THE TENTH CIRCUIT'S NUANCED APPROACH TO ADMINISTRATIVE EXHAUSTION OF CONSTITUTIONAL CLAIMS

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ABSTRACT

The Tenth Circuit is typically more reluctant than most other courts of appeals to treat constitutional claims differently from nonconstitutional claims for purposes of administrative exhaustion. Consequently, the Tenth Circuit is less likely to exempt constitutional claims from exhaustion mandates. The Tenth Circuit usually requires litigants to raise these claims before a responsible agency prior to seeking relief in court, absent a particularized showing of undue burden or futility. Notably, despite the Supreme Court's recent disparagement of administrative exhaustion of constitutional challenges to agency structure in *Axon v. FTC* and *Carr v. Saul*, the Tenth Circuit recently reaffirmed the continuing validity of its prior jurisprudence on exhaustion of constitutional claims, reiterating its pre-*Carr* assertion that unexhausted "structural challenges 'have no special entitlement to review' on appeal from the agency."[1]

This Article describes, defends, and discusses the strategic implications of the Tenth Circuit's approach to exhaustion of constitutional claims. It identifies specific aspects of Tenth Circuit jurisprudence that make the Tenth Circuit more likely to require exhaustion of constitutional claims. It explains that this approach comports with Supreme Court precedents because the Court has never categorically exempted constitutional claims from exhaustion mandates, despite the Court's disparagement of agency adjudication of constitutional claims in cases such as *Axon* and *Carr*. This Article also argues that the Tenth Circuit is reasonable to presume that administrative exhaustion of constitutional claims provides similar benefits to administrative exhaustion of other claims, absent a particularized showing to the contrary. It further argues that the procedural, legal, and administrative background of significant cases in which the Tenth Circuit required exhaustion of constitutional claims demonstrates the wisdom of this approach. The Article concludes by discussing strategic

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1. Smith v. Board of Governors of the Federal Reserve System, 73 F.4th 815, 823 (10th Cir. 2023) (quoting Turner Bros., Inc. v. Conley, 757 F. App'x 697, 700 (10th Cir. 2018)).

implications of the Tenth Circuit's nuanced approach to exhaustion of constitutional claims for agencies and litigants, both at the administrative stage and when litigating the exhaustion issue.

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INTRODUCTION

Having to comply with administrative exhaustion mandates is normally a fact of life for parties intending to challenge agency action in court. Exhaustion of remedies mandates require litigants to give a responsible agency the opportunity to address their claim before they seek relief in court.[2] Issue exhaustion mandates require parties to agency proceedings to raise any arguments they wish to make before the agency.[3] Litigants who fail to comply with exhaustion of remedies mandates risk dismissal of their suit, while litigants who fail to comply with issue exhaustion mandates may be barred from raising their unexhausted arguments when seeking judicial review of an agency ruling.[4] Administrative exhaustion can be expressly or implicitly required by statutes, mandated by agency rules, or imposed by courts in the form of judge-made "prudential" exhaustion requirements.[5]

Courts often justify exhaustion mandates based on a presumption that exhaustion benefits agencies, courts, and litigants in various ways.[6] But courts may decline to require exhaustion if these advantages are attenuated or are outweighed by the downsides of delayed judicial review.[7] Exhaustion potentially benefits agencies because it permits them to apply specialized expertise, exercise administrative discretion, and take prompt corrective action to avoid litigation.[8] Exhaustion may also benefit courts by forestalling litigation if a matter is resolved administratively, by preventing inefficient piecemeal litigation, and by providing a record for judicial review.[9] Litigants may also benefit from administrative exhaustion because agency proceedings may be faster or less costly than court litigation[10] and because issue exhaustion mandates protect litigants who prevail before an agency from "sandbagging" by losing parties who belatedly raise new arguments for the first time on judicial review of the agency's decision.[11] But courts may decline to enforce exhaustion mandates if these advantages are attenuated[12] or outweighed by significant harm from delayed judicial review.[13] Accordingly, when litigants demonstrate that exhaustion would

2. Reiter v. Cooper, 507 U.S. 258, 269 (1993).
3. Sims v. Apfel, 530 U.S. 103, 108 (2000).
4. *Reiter*, 507 U.S. at 269; *Sims*, 530 U.S. at 108.
5. Island Creek Coal Co. v. Bryan, 937 F.3d 738, 746–49 (6th Cir. 2019).
6. McCarthy v. Madigan, 503 U.S. 140, 146–49 (1992).
7. *Id.*
8. *Id.* at 145.
9. *Id.*
10. Woodford v. Ngo, 548 U.S. 81, 89 (2006).
11. Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs, 987 F.3d 581, 592 (6th Cir. 2021); *accord* Sims v. Apfel, 530 U.S. 103, 109 (2000).
12. *E.g.*, Commander Props., Inc. v. FAA, 11 F.3d 204, 205 n.2 (D.C. Cir. 1993) (declining to enforce an issue exhaustion mandate because the administrative scheme failed to provide an opportunity to raise a disputed issue before the agency).
13. *E.g.*, Briggs v. Sullivan, 886 F.2d 1132, 1140 (9th Cir. 1989) (citation omitted) (refusing to require means-tested benefits recipients to exhaust remedies before suing over reduced benefits payments because "retroactive payments . . . . cannot erase the experience or the entire effect of several months without food, shelter or other necessities").

be futile or highly prejudicial, courts may refuse to require prudential exhaustion, hold that an implied exhaustion mandate should not encompass a particular claim,[14] or conclude that exceptions to statutory or regulatory exhaustion requirements should apply to a party's claim.[15]

This Article addresses the Tenth Circuit's typical practice of applying the general presumption that administrative exhaustion is beneficial, absent a showing to the contrary, with equal force when litigants raise constitutional claims.[16] This practice makes the Tenth Circuit's exhaustion jurisprudence distinct from that of most other circuits. When confronted with constitutional claims, most courts of appeals have at times relaxed or even reversed the presumption that exhaustion is appropriate unless a litigant demonstrates otherwise, particularly when litigants raise "structural" claims that challenge the constitutionality of an agency's structure—typically on separation of powers grounds[17] or claims that a statute is unconstitutional.[18] These courts frequently assert that agencies are an inferior venue for resolving these and other constitutional claims,[19] often assuming that agencies lack the necessary expertise or authority to consider or grant relief on these claims[20] and that the typical advantages associated with exhaustion—such as an agency's ability to apply special expertise—do not apply to constitutional claims.[21] Consequently, courts may decline to require prudential exhaustion of some constitutional claims, refuse to hold that statutes implicitly require exhaustion of these claims,[22] or apply

14. *See* Yonatan Gelblum, *The Myth That Agency Adjudications Cannot Address Constitutional Claims*, 33 GEO. MASON L. REV. (forthcoming 2025) (manuscript at 12–13) (citations omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4782022.

15. *Id.* at 13.

16. *See, e.g.*, Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 824 (10th Cir. 2023) ("Because the agency regulation required Petitioners to raise this issue before the Board, and they do not show that they could not have done so, they have forfeited their Appointments Clause challenge and we will not consider it now."); C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1439 (10th Cir. 1988) ("Although constitutional concerns are implicated, such concerns could have been addressed [in agency proceedings] below.").

17. Examples of structural challenges to agency action include those based on assertions that procedures for appointing agency officials violate the Appointments Clause, and challenges to the constitutionality of statutes that limit the President's or an agency head's ability to freely remove agency officials from office. *E.g.*, Fleming v. U.S. Dep't of Agric., 987 F.3d 1093, 1102 (D.C. Cir. 2021) (describing such challenges as "structural").

18. *E.g.*, Calcutt v. FDIC, 37 F.4th 293, 311–13 (6th Cir. 2022) (declining to require exhaustion of a challenge to agency heads' statutory removal protections because the claim was a structural attack on the agency's enabling act), *rev'd on other grounds*, 598 U.S. 623 (2023).

19. *E.g.*, U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336, 348 (5th Cir. 2022) ("[R]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." (quoting Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973))).

20. *E.g.*, Cirko *ex rel.* Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 157 (3d Cir. 2020) (alleged Appointments Clause violation was "beyond the power of the agency to remedy"); Andrade v. Lauer, 729 F.2d 1475, 1491 (D.C. Cir. 1984) (agency officials "have neither the qualifications nor the expertise" necessary to address a constitutional claim).

21. *E.g.*, *Calcutt*, 37 F.4th at 312–13 (exhaustion of "a structural constitutional challenge over which the FDIC Board has no special expertise. . . . would have been a pointless exercise").

22. *E.g.*, *Cirko*, 948 F.3d at 153 (declining to impose a prudential issue exhaustion requirement on a litigant raising an Appointments Clause challenge); *Andrade*, 729 F.2d at 1491–93 (holding that although the Civil Service Reform Act implicitly requires administrative exhaustion of most disputes relating to federal employment, it does not require exhaustion of an Appointments Clause claim).

express or implicit exceptions to statutory or regulatory exhaustion mandates when litigants raise constitutional claims.[23]

This greater reluctance on the part of most circuits to require exhaustion of constitutional claims may, at first blush, appear reasonable in light of several Supreme Court decisions disparaging administrative resolution of such claims. In *Weinberger v. Salfi*[24] and *Mathews v. Diaz*,[25] the Court described facial constitutional challenges to statutes[26] as "beyond the [agency's] competence."[27] In *Mathews v. Eldridge*,[28] the Court stated that "[i]t is unrealistic to expect that the [agency] would consider substantial changes in the current administrative review system at the behest of a single [party] raising a constitutional challenge [to agency rules] in an adjudicatory context."[29] And in *Califano v. Sanders*,[30] the Court asserted that in contrast to attacks on the merits of a benefits determination, "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures."[31] More recently, in both *Carr v. Saul* (*Carr II*),[32] which reversed a Tenth Circuit ruling in *Carr v. Commissioner, SSA* (*Carr I*)[33] that imposed a prudential issue exhaustion requirement on litigants raising a structural claim,[34] and in *Axon Enterprise, Inc. v. FTC*,[35] the Court observed that "agency adjudications are generally ill suited to address structural constitutional challenges."[36] Similarly, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[37] the Court described structural claims as "outside [the agency's] competence and expertise."[38] In addition, in *Freytag v. Commissioner*,[39] the Court held that reviewing courts may excuse a litigant's failure to have raised a structural constitutional claim in the proceeding under review due to the importance of the constitutional separation of powers issues typically implicated by such claims.[40] Lower courts have subsequently construed *Freytag* as permitting

23. *E.g.*, *Calcutt*, 37 F.4th at 311 (citation omitted) (concurring with a litigant's claim that a regulatory exhaustion mandate is implicitly limited to "issues over which the agency has jurisdiction, and that because agencies lack 'authority to entertain a facial constitutional challenge to the validity of a law,' he did not need to exhaust" a facial challenge to a statute); Noel Canning v. NLRB, 705 F.3d 490, 497 (D.C. Cir. 2013) (express waiver of issue exhaustion mandate for "extraordinary circumstances" made it unnecessary to exhaust a challenge to agency action based on the Recess Appointments Clause), *aff'd on other grounds*, 573 U.S. 513 (2014).

24. 422 U.S. 749 (1975).

25. 426 U.S. 67 (1976).

26. *See* Bucklew v. Precythe, 587 U.S. 119, 138 (2019) ("A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications.").

27. *Diaz*, 426 U.S. at 76; *Salfi*, 422 U.S. at 767.

28. 424 U.S. 319 (1976).

29. *Id.* at 330.

30. 430 U.S. 99 (1977).

31. *Id.* at 109.

32. 593 U.S. 83 (2021).

33. 961 F.3d 1267 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

34. *Id.* at 1268.

35. 598 U.S. 175 (2023).

36. *Id.* at 195; *Carr II*, 593 U.S. at 92.

37. 561 U.S. 477 (2010).

38. *Id.* at 491.

39. 501 U.S. 868 (1991).

40. *Id.* at 878–80.

judicial consideration of unexhausted structural claims even when these claims would ordinarily be subject to an issue exhaustion mandate.[41]

The relatively greater judicial readiness to exempt constitutional challenges from exhaustion mandates, combined with recent jurisprudential developments that provide new constitutional grounds to attack agency action,[42] can significantly impact both courts and agencies. It increases the likelihood that constitutional attacks on the administrative state will reach the courts and that the courts will reach these issues instead of resolving cases on alternate, nonconstitutional grounds.[43] This results in parallel proceedings in courts and agencies as well as additional judicial proceedings in the same matter if a party litigates a constitutional claim before agency proceedings have concluded and subsequently seeks review of the agency's final decision on nonconstitutional claims. Consequently, this practice may further burden the federal courts, which have already faced an exponential growth in caseloads in recent years.[44]

The greater likelihood that court litigation over constitutional claims will take place prior to or concurrently with administrative proceedings (rather than after such proceedings have concluded) also increases the potential burden to agencies of pursuing administrative enforcement, which may force difficult decisions on how to deploy limited agency resources. For example, after *Axon* allowed the respondent in an administrative Federal Trade Commission (FTC) antitrust proceeding to collaterally attack the proceeding in district court on structural constitutional grounds rather than requiring it to seek judicial relief only after the administrative proceeding ended,[45] the FTC dismissed the administrative action.[46] It explained that the pending court challenge to the action "will likely result in years of additional litigation," so that despite the allegedly harmful effects of the respondent's actions, "the increasingly unlikely possibility of reaching a timely resolution of the antitrust merits that led to the filing of our complaint in the first place" led the FTC "to the difficult conclusion that the public interest requires that this litigation no longer be continued."[47]

41. *Compare, e.g.*, *In re* Palo Alto Networks, Inc., 44 F.4th 1369, 1374 (Fed. Cir. 2022) (citing *Freytag* as grounds for considering an Appointments Clause argument not raised before the U.S. Patent and Trademark Office (USPTO)), *with In re* DBC, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (holding that absent application of discretion under *Freytag*, an Appointments Clause argument not raised before the USPTO is waived).

