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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