42. *See, e.g.*, Cody v. Kijakazi, 48 F.4th 956, 961 (9th Cir. 2022) (describing the Appointments Clause ruling in *Lucia*, as "a watershed decision that created new issues and questions for federal agencies" (citing Lucia v. SEC, 585 U.S. 237 (2018))).

43. *See* Jeff Overley, *Industry Emboldened After Justices Galvanize Agency Attacks*, LAW360 (May 17, 2024, 4:59 PM), https://www.law360.com/articles/1835195/industry-emboldened-after-justices-galvanize-agency-attacks (quoting a litigator's assertion that as a result of decisions like *Axon* "a regulated entity that has a strong [structural] claim can go straight to court, where the claim will be front and center").

44. Christopher J. Walker & David Zaring, *The Right to Remove in Agency Adjudication*, 85 OHIO ST. L.J. 1, 28 (2024) (citations omitted).

45. *See* Axon Enter., Inc. v. FTC, 598 U.S. 175, 183–84 (2023).

46. Order Returning Matter to Adjudication and Dismissing Complaint, Axon Enter., Inc., No. 9389 (F.T.C. Oct. 6, 2023).

47. *Id.*

The common judicial readiness to exempt constitutional claims from administrative exhaustion mandates thus has important ramifications for both courts and agencies.

The Tenth Circuit, however, has generally been reluctant to relax the presumption that exhaustion should be required merely because a litigant raises a constitutional claim. It typically applies exhaustion mandates with equal force to both constitutional and nonconstitutional claims, thus requiring exhaustion of constitutional claims absent a particularized showing of futility or prejudice.[48] This difference between the Tenth Circuit's general approach to exhaustion of constitutional claims and the approach of most other circuits has twice caused a direct conflict that prompted the Supreme Court to grant certiorari to resolve the circuit split. In *Thunder Basin Coal Co. v. Reich*,[49] the Court resolved a split between the Sixth and Tenth Circuits[50] when it affirmed the Tenth Circuit's holding that the Federal Coal Mine Safety and Health Act of 1969, as amended (Coal Act)[51] implicitly required a party raising a facial due process challenge to the Act's enforcement scheme to exhaust administrative remedies through that scheme in lieu of bringing a pre-enforcement challenge in district court.[52] More recently, in *Carr*, the Court reversed a Tenth Circuit ruling[53] that, in

48. *E.g.*, Turner Bros., Inc. v. Conley, 757 F. App'x 697, 700 (10th Cir. 2018) (citation omitted) (demonstrating that unexhausted "Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review"); Blackbear v. Norton, 93 F. App'x 192, 194 (10th Cir. 2004) (rejecting argument that "Plaintiffs . . . need not exhaust administrative remedies because their claims are constitutional in nature"); Schreiber v. Cuccinelli, 981 F.3d 766, 785 (10th Cir. 2020) (quoting Harline v. DEA, 148 F.3d 1199, 1203 (10th Cir. 1998)) (plaintiff raising constitutional claim "'bears the burden of establishing' that 'exhaustion would be futile'"); *Harline*, 148 F.3d at 1202–03 (requiring plaintiff seeking to litigate an unexhausted structural constitutional objection to agency action to demonstrate, *inter alia*, that delayed judicial review would result in irreparable harm).

49. 510 U.S. 200 (1994).

50. *Id.* at 206 (noting circuit split). The Tenth Circuit decision also disagreed with the ruling of a district court in the Seventh Circuit. *See* Zeigler Coal Co. v. Marshall, 502 F. Supp. 1326, 1330 (S.D. Ill. 1980), *discussed by* Thunder Basin Coal Co. v. Martin (*Thunder Basin I*), 969 F.2d 970, 973 (10th Cir. 1992).

51. 30 U.S.C. §§ 801–966.

52. Thunder Basin Coal Co. v. Reich (*Thunder Basin II*), 510 U.S. 200, 218 (1994), *aff'g Thunder Basin I*, 969 F.2d at 975.

53. *Carr* also reversed the Eighth Circuit, which had adopted the same approach as the Tenth Circuit. *Carr II*, 593 U.S. 83, 96 (2021), *rev'g* Davis v. Saul, 963 F.3d 790 (8th Cir. 2020). Among the other circuits, the Eighth Circuit's jurisprudence is arguably closest to that of the Tenth Circuit in terms of reluctance to exempt constitutional claims from exhaustion mandates. Apart from siding with the Tenth Circuit's minority position in *Carr I* on the applicability of prudential exhaustion to SSA ALJ proceedings, the Eighth Circuit, like the Tenth Circuit, has been skeptical of the *Freytag* exception permitting courts to exercise discretion to hear unexhausted structural constitutional challenges. *E.g.*, *Davis*, 963 F.3d at 795 (declining to exercise discretion under *Freytag*, on the grounds that doing so would be disruptive to the agency and create perverse incentives for unsuccessful administrative litigants to belatedly raise structural objections in order to obtain a "second chance"). And on a hotly contested structural issue that was not directly litigated in the Tenth Circuit, the Eighth Circuit parted ways with other circuits by refusing to consider an unexhausted Recess Appointments Clause challenge to the composition of the National Labor Relations Board. *Compare* NLRB v. RELCO Locomotives, Inc., 734 F.3d 764, 798 (8th Cir. 2013) (refusing to find that the structural nature of a Recess Appointments Clause objection constituted "extraordinary circumstances" for purposes of an express exception to a statutory exhaustion mandate), *with* Noel Canning v. NLRB, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd on other grounds*, 573 U.S. 513 (2014) ("extraordinary circumstances" made it

contrast to decisions issued by the Third, Fourth, and Sixth Circuits, required prudential issue exhaustion by disability claimants raising Appointments Clause challenges to Social Security Administration (SSA) Administrative Law Judges (ALJs).[54]

Despite being reversed in *Carr*, and notwithstanding the Court's recent disparagement of agency adjudication of constitutional claims in *Carr* and *Axon*, the Tenth Circuit recently reaffirmed the continuing vitality of its nuanced approach to exhaustion of constitutional claims in *Smith v. Board of Governors of the Federal Reserve System*.[55] *Smith*, a precedential opinion that was the first Tenth Circuit ruling on exhaustion of structural constitutional claims following *Axon* and *Carr*, held that the petitioners waived a structural challenge to agency proceedings by failing to comply with a Federal Reserve Board regulation that required issue exhaustion, and rejected their argument that the agency proceeding was not an appropriate forum in which to seek relief on this claim.[56] Quoting from one of its nonprecedential pre-*Carr* opinions, the Tenth Circuit held that unexhausted "structural challenges 'have no special entitlement to review' on appeal from the agency"[57] and distinguished both *Axon* and *Carr*[58] rather than extending their holdings as some circuits have done.[59]

This Article examines, defends, and discusses the strategic implications to agencies and litigants of the Tenth Circuit's approach to administrative exhaustion of constitutional claims. Part I discusses aspects of Tenth Circuit jurisprudence that makes it more likely than most other courts of appeal to require exhaustion of constitutional claims. The Tenth Circuit is less ready than other courts to assume that agencies are not an appropriate forum for resolving constitutional claims, tends to distinguish rather than extend Supreme Court precedents disfavoring exhaustion of constitutional claims, and is openly hostile to the *Freytag* exception permitting courts to exercise discretion to consider unexhausted structural constitutional claims. Part II argues that the Tenth Circuit's approach comports with Supreme Court precedent because despite the occasional use of broad language disparaging agency adjudication of constitutional claims in some Supreme Court decisions, the Court's *holdings* on the issue are relatively narrow. The Supreme Court has also held in other cases that constitutional claims can be subjected to exhaustion mandates, and even when it reversed the Tenth Circuit in *Carr*, it did not assert that the Tenth Circuit had failed to follow binding precedents on exhaustion of

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unnecessary to exhaust the same Recess Appointments Clause challenge before the same agency given its constitutional nature); authorities cited *infra* note 131 (consideration by the Fourth Circuit of the same unexhausted claim before the same agency that a panel member asserted was undertaken pursuant to the *Freytag* exception).

54. *Carr II*, 593 U.S. at 87–88, 96, *rev'g Carr I*, 961 F.3d 1267 (10th Cir. 2020).
55. 73 F.4th 815 (10th Cir. 2023).
56. *Id.* at 822–24.
57. *Id.* at 823 (quoting Turner Bros., Inc. v. Conley, 757 F. App'x 697, 700 (10th Cir. 2018)).
58. *Id.* at 823 & n.9.
59. *See infra* notes 123–124 and accompanying text.

constitutional claims. Part III reviews the potential benefits of requiring administrative exhaustion of constitutional claims and explains why administrative exhaustion of constitutional claims can be as beneficial as exhaustion of other claims. Part III also uses three significant Tenth Circuit cases concerning exhaustion of constitutional claims—*Thunder Basin*, *Carr*, and *Smith*—as case studies to demonstrate that the Tenth Circuit is reasonable to presume that the benefits of exhaustion also apply to constitutional claims absent a showing to the contrary. Lastly, Part IV discusses the strategic implications of the Tenth Circuit's jurisprudence for agencies and nonagency litigants in cases where exhaustion of constitutional claims may be at issue, both at the administrative stage and when arguing in court for or against the applicability of an exhaustion mandate. It explains how, apart from the need for parties who intend to seek judicial relief on constitutional claims to scrupulously comply with exhaustion mandates, the Tenth Circuit's nuanced approach makes it important for agencies and other litigants to consider how the particular characteristics of a party's case and the applicable administrative scheme may support or rebut the Tenth Circuit's general presumption that administrative exhaustion is beneficial.

I. TENTH CIRCUIT JURISPRUDENCE TENDS TO FAVOR REQUIRING EXHAUSTION OF CONSTITUTIONAL CLAIMS

This Part explains how the Tenth Circuit's approach to administrative exhaustion of constitutional claims differs from the approach of most other courts of appeals. It identifies three specific aspects of Tenth Circuit jurisprudence that make it more likely that litigants bringing constitutional claims in the Tenth Circuit will be subjected to exhaustion mandates. First, the Tenth Circuit is more reluctant than other circuits to presume that agencies are not an appropriate forum in which to raise constitutional claims, and it therefore typically requires exhaustion of these claims absent a particularized showing that exhaustion would be futile or that delayed judicial review would cause irreparable harm. Second, while other circuits have relied on broadly-worded reasoning or dicta in Supreme Court rulings such as *Carr* and *Eldridge* that disparage the benefits of exhaustion of constitutional claims as grounds for exempting litigants from exhaustion mandates in other situations involving constitutional claims, the Tenth Circuit has tended to only apply the more limited *holdings* in these decisions and is therefore more likely to distinguish these rulings when presented with different situations. Lastly, while most circuits have shown a willingness to apply the *Freytag* exception to consider structural constitutional claims that were not raised in accordance with an applicable issue exhaustion mandate, the Tenth Circuit has expressed an outright hostility towards exercising this discretion.

A. Reluctance to Presume that Agencies Are an Inferior Forum for Resolving Constitutional Claims

Courts generally presume that administrative exhaustion is beneficial and consequently tend to require it absent a showing of undue burden or futility.[60] But most circuits have relaxed or reversed the presumption in favor of administrative exhaustion when litigants have raised various constitutional claims,[61] particularly structural claims[62] or facial challenges to statutes.[63] Courts often explain this differential treatment with categorical assertions that agencies cannot address constitutional claims because they lack the necessary competence or authority to do so[64] or that there is no

60. *See generally* McCarthy v. Madigan, 503 U.S. 140, 146–49 (1992) (citations omitted) (discussing how courts should determine whether exhaustion is required).

61. *See, e.g.*, Andrade v. Lauer, 729 F.2d 1475, 1491 (D.C. Cir. 1984) (refusing to hold that an implicit exhaustion mandate applies to an Appointments Clause claim that agency officials "have neither the qualifications nor the expertise" to address); R.I. Dep't of Env't Mgmt. v. United States, 304 F.3d 31, 44 (1st Cir. 2002) (citing Califano v. Sanders, 430 U.S. 99, 109 (1977)) (declining to require exhaustion of an Eleventh Amendment challenge to agency proceedings because the issue would be "best addressed by a federal court"); Gorgonzola v. Dir., U.S. Off. of Pers. Mgmt., No. 22-1942, 2023 WL 1478999, at *5 (3d Cir. Feb. 2, 2023) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 (2010)) (declining to subject a due process challenge to an implicit exhaustion mandate because the claim presented "standard questions of [constitutional] law, which the courts are at no disadvantage in answering") (modification in the original); K & R Contractors, LLC v. Keene, 86 F.4th 135, 145 (4th Cir. 2023) (quoting *Carr II*, 593 U.S. 83, 93 (2021)) (declining to require exhaustion of a challenge to statutory removal protections "about which the [agency] has 'no special expertise and for which [it] can provide no relief"), *reh'g en banc denied*, No. 20-2021 (4th Cir. Jan. 9, 2024); Feds for Med. Freedom v. Biden, 63 F.4th 366, 381 (5th Cir. 2023), *vacated on other grounds*, 144 S. Ct. 480 (2023) (quoting *Thunder Basin II*, 510 U.S. 200, 212 (1994)) (declining to subject litigants raising "constitutional issues" that are "outside the agency's expertise" to an implicit exhaustion mandate); Ramsey v. Comm'r of Soc. Sec., 973 F.3d 537, 545–46 (6th Cir. 2020) (declining to require prudential issue exhaustion of "an Appointments Clause challenge [that] involves neither an exercise of discretion, nor an issue within the agency's special expertise"); Yi Tu v. Nat'l Transp. Safety Bd., 470 F.3d 941, 945 n.6 (9th Cir. 2006) (quoting Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364, 366 (9th Cir. 1996)) (declining to impose an issue exhaustion requirement on a due process challenge to agency procedures, and asserting that the agency is "without the power or jurisdiction to adjudicate th[is] constitutional claim[]") (modification in the original); Celgene Corp. v. Peter, 931 F.3d 1342, 1357 n.11 (Fed. Cir. 2019) (declining to require issue exhaustion of a due process challenge to the retroactive applicability of a statute despite the agency's assertion that it could have exercised its discretion not to apply the statute in an unconstitutional manner had the issue been raised administratively).

62. *E.g.*, *K & R Contractors*, 86 F.4th at 145 (quoting *Carr II*, 593 U.S. at 92) ("[A]gency adjudications are generally ill suited to address structural constitutional challenges . . . ."); *Ramsey*, 973 F.3d at 545–46 (quoting Cirko *ex rel.* Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 153 (3d Cir. 2020)) ("[E]xhaustion is generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges . . . .").

63. *E.g.*, Calcutt v. FDIC, 37 F.4th 293, 312–13 (6th Cir. 2022) (because an agency "has no power to invalidate its own organic statute . . . . [r]equiring issue exhaustion in this situation would have been a pointless exercise"), *rev'd on other grounds*, 598 U.S. 623 (2023); *Gilbert*, 80 F.3d at 366–67 (citations omitted) ("[C]hallenges to the constitutionality of a statute . . . are beyond the power or the jurisdiction of an agency. Because the agency lacks the authority to review such claims, a petitioner need not exhaust the claims before seeking judicial review."); Mobility Workx, LLC v. Unified Pats., LLC, 15 F.4th 1146, 1151 (Fed. Cir. 2021) ("[C]onstitutional challenges to the statute under which the agency operates need not be raised before the agency.").

64. *E.g.*, *Andrade*, 729 F.2d at 1491 (agency officials "have neither the qualifications nor the expertise" to address separation of powers claims); *K & R Contractors*, 86 F.4th at 145 (quoting *Carr II*, 593 U.S. at 93) (declining to require exhaustion of a challenge to statutory removal protection "about which the [agency] has 'no special expertise and for which [it] can provide no relief'"); Howard v. FAA, 17 F.3d 1213, 1218 (9th Cir. 1994) ("Challenges to the constitutionality of an agency regulation . . . lie outside the cognizance of that agency.").

benefit to agency consideration of constitutional claims.[65] In contrast, the Tenth Circuit usually[66] applies the general presumption that exhaustion is beneficial with equal force when litigants raise constitutional claims unless a litigant demonstrates otherwise, generally refusing to assume that these claims are inherently less suitable for resolution at the agency level.[67] The Tenth Circuit's reluctance to presume that agencies cannot effectively resolve such claims has caused it to hold that exhaustion mandates apply to constitutional claims in circumstances when other courts have declined to do so—notably with respect to structural constitutional challenges and facial constitutional challenges to statutes. And it is less likely to excuse litigants' failure to comply with these mandates due to purported uncertainty about whether an agency would be able and willing to provide redress on a constitutional claim.

The Tenth Circuit has generally been hostile to any suggestion that agencies are a presumptively inappropriate forum for resolving constitutional claims. Instead, the Tenth Circuit requires litigants who seek to avoid the application of exhaustion mandates to their constitutional claims to make a particularized showing that it would not be appropriate to require exhaustion. It has thus declined litigants' invitations to engage in the

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65. *E.g.*, *R.I. Dep't of Env't Mgmt.*, 304 F.3d at 43 (citations omitted) (declining to require exhaustion of a claim that "is strictly constitutional in scope, and [therefore] does not require the application of agency expertise"); *Cirko*, 948 F.3d at 158 (citations omitted) (declining to require exhaustion of an Appointments Clause challenge because deference to agency expertise is irrelevant due to the agency's lack of "competence and expertise" concerning constitutional questions, and because no early error correction would occur because "[i]t is unrealistic to expect [the agency to] consider substantial changes in the current administrative review system [in response to] a constitutional challenge in an adjudicatory context"); Probst v. Saul, 980 F.3d 1015, 1021 (4th Cir. 2020) ("The judiciary is at least as equipped to evaluate [an Appointments Clause] claim as the SSA is. . . . [N]either the agency's expertise nor its discretion is implicated here, which dampens the impact of the traditional pro-exhaustion rationales.").

66. The Tenth Circuit's jurisprudence on exhaustion of constitutional challenges before the Board of Immigration Appeals is a notable exception, where, in reliance on out-of-circuit precedents, the Tenth Circuit has generally applied a presumption against exhaustion. *See, e.g.*, Hoang v. Comfort, 282 F.3d 1247, 1254 (10th Cir. 2002), *abrogated on other grounds by* Demore v. Kim, 538 U.S. 510 (2003) (citing Welch v. Reno, 101 F. Supp. 2d 347, 351–52 (D. Md. 2000)); Yanez v. Holder, 149 F. Supp. 2d 485, 489–90 (N.D. Ill. 2001)); Akinwunmi v. I.N.S., 194 F.3d 1340, 1341 (10th Cir. 1999) ("Courts have carved out an exception to the exhaustion requirement for constitutional challenges to the immigration laws, because the BIA has no jurisdiction to review such claims." (citing Rashtabadi v. I.N.S., 23 F.3d 1562, 1567 (9th Cir. 1994))), *quoted by* Tjandra v. Ashcroft, 109 F. App'x 334, 336 (10th Cir. 2004). The Tenth Circuit's differential treatment of exhaustion of constitutional claims in the immigration context may be due to the *Board*'s long history of broadly and expressly disclaiming authority to address various constitutional claims. *E.g.* Fuentes-Campos, 21 I. & N. Dec. 905, 912 (B.I.A. 1997) ("It is well settled that we lack jurisdiction to rule on the constitutionality of the [Immigration and Nationality] Act and the regulations we administer."), *cited by* Schreiber v. Cuccinelli, 981 F.3d 766, 784 (10th Cir. 2020); *see also* Aguayo v. Garland, 78 F.4th 1210, 1216 (10th Cir. 2023) (citation omitted) ("The BIA did not pass on whether ICE's issuance of immigration detainers violated federal law or the Constitution, reasoning 'we have no authority to entertain such challenges to the statutes and regulations we administer.'").

67. *See, e.g.*, Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 824 (10th Cir. 2023) ("Because the agency regulation required Petitioners to raise this issue before the Board, and they do not show that they could not have done so, they have forfeited their Appointments Clause challenge and we will not consider it now."); C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1439 (10th Cir. 1988) ("Although constitutional concerns are implicated, such concerns could have been addressed [in agency proceedings] below.").

type of disparagement of constitutional adjudication by agencies that other courts routinely engage in. For example, the Tenth Circuit asserted that it "need not address" a contention by a litigant belatedly attempting to raise an Appointments Clause challenge to a Department of Labor (DOL) ALJ "that neither the ALJ nor the [agency] had authority to rule on constitutional issues."[68] It deemed another court's assertion that an alleged Appointments Clause violation by the SSA was "beyond the power of the agency to remedy" to be "counter to our precedent" and therefore required exhaustion of the issue.[69] And it has repeatedly asserted that unexhausted "structural challenges 'have no special entitlement to [judicial] review.'"[70] Instead, the Tenth Circuit generally requires these litigants to rebut the general presumption that exhaustion would be beneficial with a specific showing that particular characteristics of their claim or the applicable administrative scheme make it inappropriate to require exhaustion.[71] Typically, to make this showing, litigants must demonstrate futility[72] (such as when agency procedures do not provide litigants with access to officials authorized to grant relief on constitutional claims)[73] or show that delayed judicial review would be highly prejudicial[74] (such as when waiting for an agency to resolve a dispute over public benefits may prevent a plaintiff from obtaining necessary medical care).[75] If litigants fail to make this showing, then the Tenth Circuit will usually presume that "[a]lthough constitutional concerns are implicated, such concerns could have been addressed [by the agency]" and therefore subject the constitutional claim to generally applicable exhaustion mandates.[76]

The Tenth Circuit's reluctance to indulge categorical assumptions that agencies cannot address constitutional claims and its tendency to instead require a showing that this is actually the case make the Tenth Circuit more likely than most other courts of appeal to hold that an exhaustion mandate applies to a litigant's constitutional claim. It has thus made differing pronouncements from other circuits on the propriety of exhaustion

68. Turner Bros., Inc. v. Conley, 757 F. App'x 697, 700 (10th Cir. 2018).

69. *Carr I*, 961 F.3d 1267, 1275 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021) (discussing *Cirko*, 948 F.3d at 157).

70. *Smith*, 73 F.4th at 823 (citations omitted); *Turner Bros.*, 757 F. App'x at 700 (citation omitted).

71. *See generally* authorities cited *supra* note 67.

72. Schreiber v. Cuccinelli, 981 F.3d 766, 785 (10th Cir. 2020) (citation omitted) (explaining that a plaintiff raising constitutional claim "'bears the burden of establishing' that 'exhaustion would be futile'").

73. *Cf. Smith*, 73 F.4th at 823–24 (holding that exhaustion of an Appointments Clause claim would not have been futile and therefore was not excused because agency rules provided for a direct appeal to agency heads authorized to make a constitutionally valid appointment).

74. *E.g.*, Harline v. DEA, 148 F.3d 1199, 1203 (10th Cir. 1998) (plaintiff seeking to avoid application of exhaustion mandate to constitutional claim "bears the burden of establishing," *inter alia*, "irreparable harm").

75. *See* Bartlett v. Schweiker, 719 F.2d 1059, 1061–62 (10th Cir. 1983) (noting that allegations of inability by public benefits recipients to pay for necessary medical treatment while waiting for the agency to resolve a dispute over benefits payments would have demonstrated "irreparable harm" that might have excused exhaustion had they timely raised these allegations in the district court).

76. C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1439 (10th Cir. 1988).

for various types of constitutional claims, including First Amendment challenges to agency action[77] and due process challenges to agency regulations.[78] But the most notable differences between the Tenth Circuit and other courts of appeals concern structural constitutional challenges and facial challenges to statutes, claims for which other circuits are most likely to relax the presumption in favor of exhaustion.

Many circuits have asserted that agencies are not an appropriate forum for resolving structural claims and have consequently excused exhaustion of such claims in various circumstances.[79] But the Tenth Circuit is typically hostile to any suggestion that structural claims should be presumptively exempt from exhaustion mandates and refuses to presume that agencies are unable to address these claims. For example, the Tenth Circuit decision that the Supreme Court subsequently reversed in *Carr* had reasoned that it was appropriate to require prudential issue exhaustion of Appointments Clause challenges in SSA ALJ proceedings[80] because "an administrative Appointments Clause challenge would have notified the agency of the need to appoint its ALJs, a remedy within the SSA's authority."[81] In contrast, the Third and Fourth Circuits had refused to require exhaustion of the same claim partly based on assertions that the SSA could not address an Appointments Clause claim,[82] and specifically indicated that the structural nature of the claim made it inappropriate to require exhaustion.[83] In some cases, the Tenth Circuit has simply applied its standard exhaustion analysis to structural constitutional claims without further comment, requiring that they be exhausted absent a particularized showing

77. *Compare, e.g.*, Am. Fed'n of Gov't Emps., AFL-CIO Local 916 v. Fed. Lab. Rels. Auth., 951 F.2d 276, 280 (10th Cir. 1991) (enforcing a statutory issue exhaustion mandate when a litigant failed to raise a First Amendment claim before the responsible agency), *with* 800 River Rd. Operating Co. LLC v. NLRB, 784 F.3d 902, 906 n.1 (3d Cir. 2015) (holding that a similarly-worded exhaustion mandate should not apply to a First Amendment claim because of its constitutional nature).

78. *Compare, e.g.*, Bennett v. Nat'l Transp. Safety Bd., 66 F.3d 1130, 1135 (10th Cir. 1995) (requiring issue exhaustion of a due process challenge to an agency regulation), *with* Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364, 366–67 (9th Cir. 1996) (declining to require issue exhaustion of a due process objection to the same agency's administrative procedures because "challenges to the constitutionality of a statute or a regulation promulgated by an agency are beyond the power or the jurisdiction of an agency").

79. *E.g.*, K & R Contractors, LLC v. Keene, 86 F.4th 135, 145 (4th Cir. 2023) (citations omitted) (declining to require exhaustion of a structural challenge partly because "agency adjudications are generally ill suited to address structural constitutional challenges"), *reh'g en banc denied*, No. 20-2021 (4th Cir. Jan. 9, 2024); Calcutt v. FDIC, 37 F.4th 293, 312 (6th Cir. 2022) ("A further consideration counsels against imposing an issue-exhaustion requirement here: Calcutt's challenge . . . is a structural constitutional challenge . . . ."), *rev'd on other grounds*, 598 U.S. 623 (2023).

80. *See Carr I*, 961 F.3d 1267, 1268 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

81. *Id.* at 1275 (citation omitted).

82. *See* Cirko *ex rel.* Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 157 (3d Cir. 2020) (describing an Appointments Clause claim as "beyond the power of the agency to remedy"); Probst v. Saul, 980 F.3d 1015, 1021 n.6 (4th Cir. 2020) (asserting that "the agency was without real discretion to address" an Appointments Clause claim).

83. *Cirko*, 948 F.3d at 153 ("[E]xhaustion is generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges . . . ."); *Probst*, 980 F.3d at 1021 (distinguishing cases requiring exhaustion of other claims before the SSA because "[a]n Appointments Clause challenge, at bottom, is a 'structural,' separation-of-powers objection").

that the administrative scheme could not effectively address them,[84] rather than presuming—as have other courts—that the agency could not effectively address structural claims. And in other cases, the Tenth Circuit has expressly asserted that unexhausted structural constitutional claims "have no special entitlement to review."[85]

Facial challenges to statutes are another notable category of constitutional claims that Tenth Circuit has been more reluctant to presume that agencies cannot adequately address, compared to other circuits. It is very common for courts to decline to require exhaustion of such challenges, typically based on assertions that agencies lack authority to rule on the constitutionality of an act of Congress.[86] But the Tenth Circuit has been less willing to indulge this presumption.[87] For example, it extended the Supreme Court's holding in *Shalala v. Illinois Council on Long Term Care, Inc.*[88]—that a facial constitutional challenge to Medicare regulations was subject to a statutory exhaustion mandate[89]—to also require exhaustion of a facial challenge to the Medicare Act itself, rejecting the argument that *Shalala* could be distinguished because "plaintiffs here challenge 'the underlying legislation upon which the agency's regulations are promulgated.'"[90] In *Thunder Basin Coal Co. v. Martin* (*Thunder Basin I*),[91] the Tenth Circuit required exhaustion of a challenge to the Coal Act's enforcement provisions although the relevant statutory scheme did not even

84. *See, e.g.*, Malouf v. SEC, 933 F.3d 1248, 1257 (10th Cir. 2019) (refusing to excuse a failure to exhaust an Appointments Clause claim where the petitioner "has not shown that exhaustion of this challenge would have been clearly useless"); Harline v. DEA, 148 F.3d 1199, 1203–04 (10th Cir. 1998) (holding that in order to excuse the failure to exhaust a "structural" due process objection to the use of agency personnel to adjudicate enforcement actions brought by the agency, a litigant must, *inter alia*, demonstrate futility of administrative remedies and irreparable harm from delayed judicial review).

85. Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 823 (10th Cir. 2023) (citations omitted); Turner Bros., Inc. v. Conley, 757 F. App'x 697, 700 (10th Cir. 2018) (citation omitted).

86. *See, e.g.*, Mobility Workx, LLC v. Unified Pats., LLC, 15 F.4th 1146, 1150 (Fed. Cir. 2021) ("[A]gencies generally do not have authority to declare a statute unconstitutional."); Hettinga v. United States, 560 F.3d 498, 506 (D.C. Cir. 2009) ("The Secretary lacks the power either to declare provisions of the [challenged statute] unconstitutional, or to exempt the [appellants] from the requirements of the [statute]."); Republic Indus., Inc. v. Cent. Pa. Teamsters Pension Fund, 693 F.2d 290, 296 (3d Cir. 1982) ("[Appellant's] frontal assault on the entire statute constitutes a facial constitutional challenge which supports the inapplicability of the exhaustion doctrine."); K & R Contractors, LLC v. Keene, 86 F.4th 135, 145 (4th Cir. 2023) ("[O]nly the judiciary possesses the power to enjoin enforcement of statutes inconsistent with the Constitution."), *reh'g en banc denied*, No. 20-2021 (4th Cir. Jan. 9, 2024); Calcutt v. FDIC, 37 F.4th 293, 312 (6th Cir. 2022) ("[T]he FDIC has no power to invalidate its own organic statute; thus, it could never entertain Calcutt's separation-of-powers challenge to the FDIC Board in the first place."), *rev'd on other grounds*, 598 U.S. 623 (2023); Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364, 366–67 (9th Cir. 1996) ("[C]hallenges to the constitutionality of a statute . . . are beyond the power or the jurisdiction of an agency."); Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550, 1557 (11th Cir. 1985) (citations omitted) ("[T]he FmHA administrative review procedures are inadequate because Panola makes a constitutional attack on FmHA's statutory scheme.").

87. The Tenth Circuit itself, however, has exempted such challenges from exhaustion mandates in the immigration context, where the responsible agency had itself disclaimed authority to pass on the constitutionality of a statute. *See* authorities cited *supra* note 66.

88. 529 U.S. 1 (2000).

89. *See id.* at 5, 12, 24.

90. Home Care Ass'n. of Am., Inc. v. United States, No. 98-6364, 2000 WL 1289154, at *1 (10th Cir. Sept. 13, 2000) (citation omitted).

91. 969 F.2d 970 (10th Cir. 1992), *aff'd sub nom.*, *Thunder Basin II*, 510 U.S. 200 (1994).

expressly require exhaustion,[92] noting that the Mine Safety and Health Review Commission claimed authority to adjudicate such disputes.[93] This ruling was somewhat innovative, because at the time, the Supreme Court had not yet held that no "mandatory" rule bars agencies from resolving facial challenges to statutes; the Court reached this conclusion for the first time only when it affirmed the Tenth Circuit.[94] In contrast, the Sixth Circuit has subsequently assumed, without explanation, that the very same agency lacks authority to rule on such challenges,[95] and it even excused a failure to exhaust an *as-applied* challenge before the Commission[96] due to purported uncertainty about its authority to address the issue.[97] The Fourth Circuit similarly held that exhaustion of a facial challenge to a statute in proceedings before the DOL Benefits Review Board was unnecessary based on the Board's purported inability to invalidate the statute,[98] without addressing the Board's history of claiming authority to consider facial challenges to statutes.[99] Thus, facial challenges to statutes are another significant class of constitutional claims that the Tenth Circuit is less willing to assume are unsuited for administrative resolution, and it is therefore more likely to subject these claims to exhaustion mandates.

Apart from making the Tenth Circuit more likely to hold that exhaustion mandates apply to a constitutional claim, its reluctance to presume that agencies cannot address constitutional claims makes it less likely, compared to other circuits, to excuse a litigant's erroneous failure to comply with these mandates due to mere uncertainty over whether the agency would have granted relief on a constitutional claim. For example, in *Jones Brothers, Inc. v. Secretary of Labor*,[100] the Sixth Circuit held that although a statutory issue exhaustion mandate applicable to proceedings before the Mine Safety and Health Review Commission applies to Appointments

92. *Id.* at 972–74.

93. *Id.* at 974 (citing Sec'y of Lab., MSHA v. Richardson, 3 F.M.S.H.R.C. 8, 18–21 (1981)).

94. *Thunder Basin II*, 510 U.S. 200, 215 (1994).

95. Jones Bros., Inc. v. Sec'y of Lab., 898 F.3d 669, 673 (6th Cir. 2018) ("This administrative agency, like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law.").

96. In contrast to a facial constitutional challenge, which asserts that it is impossible to apply a statute constitutionally under any circumstances, see Bucklew v. Precythe, 587 U.S. 119, 138 (2019), an as-applied challenge only asserts that a particular application of the statute is unconstitutional. *See* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006) (citation omitted) ("It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.'").

97. *Jones Bros.*, 898 F.3d at 677–78.

98. K & R Contractors, LLC v. Keene, 86 F.4th 135, 145–46 (4th Cir. 2023) (citations omitted) (declining to subject a constitutional challenge to a statute that governs a regulatory issue exhaustion mandate because the "[Benefits Review] Board has no authority to . . . . invalidate a statute enacted by Congress to govern and restrain the agency."), *reh'g en banc denied*, No. 20-2021 (4th Cir. Jan. 9, 2024).

99. *See* Duck v. Fluid Crane & Constr. Co., BRB No. 02-0335, 2002 WL 32069335, at *2 n.4 (DOL Ben. Rev. Bd. Oct. 22, 2002) ("The Board . . . possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction.").

100. 898 F.3d 669 (6th Cir. 2018).

Clause claims,[101] a codified exception for litigants who fail to raise an issue due to "extraordinary circumstances" allowed a party to raise the claim for the first time on appeal.[102] The court recognized that the Commission had clear statutory authority to make constitutionally valid appointments, which it exercised after the administrative proceeding at issue had terminated.[103] The panel nonetheless reasoned that at the time the petitioner appeared before the agency, it had "quite understandably" questioned whether the agency could grant relief on its claim when the agency had not previously addressed the Appointments Clause, given "the absence of legal authority addressing whether the Commission could entertain the claim."[104] In contrast, the Tenth Circuit refused to excuse noncompliance with a statutory issue exhaustion mandate that provided an exception for noncompliance due to "reasonable grounds"[105] when a litigant sought to raise an Appointments Clause challenge to a Securities and Exchange Commission (SEC) ALJ on appeal, *precisely because* the SEC had not previously addressed this issue.[106] The Tenth Circuit reasoned that under these circumstances, it would have been unreasonable for a litigant to assume the agency would *not* grant relief on his constitutional claim.[107] The Tenth Circuit similarly refused to excuse exhaustion of a due process challenge to the Board of Immigration Appeals' interpretation of a statute despite the agency's prior assertion that "the Board does not have jurisdiction to rule on the constitutionality of laws it administers,"[108] reasoning that "[w]e . . . do not know whether—when presented with . . . an argument" that its *interpretation* of a statute is unconstitutional, the Board would have denied relief.[109] The Tenth Circuit's greater reluctance compared to other circuits to simply assume that agencies cannot address constitutional claims thus leads to a greater likelihood that it will enforce exhaustion mandates when litigants raise these claims.

B. Preference for Distinguishing Supreme Court Precedents Disfavoring Exhaustion of Constitutional Claims

An additional reason for the Tenth Circuit's greater readiness to require exhaustion of constitutional claims is that compared to most other circuits, it is more likely to distinguish (rather than to extend) Supreme Court holdings that exempt constitutional claims from exhaustion mandates. In contrast to other circuits that might focus on broad language in the dicta or reasoning in these rulings that disparages exhaustion of constitutional claims, the Tenth Circuit usually relies solely on the typically

101. *Id.* at 674.
102. *Id.* at 677 (citing 30 U.S.C. § 816(a)(1)).
103. *Id.* at 676–77 (citations omitted).
104. *Id.* at 677–78.
105. 15 U.S.C. §§ 78y(c)(1), 80b-13(a).
106. Malouf v. SEC, 933 F.3d 1248, 1257 (10th Cir. 2019).
107. *Id.*
108. Schreiber v. Cuccinelli, 981 F.3d 766, 784 (10th Cir. 2020) (citations omitted).
109. *Id.* at 785.

narrower holdings in these cases, applying them when confronted with a directly comparable situation and otherwise distinguishing them.

For example, in *Eldridge*, the Supreme Court held that a litigant facing hardship from termination of disability benefits by SSA's predecessor agency, the Department of Health, Education, and Welfare, could bring a due process claim in court to challenge agency procedural rules permitting termination of benefits without a predeprivation hearing, although he had not first exhausted *post-termination* remedies.[110] The Tenth Circuit generally construes *Eldridge*'s holding as exempting litigants from exhausting remedies if they can demonstrate (1) a colorable claim (whether constitutional or statutory in nature)[111] that is collateral to the merits issues that the administrative proceeding is responsible for adjudicating,[112] (2) irreparable harm from having to exhaust before seeking judicial review, and (3) futility of exhausting administrative remedies.[113] Strictly applying *Eldridge* in this manner renders it distinguishable or wholly irrelevant in many contexts. For example, in the issue exhaustion context, which arises on judicial review of an agency's ruling *after* administrative proceedings conclude, one element—irreparable harm from delayed judicial review—will never be present because the party has already gone through the administrative process; the only issue concerning exhaustion is whether the party should have raised a specific argument during the administrative proceeding. It is therefore unsurprising that the Tenth Circuit did not treat *Eldridge* as controlling when it considered (and rejected) an assertion that Appointments Clause claims involving the SSA—the successor to the respondent agency in *Eldridge*—should not be subject to an issue exhaustion mandate.[114] While noting *Eldridge*'s assertion that "corrective action was unlikely 'at the behest of a single [benefits claimant]'" who raised a constitutional objection,[115] the Tenth Circuit did not treat this language in *Eldridge* as a standalone *holding* that exhaustion of a constitutional claim before the agency should never be required because the agency might not take corrective action as a result. Instead, it noted that other Supreme Court precedents indicate that exhaustion still serves a purpose by putting the

110. Mathews v. Eldridge, 424 U.S. 319, 330–31 (1976).

111. Reed v. Heckler, 756 F.2d 779, 785 (10th Cir. 1985); Puente v. Callahan, No. 97-1056, 1997 WL 408060, at *2 (10th Cir. July 18, 1997).

112. "For a claim to be collateral, it must not require the court to immerse itself in the substance of the underlying [merits] claim" and "'must seek some form of relief that would be unavailable through the administrative process,' rather than the 'substantive, permanent relief that the plaintiff seeks . . . through the agency appeals process.'" Blue Valley Hosp., Inc. v. Azar, 919 F.3d 1278, 1285 (10th Cir. 2019) (citations omitted). A prototypical example of such a claim is a challenge to the *procedures* for awarding benefits that seeks to require the agency to follow a different process rather than seeking a ruling awarding benefits outright. *Id.* (citing Bowen v. City of New York, 476 U.S. 467, 483 (1986)).

113. Marshall v. Shalala, 5 F.3d 453, 455 (10th Cir. 1993). In its earliest rulings construing *Eldridge*, the Tenth Circuit did not require a showing of futility. *E.g.*, *Reed*, 756 F.2d at 783 (referencing the requirement of a colorable collateral claim and irreparable harm); Bartlett v. Schweiker, 719 F.2d 1059, 1061 (10th Cir. 1983) (same). However, by 1986, the Tenth Circuit had begun to apply the futility requirement. *See* Koerpel v. Heckler, 797 F.2d 858, 862 (10th Cir. 1986).

114. *Carr I*, 961 F.3d 1267, 1275 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

115. *Id.* at 1273 (quoting *Eldridge*, 424 U.S. at 330) (modifications in original).

agency "on notice of the accumulating risk of wholesale reversals being incurred by its persistence," even when an agency fails to change course in response to an objection raised by an individual party.[116] In contrast, circuits that reached the opposite result concerning exhaustion of the same type of claim before the SSA relied on this assertion in *Eldridge*, which excused *exhaustion of remedies* based on this assertion *together with considerations of hardship from delayed judicial review*, to support their conclusion that *issue exhaustion* of a constitutional claim should not be required.[117]

More recently, in *Smith*, the Tenth Circuit declined to read *Carr* and *Axon*, which broadly asserted that "agency adjudications are generally ill suited to address structural constitutional challenges,"[118] as providing a basis for exempting a structural challenge from a regulatory issue exhaustion mandate applicable to Federal Reserve Board enforcement proceedings.[119] Notably, the Tenth Circuit decided *Smith* less than three months after the Supreme Court decided *Axon*, and *Smith* was the Tenth Circuit's first ruling on issue exhaustion of structural constitutional claims after *Carr* reversed the Tenth Circuit's holding that Appointments Clause claims in SSA proceedings were subject to a prudential issue exhaustion mandate.[120] The *Carr* Court had held that these claims did not have to be exhausted because the largely inquisitorial nature of SSA proceedings,[121] the futility of exhaustion, and the structural nature of the claim "[t]aken together . . . make clear that 'adversarial development' of the Appointments Clause issue 'simply [did] not exist.'"[122] Some courts have relied on *Carr*'s disparagement of agency resolution of structural claims when declining to require issue exhaustion of these claims in other administrative schemes that involve adversarial proceedings—in contrast to the largely inquisitorial SSA proceedings in *Carr*.[123] These courts have also relied on the Supreme Court's similar disparagement of agency resolution of structural claims in *Axon*, which concerned exhaustion of remedies, when

116. *Id.* (quoting United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952)).

117. Cirko *ex rel.* Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 158 (3d Cir. 2020) (quoting *Eldridge*, 424 U.S. at 330); Probst v. Saul, 980 F.3d 1015, 1023 (4th Cir. 2020) (same); Ramsey v. Comm'r of Soc. Sec., 973 F.3d 537, 545–46 (6th Cir. 2020) (same).

118. Axon Enter., Inc. v. FTC, 598 U.S. 175, 195 (2023) (citation omitted); *Carr II*, 593 U.S. at 92.

119. Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 822–24 (10th Cir. 2023).

120. *See Carr I*, 961 F.3d 1267, 1276 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

121. "[An administrative] proceeding is inquisitorial when the agency develops the issues on its own and adversarial when the 'parties are expected to develop the issues.'" *Id.* at 1275 (citation omitted).

122. *Carr II*, 593 U.S. 83, 95–96 (2021) (citation omitted).

123. *E.g.*, K & R Contractors, LLC v. Keene, 86 F.4th 135, 145 (4th Cir. 2023) (quoting *Carr II*, 593 U.S. at 92–93), *reh'g en banc denied*, No. 20-2021 (4th Cir. Jan. 9, 2024); Calcutt v. Fed. Deposit Ins. Corp., 37 F.4th 293, 312 (6th Cir. 2022) (citing *Carr II*, 593 U.S. at 92), *rev'd on other grounds*, 598 U.S. 623 (2023); Flores v. Garland, No. 19-72559, 2022 WL 501360, at *2 (9th Cir. Feb. 18, 2022) (quoting *Carr II*, 593 U.S. at 92).

declining to require *issue exhaustion* of such claims.[124] In contrast, the *Smith* panel distinguished *Carr* due, *inter alia*, to the adversarial nature of Federal Reserve Board enforcement proceedings[125] and distinguished *Axon* on the grounds that *Axon* involved a collateral attack on ongoing agency proceedings rather than an appeal from an agency's final decision,[126] where only issue exhaustion is potentially implicated. Having declined to extend these cases' holdings to the situation before it, the *Smith* panel reaffirmed the validity of prior Tenth Circuit jurisprudence on exhaustion of constitutional claims, quoting an assertion from a pre-*Carr* Tenth Circuit ruling that "structural challenges 'have no special entitlement to review' on appeal from the agency."[127] This preference for distinguishing rather than extending Supreme Court holdings exempting constitutional claims from exhaustion is another reason why litigants bringing such claims are likelier to be subjected to administrative exhaustion mandates in the Tenth Circuit than in most other circuits.

C. Hostility to Exercising Discretion Under Freytag *to Consider Unexhausted Structural Constitutional Claims*

A third reason why the Tenth Circuit is more likely to require exhaustion of constitutional claims than most other circuits is its hostility to the *Freytag* exception. *Freytag* permits reviewing courts to exercise discretion on a case-by-case basis in order to consider structural constitutional arguments that should have been raised in the proceeding under review but were waived.[128] Thus, it may allow a court to review a claim that was not properly exhausted before an agency as required by an issue exhaustion mandate that would ordinarily apply to the claim.[129] In contrast to most other circuits, the Tenth Circuit has not only consistently declined to exercise such discretion but has also strongly indicated that it would categorically refuse to do so.

Most circuits have demonstrated openness to applying the *Freytag* exception on review of agency rulings by exercising discretion to hear waived structural constitutional challenges that ordinarily should have been raised administratively or even extending *Freytag*'s reasoning to categorically excuse an entire class of claims from an exhaustion requirement. The Federal Circuit, Fifth Circuit, and Ninth Circuit have each entertained structural constitutional objections not exhausted before an administrative agency pursuant to this exception.[130] Similarly, a member of

124. *E.g.*, *K & R Contractors*, 86 F.4th at 145 n.6 (quoting Axon Enter., Inc. v. FTC, 598 U.S. 175, 194 (2023)).
125. Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 823 (10th Cir. 2023).
126. *Id.* at 823 n.9.
127. *Id.* at 823 (quoting Turner Bros., Inc. v. Conley, 757 F. App'x 697, 700 (10th Cir. 2018)).
128. Freytag v. Comm'r, 501 U.S. 868, 878–80 (1991) (citations omitted).
129. *See* authorities cited *supra* note 41.
130. *See, e.g.*, Willy v. Admin. Rev. Bd., 423 F.3d 483, 490 n.20 (5th Cir. 2005) (applying *Freytag* to excuse the failure to raise an Appointments Clause and removal challenge before the agency);

a Fourth Circuit panel indicated that *Freytag* provided the basis for the panel's decision to consider a Recess Appointment Clause challenge to members of the National Labor Relations Board that was not raised during agency proceedings or even in the challenger's opening brief on appeal from the Board's decision.[131] The D.C. Circuit applied the *Freytag* exception in one case to consider a structural argument not raised in proceedings before the Tax Court—an Article I tribunal[132]—and in a different case it indicated in dicta its readiness to consider applying the exception to other constitutional claims that a litigant had not exhausted in agency proceedings before the U.S. Postal Service.[133] The Third and Sixth Circuits even extended *Freytag*'s reasoning, which concerned a discretionary single-case exception in "rare cases" to otherwise applicable waiver rules,[134] by citing *Freytag* in support of their holdings that a prudential issue exhaustion requirement should be categorically inapplicable to Appointments Clause challenges to SSA adjudicators.[135] In the majority of circuits, *Freytag* has therefore provided an additional basis for not enforcing issue exhaustion mandates when litigants raise structural constitutional claims.

In contrast, the Tenth Circuit does not have a practice of exercising such discretion to consider unexhausted structural claims, has emphasized that they are subject to the same waiver rules as other claims, and has expressed hostility to the very idea of exercising discretion to review structural claims that were not properly exhausted, as permitted by *Freytag*. In *Carr I*, the Tenth Circuit declined to exercise discretion to hear an unexhausted structural challenge to the appointment of SSA ALJs that it deemed subject to a prudential exhaustion mandate,[136] although two other circuits invoked *Freytag* under comparable circumstances as a reason for holding that these claims should not be subject to a prudential exhaustion mandate at all.[137] And rather than citing to the *Freytag* majority's holding that courts may exercise discretion to consider structural constitutional claims that were not preserved in proceedings under review, the Tenth

Ramirez v. Barr, 814 F. App'x 259, 264 (9th Cir. 2020) (same); *In re* Palo Alto Networks, Inc., 44 F.4th 1369, 1374 (Fed. Cir. 2022) (applying *Freytag* to excuse the failure to raise an Appointments Clause claim administratively); Arthrex, Inc. v. Smith & Nephew Inc., 941 F.3d 1320, 1326–27 (Fed. Cir. 2019) (same), *modified on other grounds sub nom*. United States v. Arthrex, Inc., 594 U.S. 1 (2021).

131. NLRB v. Enter. Leasing Co. Se., LLC, 722 F.3d 609, 662 n.1 (4th Cir. 2013) (Diaz, J., concurring in part and dissenting in part); *see also* Supplemental Brief for the National Labor Relations Board at 3, Enter. Leasing Co., 722 F.3d 609 (4th Cir. 2013) (No. 12-1514) (citation omitted) (noting that "the employers in neither case raised the constitutional challenges . . . they now invoke at any point in proceedings before the Board").

132. Kuretski v. Comm'r, 755 F.3d 929, 937 (D.C. Cir. 2014) (considering structural constitutional objection not raised in the Tax Court).

133. Dynaquest Corp. v. USPS, 242 F.3d 1070, 1076 (D.C. Cir. 2001) (citing *Freytag*, 501 U.S. at 878–79) (noting that pursuant to *Freytag*, "courts have discretion to consider Appointments Clause challenges" not exhausted before an agency but declining review on standing grounds).

134. *Freytag*, 501 U.S. at 879 (citation omitted).

135. Ramsey v. Comm'r of Soc. Sec., 973 F.3d 537, 546 (6th Cir. 2020) (citing *Freytag*, 501 U.S. at 879); Cirko *ex rel.* Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 154–55 (3d Cir. 2020) (discussing *Freytag*, 501 U.S. at 879–80).

136. *Id.* at 1276 n.10.

137. *See* authorities cited *supra* note 135.

Circuit has only cited to *Freytag*'s associated holding that structural constitutional challenges are nonjurisdictional[138] as a basis for holding that these claims are subject to normal rules of forfeiture or waiver if not raised before an agency.[139] More significantly, the Tenth Circuit has shown outright hostility to *Freytag*'s holding that courts may excuse a party's waiver of structural arguments. Specifically, when the Tenth Circuit refused to excuse the failure to properly exhaust an Appointments Clause claim in a 2018 unpublished opinion[140] and more recently in its precedential ruling in *Smith*,[141] it quoted Justice Scalia's partial concurrence in *Freytag*, which *disagreed* with the majority's reasoning concerning waiver of structural claims and instead asserted that "Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review."[142] This distaste for the *Freytag* exception is yet another reason for the Tenth Circuit's greater likelihood, compared to most other courts of appeals, to subject litigants raising constitutional claims to administrative exhaustion mandates.

II. THE TENTH CIRCUIT'S APPROACH COMPORTS WITH SUPREME COURT PRECEDENTS ON EXHAUSTION OF CONSTITUTIONAL CLAIMS

This Part argues that despite the Supreme Court's occasionally broad disparagement of agency adjudication of constitutional claims, the Tenth Circuit's reluctance to excuse these claims from administrative exhaustion mandates does not directly conflict with the Court's jurisprudence. The decisions in which the Court declined to hold that a constitutional claim was subject to an exhaustion mandate have relied partly or exclusively on factors distinct from the constitutional nature of the claim, and elsewhere the Court has held or implied that constitutional claims can be subject to exhaustion mandates. *Carr*, which is the only Supreme Court decision to reverse a Tenth Circuit ruling requiring exhaustion of a constitutional claim, created new precedent that did not yet exist at the time the Tenth Circuit decided the matter, and the Court's opinion in *Carr* did not assert that the Tenth Circuit had failed to correctly apply existing Supreme Court precedents. Consequently, the Tenth Circuit's approach favoring exhaustion of constitutional claims is not inconsistent with Supreme Court decisions on the issue. Rather than representing a misapplication or flaunting of Supreme Court precedent, the Tenth Circuit's divergence from most other circuits with respect to exhaustion of constitutional claims simply

138. In contrast to a jurisdictional challenge, which concerns the very authority of an Article III court to hear a matter and must always be considered by the court, rendering it nonwaivable, a nonjurisdictional challenge may be waived. Santos-Zacaria v. Garland, 598 U.S. 411, 416, 423 (2023).

139. Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 822 n.5 (10th Cir. 2023) (citing *Freytag*, 501 U.S. at 878–79); Turner Bros., Inc. v. Conley, 757 F. App'x 697, 700 (10th Cir. 2018) (same).

140. *Turner Bros.*, 757 F. App'x at 700 (quoting *Freytag*, 501 U.S. at 893–94 (Scalia, J., concurring in part and concurring in the judgment)).

141. *Smith*, 73 F.4th at 823 (quoting *Turner Bros.*, 757 F. App'x at 700 (citing *Freytag*, 501 U.S. at 893 (Scalia, J., concurring in part and concurring in the judgment))).

142. *Freytag*, 501 U.S. at 893 (Scalia, J., concurring in part and concurring in the judgment).

appears to reflect a preference for requiring administrative exhaustion *in the absence* of directly controlling Supreme Court precedent to the contrary.

A. Supreme Court Holdings Exempting Constitutional Claims from Exhaustion Rely Wholly or in Part on Other Factors

The Supreme Court has never relied entirely on the constitutional nature of a claim to categorically exempt the claim from exhaustion mandates, even in cases where the Court has disparaged an agency's ability to address the claim. For example, the Court's assertion in *Salfi* and *Diaz* that adjudication of a facial constitutional challenge to a statute administered by an agency was "beyond the [agency's] competence"[143] was merely dicta because these cases only *held* that the agency could (and had) waived exhaustion by not asserting that the respondents' failure to exhaust precluded the courts from adjudicating the constitutional claims.[144] Elsewhere, the Court relied on additional factors beyond the constitutional nature of a claim when declining to require exhaustion. *Eldridge*'s holding focused not only on the collateral nature of the constitutional claim at issue vis-à-vis the merits of the underlying benefits decision as well as the purported futility of raising the claim to the agency[145] but also on the potential harm to the respondent from delayed judicial review of the termination of his disability benefits.[146] Consistent with *Eldridge*'s reliance on factors other than the constitutional nature of the claim at issue, the Tenth Circuit, as well as a number of other courts, have construed *Eldridge*'s holding to apply only in comparable situations involving futility and irreparable harm from delayed judicial review of a collateral claim grounded in *either* the Constitution or a statute.[147]

In *Free Enterprise* and *Axon*, the Court assessed whether Congress intended to implicitly require exhaustion of facial structural challenges to statutes by considering, *inter alia*, whether requiring exhaustion would preclude meaningful judicial review.[148] In this regard, *Free Enterprise* deemed it problematic that because the relevant administrative scheme

143. Mathews v. Diaz, 426 U.S. 67, 76 (1976); Weinberger v. Salfi, 422 U.S. 749, 764, 767 (1975).

144. *Diaz*, 426 U.S. at 75–77; *Salfi*, 422 U.S. at 766–67.

145. Mathews v. Eldridge, 424 U.S. 319, 330–32 (1976). The Court may have presumed that exhaustion was futile because the petitioner–agency, which was also the petitioner in *Diaz* and *Salfi*, had previously asserted that "constitutional claims are beyond [its] competence" to decide. *Salfi*, 422 U.S. at 794 n.9 (citation omitted) (Brennan, J., dissenting); *see also id.* at 767 (majority opinion) ("[T]he only issue to be resolved is a matter of constitutional law concededly beyond [the agency's] competence to decide . . . ."); *accord Diaz*, 426 U.S. at 76.

146. *Eldridge*, 424 U.S. at 331 ("Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.").

147. *See supra* notes 111–113 and accompanying text; *see also, e.g.*, Caswell v. Califano, 583 F.2d 9, 14 (1st Cir. 1978) (noting showing of irreparable harm when applying *Eldridge*, and applying it to both statutory and constitutional claims); Wright v. Califano, 587 F.2d 345, 349 (7th Cir. 1978) (same).

148. Axon Enter., Inc. v. FTC, 598 U.S. 175, 186 (2023); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489–90 (2010).

only provided for adjudications of penalty assessments, the only way to proceed administratively with the facial structural challenge at issue would have required a petitioner to purposely take actions that could subject it to onerous penalties.[149] And in *Axon*, the Government represented that the agency could not grant relief on an objection that it could not constitutionally adjudicate the merits of an enforcement claim[150] but argued that the petitioner still had to defend this claim administratively on the merits simply to obtain judicial review of its constitutional defense *after* the agency had adjudicated the merits.[151] Similarly, in *Carr*, the Court described the constitutional nature of the claim as merely a factor that "tip[ped] the scales" against imposing issue exhaustion on prudential grounds,[152] primarily relying instead on the fact that SSA proceedings were not comparable to adversarial court actions in which litigants bear primary responsibility for raising claims and defenses.[153] The Court has therefore never held that the constitutional character of a claim, on its own, provides sufficient grounds for not subjecting it to an exhaustion mandate.

B. The Supreme Court Has Indicated Constitutional Claims Can Be Subject to Exhaustion Mandates

On multiple occasions, the Supreme Court has required exhaustion of constitutional claims or implied that exhaustion was required. The Court applied exhaustion mandates to facial constitutional challenges to statutes as well as other constitutional claims in a series of early decisions on exhaustion.[154] More recently, it refused to exempt a facial challenge to a statute from an express statutory exhaustion mandate.[155] In *Thunder Basin*, it affirmed the Tenth Circuit's holding that even implicit exhaustion mandates can apply to facial challenges to statutes[156] and noted that there is no "mandatory" rule against agency adjudication of such challenges.[157] Subsequently, in *Elgin v. Department of the Treasury*,[158] the Court extended *Thunder Basin* by applying a similar exhaustion mandate to a facial challenge to a statute,[159] despite the responsible agency's outright refusal to

149. *Free Enter. Fund*, 561 U.S. at 490–91.

150. Transcript of Oral Argument at 65–66, Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023) (No. 2186).

151. *See Axon*, 598 U.S. at 195.

152. *Carr II*, 593 U.S. 83, 92–93 (2021).

153. *Id.* at 95–96 (citation omitted) (emphases added) ("*Taken together*, the inquisitorial features of SSA ALJ proceedings, the constitutional character of petitioners' claims, and the unavailability of any remedy make clear that *'adversarial development' of the Appointments Clause issue 'simply [did] not exist.* "').

154. *E.g.*, W. E. B. DuBois Clubs of Am. v. Clark, 389 U.S. 309, 310 n.3, 311–13 (1967) (facial and as-applied challenges to statutes); Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 541, 553 (1954) (facial challenge); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (as-applied challenge).

155. United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 9–10 (2008).

156. *Thunder Basin II*, 510 U.S. 200, 214–16 (1994), *aff'g*, *Thunder Basin I*, 969 F.2d 970 (10th Cir. 1992).

157. *Id.* at 215.

158. 567 U.S. 1 (2012).

159. *Id.* at 5–8.

adjudicate the constitutional question.[160] The *Elgin* Court reasoned that the agency might still resolve the issue on alternate grounds and would also be sufficiently familiar with relevant constitutional concepts to assemble a helpful record for subsequent judicial review that could address the constitutional claim.[161] And in *Ryder v. United States*[162] and *Lucia v. SEC*,[163] the Court indicated that petitioners were entitled to seek judicial relief on structural Appointments Clause objections to Article II adjudicators because they had timely raised them before a military tribunal and the SEC, respectively.[164] These rulings further indicate that the Supreme Court does not expect courts to categorically exempt entire classes of constitutional claims from exhaustion mandates, and that the Tenth Circuit's reluctance to do so is therefore consistent with the Court's jurisprudence.

C. The Supreme Court's Ruling in Carr *Did Not Assert That the Tenth Circuit Had Misapplied Existing Precedents*

When it reversed the Tenth Circuit in *Carr*, the Court did not suggest that the Tenth Circuit had flaunted or misapplied controlling precedent.[165] Rather, the Court for the first time addressed an issue not specific to constitutional claims that it had left open in its prior ruling in *Sims v. Apfel*,[166] and *Carr*'s holding primarily rested on the Court's resolution of this open issue. *Sims*, a case concerning the general applicability of an issue exhaustion requirement to a nonconstitutional claim not raised in SSA Appeals Council proceedings, held that a prudential issue exhaustion mandate did not apply to applicants seeking SSA Appeals Council review of ALJ rulings.[167] A four-Justice plurality reasoned that these proceedings were inquisitorial and therefore unlike adversarial court proceedings where parties are responsible for developing the issues,[168] while Justice O'Connor concurred on the basis that SSA regulations and procedures "affirmatively suggest that specific issues need not be raised before the Appeals Council."[169]

The Supreme Court's reversal of the Tenth Circuit in *Carr* appears to have been primarily driven by the Court's resolution of a question of first impression—whether *Sims*'s holding also applied to exhaustion in SSA ALJ proceedings—rather than by any failure of the Tenth Circuit to apply controlling precedents specific to exhaustion of constitutional claims. In

160. *Id.* at 16.
161. *Id.* at 19, 22–23.
162. 515 U.S. 177 (1995).
163. 585 U.S. 237 (2018).
164. *Id.* at 251; *Ryder*, 515 U.S. at 182–83.
165. *Carr II*, 593 U.S. 83, 87–88, 95–96 (2021) (implying that the Supreme Court's reversal was aimed at resolving a genuine circuit split rather than correcting a clear misapplication of precedent; the Court methodically analyzed why an issue-exhaustion requirement should not apply in this context.).
166. 530 U.S. 103 (2000).
167. *Id.* at 104–05.
168. *Id.* at 109–11 (plurality opinion).
169. *Id.* at 113 (O'Connor, J., concurring in part and concurring in the judgment).

Carr I, the Tenth Circuit distinguished *Sims* due to differences between the procedures governing SSA Appeals Council review and those governing SSA ALJ proceedings,[170] and consequently imposed a prudential issue exhaustion requirement at the ALJ stage on benefits applicants raising Appointments Clause objections to presiding ALJs.[171] When the Supreme Court reversed, it noted that *Sims* merely provided a starting point for its analysis[172] but reasoned that "[m]uch of what the *Sims* opinions said about Appeals Council review applies equally to ALJ proceedings."[173] The Court consequently relied primarily on the nonadversarial nature of SSA ALJ proceedings in holding that exhaustion was not required,[174] describing the constitutional nature of the claim as merely a factor that "tip[ped] the scales" against requiring exhaustion.[175] And when the Government pointed to language in the Court's prior decision in *Ryder* that implied that litigants were entitled to relief based on an Appointment Clause objection to an adjudicator only if they had raised the objection before that adjudicator,[176] the Court distinguished *Ryder* on the grounds that it concerned an adversarial proceeding, rather than disapproving of its reasoning or dismissing the referenced language as dicta.[177] This treatment of *Ryder* suggests that had SSA ALJ proceedings been sufficiently adversarial—an issue that the Court had expressly declined to explore in *Sims*—the Court might have reached a different conclusion. *Carr*'s reversal of the Tenth Circuit therefore appears to have primarily rested on a ruling by the Court on a question of first impression concerning the propriety of requiring prudential exhaustion in proceedings that were not fully adversarial, rather than resting on any failure by the Tenth Circuit to correctly apply controlling precedent on exhaustion of constitutional claims.

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170. *Carr I*, 961 F.3d 1267, 1274–75 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

171. *Id.* at 1273.

172. *Carr II*, 593 U.S. 83, 89 (2021) ("[O]ur inquiry starts from the baseline set by *Sims* v. *Apfel*.").

173. *Id.* at 90.

174. *Id.* at 95–96 (alteration in original) (quoting Sims v. Apfel, 530 U.S. 103, 112 (2000) (plurality opinion) (emphases added) ("*Taken together*, the inquisitorial features of SSA ALJ proceedings, the constitutional character of petitioners' claims, and the unavailability of any remedy make clear that *'adversarial development' of the Appointments Clause issue 'simply [did] not exist'* (and could not exist) in petitioners' ALJ proceedings.").

175. *Id.* at 92–93. Moreover, three Justices would have declined to require exhaustion entirely based on the nonadversarial nature of SSA ALJ proceedings regardless of the constitutional nature of the claim. *Id.* at 96–97 (Thomas, J., concurring in part and concurring in the judgment, joined by Gorsuch & Barrett, JJ). And only one Justice asserted that the structural constitutional nature of the claim was sufficient, on its own, to excuse exhaustion. *Id.* at 97 (Breyer, J., concurring in part and concurring in judgment).

176. Ryder v. United States, 515 U.S. 177, 182–83 (1995) ("[P]etitioner raised his [Appointments Clause] objection to the judges' titles before those very judges . . . . [O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to . . . whatever relief may be appropriate if a violation indeed occurred.").

177. *Carr II*, 593 U.S. at 95.

III. THE TENTH CIRCUIT'S APPROACH TO EXHAUSTION OF CONSTITUTIONAL CLAIMS IS REASONABLE

This Part argues that the Tenth Circuit's approach to exhaustion of constitutional claims—which presumes, absent a showing to the contrary, that the benefits generally associated with administrative exhaustion of nonconstitutional claims are just as likely to apply when litigants raise constitutional claims—is reasonable. This Part first provides a brief overview of commentary and jurisprudence that supports the view that agencies are not a categorically inferior forum for resolving constitutional claims and that many of the advantages associated with administrative exhaustion can apply with equal force when litigants raise constitutional claims, as the Tenth Circuit usually presumes. It then proceeds to utilize *Thunder Basin I*, *Carr I*, and *Smith* as case studies to show how the record and relevant administrative and legal background in these cases concretely demonstrate that the Tenth Circuit is reasonable to presume that the benefits of exhaustion can apply with equal force to constitutional claims.

A. The Benefits of Exhaustion Can Apply with Equal Force to Constitutional Claims

The benefits associated with exhaustion can apply to constitutional claims just as much as they apply to nonconstitutional claims. As I have argued elsewhere, notwithstanding disparagement of agency adjudication of constitutional claims by courts,[178] commentators,[179] and even some agency officials,[180] agencies are often able to effectively address these claims.[181] The common assumption that agencies necessarily lack the institutional competence or authority to address constitutional claims lacks empirical and legal support,[182] as does the assertion that the advantages typically attributed to exhaustion do not apply to agency resolution of constitutional claims.[183] In fact, many of the advantages typically associated with exhaustion—such as an agency's ability to apply special expertise

178. *E.g.*, authorities cited *supra* notes 64–65.

179. *E.g.*, Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 TEX. L. REV. 339, 404 (2022) ("[A]gencies have no power to rule on the constitutionality of . . . structural claims."); Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 45 (1985) ("[W]hen a statute is challenged on its face. . . . the agency can add little that will illuminate the controversy. . . . [I]ts factual expertise . . . is [un]likely to be helpful."); Peter A. Devlin, Note, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234, 1265 (2018) (referencing agencies' "lack of power to adjudicate constitutional issues").

180. *E.g.*, Linda King, 198 Interior Dec. 134, 142 (IBLA 2022) (citation omitted) (refusing to consider due process or takings objections to agency action because "the Board does not adjudicate constitutional questions of law"); Kawasaki Kisen Kaisha, Ltd. v. Port Auth. of N.Y. & N.J., No. 11-12, 2014 WL 7328475, at *6 n.15 (F.M.C. Nov. 20, 2014) (citation omitted) (refusing to consider a Tonnage Clause objection to port charges because "[c]onstitutional considerations 'are more appropriately the province of the courts'"); Stone v. DOL, 57 E.C.A.B. 292, 296 (2005) ("Appellant's argument that he was denied due process and a fair hearing because of bias by the claims examiner raises a constitutional question. . . . unsuited to resolution in administrative hearing procedures.").

181. *See* Gelblum, *supra* note 14, at 8–9.

182. *Id.* at 18–46.

183. *Id.* at 61–69.

and correct errors at an early stage—may be present when litigants raise constitutional claims.[184]

Although courts that decline to require exhaustion of constitutional claims often assert, in categorical terms, that agency adjudicators lack the necessary competence to address constitutional issues,[185] this assertion lacks empirical support. As documented in the burgeoning literature on "administrative constitutionalism," agencies have grappled with constitutional issues since the early days of the Republic and continue to do so regularly.[186] Agencies have a strong incentive to consider constitutional concerns when taking official action in order to avoid having their actions set aside on constitutional grounds, and routinely do so in all aspects of their operations, including adjudications.[187] In fact, an agency that regularly engages in adjudication is likely to have comparable experience to many generalist district courts in considering the precise constitutional issues most likely to arise in its proceedings.[188]

In addition, the common assertion that agencies lack authority to meaningfully address constitutional claims due to their purported inability to "declare" statutes unconstitutional or resolve other constitutional issues[189] lacks legal support. As some courts and commentators have noted, agency officers' constitutionally prescribed oath to uphold the Constitution may imply a duty to consider constitutional objections when acting in an adjudicatory capacity,[190] and the adjudication and recusal provisions of the Administrative Procedure Act (APA) may also imply such an

184. *Id.*

185. *See, e.g.*, authorities cited *supra* note 64.

186. *See generally* Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1715, 1720, 1726, 1731 (2019).

187. Gelblum, *supra* note 14, at 18–29; Robert C. Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 584 (1987) ("Agencies routinely resolve constitutional issues in their normal functions and . . . are no less competent to decide constitutional issues than are non-Article III judges."); *accord* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RSRV. L. REV. 905, 916 (1989) ("[I]f [constitutional] expertise is important it parades down the halls of the executive branch.").

188. Gelblum, *supra* note 14, at 27–29.

189. *E.g.*, Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364, 366–67 (9th Cir. 1996) ("[C]hallenges to the constitutionality of a statute or a regulation promulgated by an agency are beyond the power or the jurisdiction of an agency."); *see also, e.g.*, authorities cited *supra* note 64, 86.

190. *E.g.*, Jones Bros., Inc. v. Sec'y of Lab., 898 F.3d 669, 674–75 (6th Cir. 2018) (citation omitted) (an agency may not "look the other way when it comes to as-applied constitutional challenges and constitutional-avoidance arguments. . . . That ongoing duty to conform its behavior with our highest law . . . . is re-enforced by the oath each executive officer must take to 'to support this Constitution'"); Meredith Corp. v. FCC, 809 F.2d 863, 874 (D.C. Cir. 1987) ("Federal officials . . . take a specific oath to support and defend [the Constitution]. [An agency] must discharge its constitutional obligations by explicitly considering [a constitutional] claim . . . [F]ailure to do so [is] the very paradigm of arbitrary and capricious administrative action."); David S. Welkowitz, *Trademark Trial and Appeal Board, Meet the Constitution*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 509, 518 (2017) ("It might seem obvious that a federal agency must have the authority to interpret and apply federal constitutional principles to its actions. After all, federal [agency] judges are officers of the United States, and, as such, take an oath to uphold the Constitution."); Gelblum, *supra* note 14, at 37–38.

obligation.[191] Moreover, Congress has granted agencies broad discretion in how they implement statutes, including discretion to decline to implement portions of some statutes.[192] By exercising such statutory discretion or their inherent prosecutorial discretion not to enforce a law,[193] agencies may be able to grant relief even on seemingly facial constitutional challenges to statutes.[194] Thus, executive branch agencies can often provide essentially the same type of relief on constitutional claims that a court might order, through their choices on how and whether to execute the law.[195] And agencies' procedural rules allowing for the grant of immediate relief on threshold legal questions[196] together with appellate courts' universal practice of permitting appeals under the collateral order doctrine[197] from interlocutory agency rulings[198] can protect any asserted "right not to

191. 5 U.S.C. § 556(b) (requiring agencies to "determine" requests for "disqualification of a presiding . . . employee"); Axon Enter., Inc., No. 9389, 2020 WL 5406806, at *1 (F.T.C. Sept. 3, 2020) ("Nothing in [agency rules governing requests to disqualify ALJs] precludes disqualification based on constitutional infirmity."), *dismissed on other grounds*, 2023 WL 6895829 (F.T.C. Oct. 6, 2023); 5 U.S.C. § 557(c)(3)(A) (requiring agencies to address "all the material issues of . . . law . . . presented on the record"); C. Stuart Greer, *Expanding the Judicial Power of the Administrative Law Judge to Establish Efficiency and Fairness in Administrative Adjudication*, 27 U. RICH. L. REV. 103, 122 n.94 (1992) ("[Section] 557(c)(3)(A). . . . does not expressly prohibit an administrative agency from addressing the constitutionality of statutes.").

192. *E.g.*, 12 U.S.C. § 1818(a)(2)(F) (permitting bank regulatory agencies to "compromise, modify, or remit" statutory penalties); 26 U.S.C. §§ 7121(a), 7122(a) (permitting the Internal Revenue Service to compromise tax liabilities). For example, in 2023, the Internal Revenue Service exercised its statutory authority to compromise unpaid taxes otherwise due under the Internal Revenue Code a total of 12,711 times, implicating $214.5 million in outstanding taxes. IRS, PUBL'N NO. 55-B, DATA BOOK 2023, at 59 (2024).

193. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (holding that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to [its] absolute discretion").

194. Gelblum, *supra* note 14, at 47–51.

195. *Id.* at 48; Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 940 (2018) ("A court that enjoins the enforcement of a statute . . . is no different from a President who instructs his subordinates not to enforce a statute that he regards as unconstitutional.").

196. *E.g.*, 12 C.F.R. §§ 308.13, 308.28(a)–(b), (d), 308.29(b) (2024) (Federal Deposit Insurance Corporation regulations permitting scheduling flexibility, dispositive motions practice and interlocutory appeals to the agency heads on dispositive legal questions); 24 C.F.R. §§ 26.2(c)(4)–(7), 26.11(d), 26.16(f)–(g), 26.23(b), 26.27 (2024) (similar regulations applicable to Department of Housing and Urban Development proceedings); 34 C.F.R. §§ 668.88(e)–(f), 668.99(a), (f) (2024) (similar regulations applicable to Department of Education proceedings); 47 C.F.R. §§ 1.45(d), 1.102(b)(3), 1.251, 1.301 (2024) (similar regulations applicable to Federal Communications Commission proceedings).

197. The collateral order doctrine permits immediate appeal of interlocutory rulings that, for practical grounds, are "treated as 'final.'" Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (citation omitted).

198. Rhode Island v. EPA, 378 F.3d 19, 25 (1st Cir. 2004) (citing Osage Tribal Council v. U.S. Dep't of Lab., 187 F.3d 1174, 1179 (10th Cir. 1999); Meredith v. Fed. Mine Safety & Health Rev. Comm'n, 177 F.3d 1042, 1050–51 (D.C. Cir. 1999); Carolina Power & Light Co. v. U.S. Dep't of Lab., 43 F.3d 912, 916 (4th Cir. 1995); Jim Walter Res., Inc. v. Fed. Mine Safety & Health Rev. Comm'n, 920 F.2d 738, 744 (11th Cir. 1990); Donovan v. Occupational Safety & Health Rev. Comm'n, 713 F.2d 918, 922–23 (2d Cir. 1983); Donovan v. Oil, Chem. & Atomic Workers Int'l Union & Its Local 4–23, 718 F.2d 1341, 1344–45 (5th Cir. 1983); Marshall v. Occupational Safety & Health Rev. Comm'n, 635 F.2d 544, 548 (6th Cir. 1980)) ("[E]very circuit to have considered the question to date has determined . . . that the collateral order doctrine applies to judicial review of administrative determinations."); Donovan v. Allied Indus. Workers of Am., 760 F.2d 783, 785 n.5 (7th Cir. 1985) (citing, *inter alia*, Donovan v. Int'l Union, Allied Indus. Workers, 722 F.2d 1415 (8th Cir. 1983); Marshall & Am. Cyanamid Co. v. Oil, Chem. & Atomic Workers Int'l Union, 647 F.2d 383 (3d Cir. 1981)); *see also* Hale v. Norton, 476 F.3d 694, 698 (9th Cir. 2007) (holding by additional circuit that

stand trial" by litigants claiming that having to participate in an unconstitutionally structured administrative process harms them in a manner that the courts cannot adequately redress after the process has concluded.[199]

For similar reasons, the common assertion that the advantages typically associated with agency adjudication do not apply when litigants raise constitutional claims[200] is often incorrect. For example, because agencies can often provide effective remedies for constitutional injuries, exhaustion may prompt early corrective action that moots the need for court intervention and prevents abusive sandbagging by litigants who raise an objection to an agency's decision for the first time in court on constitutional grounds that the agency could have fully redressed administratively.[201] In addition, agencies' familiarity with the statutes they administer[202] can be relevant to constitutional controversies because it may help in determining if a statute should even be construed in a manner that raises a constitutional issue in the first place,[203] if Congress would have intended that a constitutionally offensive statutory provision be severed,[204] or if a statutory claim or defense moots the constitutional controversy.[205] Additionally, constitutional challenges—including structural challenges or facial challenges to statutes—often require factual development to resolve,[206] meaning that agency proceedings can aid courts by creating a relevant factual record for review.[207] It is therefore not unreasonable for the Tenth Circuit to presume that exhaustion of a constitutional claim is appropriate and consequently require exhaustion absent a showing of futility or undue burden.

B. Significant Tenth Circuit Cases Addressing Exhaustion of Constitutional Claims Demonstrate the Benefits of Exhaustion

To demonstrate in concrete terms why it is reasonable for the Tenth Circuit to presume that the benefits of administrative exhaustion can apply

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the doctrine "applies to . . . administrative proceedings"); King-Roberts v. USPS, No. 98-3370, 1999 WL 618121, at *2 (Fed. Cir. Aug. 13, 1999) (holding that the collateral order doctrine applied to review of agency action).

199. Gelblum, *supra* note 14, at 56–60.

200. *See* authorities cited *supra* note 65.

201. *See Carr I*, 961 F.3d 1267, 1273, 1275 n.9 (10th Cir. 2020) (finding these advantages applicable with respect to an Appointments Clause claim), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

202. Although the Supreme Court recently reemphasized the judiciary's comparative expertise in statutory interpretation, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024), it quoted with approval to earlier precedents noting that agencies may still bring a relevant "body of experience and informed judgment" to questions of statutory interpretation that entitle their views on the matter to "respect." *Id.* at 374, 399 (citations omitted).

203. *E.g.*, Schreiber v. Cuccinelli, 981 F.3d 766, 784 (10th Cir. 2020) (citations omitted) (reasoning that an agency may determine that a statute it administers should be construed in a manner that avoids any constitutional controversy).

204. Gelblum, *supra* note 14, at 66–67 (citations omitted).

205. *E.g.*, Elgin v. Dep't of the Treasury, 567 U.S. 1, 22–23 (2012) (noting that agency adjudication may moot a constitutional controversy by denying relief on other grounds).

206. Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 3, 5 (2009) (factual considerations "underlie most constitutional decision making").

207. *Elgin*, 567 U.S. at 19–20; Gelblum, *supra* note 14, at 67–69; Gelpe, *supra* note 179, at 45 ("[I]f a statute is challenged as applied, facts are important, and the administrative remedy will probably help to develop the facts.").

with equal force to constitutional claims unless litigants demonstrate otherwise, this Section uses three significant Tenth Circuit cases concerning exhaustion of such claims—*Thunder Basin I*, *Carr I*, and *Smith*—as case studies. The record in these cases as well as their broader administrative and legal background demonstrates how the benefits that are typically associated with administrative exhaustion can apply even to structural constitutional claims and supposedly facial challenges, which courts often assume are especially inappropriate for administrative resolution.[208] *Thunder Basin I* illustrates that, even when a litigant raises a seemingly facial challenge to a statute, an agency may have relevant statutory knowledge and even relevant constitutional experience, so it can grant meaningful and timely relief and potentially assemble a useful record for subsequent judicial review. *Thunder Basin I* also shows how requiring exhaustion of both constitutional and nonconstitutional claims in a single forum can prevent inefficient piecemeal litigation. *Carr I* highlights how requiring issue exhaustion can allow an agency to apply relevant expertise on nonconstitutional issues to help resolve threshold legal questions relevant to adjudicating a structural claim. Moreover, examination of the administrative and legal background in *Carr* demonstrates how exhaustion can prompt agencies to take timely corrective action on constitutional claims, despite the Court's assertion that exhaustion of the constitutional claim would have been futile. This early error correction can avoid the need for costly do-overs of agency proceedings as well as piecemeal appeals that can result when litigants first raise constitutional claims after agency proceedings have ended. *Smith* similarly illustrates these advantages to administrative exhaustion as well as the relevance of an administrative record even when litigants raise a seemingly "generic" structural facial challenge to a statute with government-wide applicability. It also highlights the potential for prejudicial sandbagging when courts do not require issue exhaustion of constitutional claims. These cases thus demonstrate that the Tenth Circuit's practice of requiring exhaustion of constitutional claims unless a litigant can make a particularized showing of undue burden or futility is reasonable.

1. *Thunder Basin I*: Avoiding Piecemeal Litigation and an Agency's Ability to Apply Expertise, Grant Timely Relief, and Develop a Record on a Facial Challenge to a Statute

Thunder Basin I, which culminated in a Supreme Court decision clarifying when a statute should be construed as implicitly requiring exhaustion of a particular claim,[209] demonstrates how requiring exhaustion of constitutional claims can prevent piecemeal appeals. It also reveals the potential relevance of agency statutory expertise and experience addressing similar constitutional claims in prior adjudications as well as an agency's

208. *See supra* notes 62–63 and accompanying text.
209. *Thunder Basin II*, 510 U.S. 200, 212–16 (1994).

ability to provide adequate relief and compile a relevant record even when litigants raise purportedly facial constitutional challenges to a statute.

A mine operator initiated the suit after DOL warned the operator that it was not in compliance with a Coal Act provision requiring it to recognize employee-elected "miners' representatives" who would have limited rights to access the operator's premises and participate in the DOL safety investigation process.[210] The operator claimed that by electing union officials to the role, its employees were improperly attempting to circumvent other applicable law that allowed employers to limit union activity and access to the employer's property.[211] Had the operator continued to refuse to comply, the DOL could have issued a citation and ultimately assessed a proposed penalty, with additional proposed penalties assessed for each day of noncompliance.[212] The Coal Act established an independent agency, the Mine Safety and Health Review Commission, which is authorized to review any such action by DOL. The operator could have initiated proceedings before the Commission to contest any citation or penalty assessment,[213] with subsequent review in a court of appeals.[214] But rather than using this process, the operator filed a pre-enforcement challenge in district court, raising its statutory argument that the Coal Act could not be used to circumvent laws allowing it to limit union activity.[215] The operator also asserted that the Coal Act's remedial scheme violated its constitutional due process rights by forcing it to risk incurring hefty penalties simply to litigate the merits of its objection to the designation of union offices as miners' representatives.[216] The district court held that the Coal Act's administrative review scheme did not deprive the courts of jurisdiction because the Commission lacked expertise over both the constitutional and statutory questions at issue.[217] It enjoined enforcement of the Act after finding that the mine operator had presented "serious" legal questions and faced irreparable harm.[218]

A unanimous panel of the Tenth Circuit reversed,[219] the Tenth Circuit subsequently denied en banc review,[220] and the Supreme Court granted certiorari and affirmed the Tenth Circuit's ruling.[221] Both the Tenth Circuit and the Supreme Court reasoned that the Coal Act's enforcement

210. *Id.* at 202–04. The miner's representatives are given access to the operator's facilities because they have a right to be present during DOL inspections and post-inspection meetings and a right to access certain mine records, and may also request that DOL inspect the mine. *Id.* at 203–04 (citations omitted).
211. *Thunder Basin I*, 969 F.2d 970, 972 (10th Cir. 1992).
212. *Thunder Basin II*, 510 U.S. at 204 n.4.
213. 30 U.S.C. §§ 815, 823(a).
214. *Id.* § 816.
215. *Thunder Basin II*, 510 U.S. at 205 (citations omitted).
216. *Id.*
217. *Thunder Basin I*, 969 F.2d at 973 (citations omitted).
218. *Thunder Basin II*, 510 U.S. at 205–06 (citations omitted).
219. *Thunder Basin I*, 969 F.2d at 977.
220. *See id.* at 970 (showing that rehearing en banc was denied Aug. 28, 1993).
221. *E.g.*, Thunder Basin Coal Co. v. Reich, 507 U.S. 971 (1993); *Thunder Basin II*, 510 U.S. at 218.

provisions implicitly required exhaustion of administrative remedies and thus precluded district court jurisdiction over a pre-enforcement due process challenge to these provisions because Congress intended the Coal Act to broadly displace district court jurisdiction in favor of a comprehensive administrative review scheme.[222] They noted that the Act's legislative history reflected concern that the prior enforcement scheme's reliance on de novo court proceedings allowed mine operators to delay paying penalties, which undermined the remedial effect of penalty assessments.[223] Both courts held that the Commission was not barred from considering the constitutional objection to its enabling act[224] and therefore declined to allow the mine operator to independently pursue this objection in district court instead of through the administrative review scheme.[225] Both courts also held that requiring administrative exhaustion did not offend due process.[226]

The record and relevant administrative background in *Thunder Basin* demonstrate that the benefits that are typically attributed to exhaustion are not necessarily attenuated when a litigant raises a constitutional claim. As both courts observed, allowing premature court interference with Commission proceedings would cause the sort of delay that the exhaustion requirement was intended to prevent.[227] And the Supreme Court noted that the Commission had experience adjudicating claims similar to the operator's statutory claim.[228] Had the Commission's application of its expertise led it to rule for the employer on this nonconstitutional claim, it would have mooted the constitutional issue altogether.[229] Thus, requiring the operator to present its constitutional claim in the same administrative forum that adjudicates statutory claims reduced the risk of piecemeal litigation that exhaustion mandates are intended to prevent.[230]

There was also no reason to assume that the Commission could not competently address the constitutional claim, bring relevant expertise to bear on the issue, or develop a relevant factual record. As both courts noted, the Commission had not shied away from considering facial challenges to the constitutionality of a statute,[231] asserting that it could do so

222. *Thunder Basin I*, 969 F.2d at 972–75; *Thunder Basin II*, 510 U.S. at 207–12.

223. *Thunder Basin I*, 969 F.2d at 974–75; *Thunder Basin II*, 510 U.S. at 209–10 (citations omitted).

224. *Thunder Basin I*, 969 F.2d at 974; *Thunder Basin II*, 510 U.S. at 215 (holding that there is no "mandatory" rule barring such agency adjudication).

225. *Thunder Basin I*, 969 F.2d at 975; *Thunder Basin II*, 510 U.S. at 215–16.

226. *Thunder Basin I*, 969 F.2d at 975–76; *Thunder Basin II*, 510 U.S. at 216–18.

227. *Thunder Basin I*, 969 F.2d at 975; *Thunder Basin II*, 510 U.S. at 216.

228. *Thunder Basin II*, 510 U.S. at 214 & n.18 (citing Kerr-McGee Coal Corp. v. Sec'y of Lab., 15 F.M.S.H.R.C. 352 (1993)).

229. *Cf.* Elgin v. Dep't of Treasury, 567 U.S. 1, 22–23 (2012) (noting that agency adjudication may moot a constitutional controversy by denying relief on other grounds).

230. *Cf.* Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 772 (1947); Gelblum, *supra* note 14, at 61–62.

231. *Thunder Basin I*, 969 F.2d at 974 (citing Sec'y of Lab., MSHA v. Richardson, 3 F.M.S.H.R.C. 8, 18–21 (1981)); *Thunder Basin II*, 510 U.S. at 215 (citing *Richardson* and other authorities) ("The Commission has addressed constitutional questions in previous enforcement proceedings.").

because it is an adjudicatory body separate from the DOL and therefore plays a role analogous to that of a court.[232] Moreover, an agency may have comparable experience to many generalist courts when it comes to addressing precisely those constitutional questions likely to come up in its proceedings.[233] In this regard, a Westlaw search for Commission decisions referencing "due process" indicates that in its roughly fourteen-year history prior to the district court's ruling in the matter, the Commission and its ALJs had issued over 100 decisions discussing due process issues related to proceedings under the Coal Act, including challenges to provisions of the Act itself, to regulations issued pursuant to the Act, and to particular applications of these authorities.[234] The Commission had also considered whether requiring interim compliance with remedial measures during the pendency of agency proceedings violated due process.[235] And early in the Commission's history, some of its adjudicators had considered an argument that it would be constitutionally problematic to construe the Coal Act as requiring an operator to risk incurring penalties in order to pursue relief before the Commission[236]—the very claim at issue in *Thunder Basin*.

Not only was there no reason to presume that the Commission could not competently consider the due process challenge given this track record but it arguably could have brought unique expertise to bear on statutory and factual issues relevant to resolution of the constitutional claim. The operator's due process claim rested on an assertion that the Coal Act's remedial scheme forced it to choose between either risking significant penalties for not complying with the "miners' representative" provision while it challenged the provision before the Commission, or incurring what it claimed was irreparable harm by complying with the provision during the pendency of administrative proceedings.[237] Adjudicating this due process claim first required construing the Coal Act to determine if it actually put the operator at risk of incurring high penalties. This was a matter that lay squarely within the competence of the Commission, which had already held that an employer could abate a citation and thereby avoid accrual of penalties while seeking review of its underlying objection to the citation.[238] In addition, the Coal Act required the Commission to consider "the gravity of the violation" and an operator's "good faith" when deciding the

232. *Richardson*, 3 F.M.S.H.R.C. at 20.

233. *See* Gelblum, *supra* note 14, at 27–29 (citations omitted).

234. *E.g.*, Sec'y of Lab., MSHA v. Alexander Bros., Inc., 4 F.M.S.H.R.C. 541, 545 (1982) (rejecting argument that a provision of the Coal Act was so vague as to violate due process); Sec of Lab., MSHA, 3 F.M.S.H.R.C. 1707, 1708, 1712 (1981) (holding that 29 C.F.R. § 2700.44(a) (1981), a Commission regulation, did not comport with procedural due process requirements); Jones v. D & R Contractors, 8 F.M.S.H.R.C. 1045, 1051–52 (1986) (holding that an ALJ's joinder ruling violated due process).

235. *E.g.*, Sec'y of Lab., MSHA v. Brody Mining, LLC, 36 F.M.S.H.R.C. 2027, 2041–47 (2014).

236. Energy Fuels Corp. v. Sec'y of Lab., MSHA, 1 F.M.S.H.R.C. 299, 317 (1979) (Lawson, C., dissenting) (asserting that it would not violate due process to only allow a hearing following the assessment of a proposed penalty); Climax Molybdenum Co. v. Sec'y of Lab., MSHA, 1 F.M.S.H.R.C. 213, 217 (1979) (ALJ ruling) (same).

237. *Thunder Basin II*, 510 U.S. 200, 205 (1994).

238. *Energy Fuels*, 1 F.M.S.H.R.C. at 299.

amount of any penalty.[239] The Tenth Circuit noted that this language might be construed to weigh against a large penalty if an operator raised a good faith dispute,[240] and the Commission had in fact already adopted that interpretation.[241]

The Commission could have also brought institutional expertise to bear when adjudicating the constitutional question in other ways. For example, it could have applied its familiarity with the Coal Act, the mining industry, and the DOL inspection process to assess how much of a burden the operator would have potentially incurred by giving representatives access to its property in compliance with the "miners' representative" provision.[242] And the Commission's familiarity with the procedural provisions of the Coal Act and its own regulations and practices would have allowed it to assess the extent to which the operator might be able to obtain prompt relief that would limit its potential exposure to accruing penalties. Lastly, had the Commission determined that a provision of the Act was facially unconstitutional, its overall familiarity with the Act might have given it an advantage in assessing whether the Act could remain fully operative without the offending provision, allowing for its severance.[243]

Moreover, proceeding before the Commission would not have left the operator without an adequate remedy on its constitutional claim. The Coal Act allows for interim relief while Commission proceedings are pending,[244] and could be construed as granting the Commission discretion to limit the amount of penalty assessed against an employer who contests a citation based on a good faith legal dispute,[245] thereby mitigating due process concerns. And even if the Commission had determined that it could not construe the Coal Act to protect the operator's due process rights, its precedents concerning its authority to pass on the constitutionality of a statute indicate that it would treat an unconstitutional provision as "void"[246] and would have presumably declined to apply such a provision to the operator were it to do so. The Act and Commission rules also permitted expedited proceedings and interlocutory appeals to the Commission from ALJ rulings on dispositive legal issues.[247] Moreover, the weight of authority indicated that the collateral order doctrine could apply to these

239. 30 U.S.C. § 820(i).
240. *Thunder Basin I*, 969 F.2d 970, 975–76 (10th Cir. 1992).
241. Sec'y of Lab., MSHA v. Mid-Continent Res., Inc., 12 F.M.S.H.R.C. 949, 957 (1990).
242. *Cf.* McCarthy v. Madigan, 503 U.S. 140, 145 (1992) (citations omitted) (exhaustion permits agencies to apply "special expertise").
243. *See generally* Gelblum, *supra* note 14, at 66–67 (citations omitted).
244. 30 U.S.C. §§ 815(b)(2), 816(a)(2).
245. *See supra* notes 240–242 and accompanying text.
246. Sec'y of Lab., MSHA v. Richardson, 3 F.M.S.H.R.C. 8, 19 (1981) (quoting Marbury v. Madison, 5 U.S. 137, 180 (1803)).
247. 30 U.S.C. § 815(d) (providing for expedited proceedings); 29 C.F.R. § 2700.74(a) (1992) (providing for discretionary interlocutory review if an ALJ "ruling involves a controlling question of law and . . . immediate review [of the ruling may] materially advance the final disposition of the proceeding").

interlocutory Commission rulings, permitting immediate judicial review[248] that would protect any cognizable "right not to stand trial" the operator might have asserted based on its constitutional objection.[249]

Lastly, as with many facial challenges to a statute, agency development of a factual record might have facilitated resolution of the due process issue.[250] Such a record might have helped assess the burden on the operator of having to allow union officials to serve as "miners' representatives" should it choose to pursue its defense through the administrative scheme without accruing penalties. Both the Tenth Circuit and Supreme Court opinions noted a lack of evidence of significant hardship that might have implicated due process concerns,[251] which indicates that this evidence—and hence the Commission's ability to develop a factual record—could have been relevant to resolving the constitutional question. *Thunder Basin I* therefore demonstrates that the various advantages typically associated with administrative exhaustion can apply even when litigants raise facial challenges to the constitutionality of a statute.

2. *Carr I*: Applying Potential Agency Expertise to a Structural Claim, Incentivizing Early Corrective Action, and Preventing Piecemeal Appeals

In *Carr I*, a unanimous Tenth Circuit panel imposed a prudential issue exhaustion requirement on social security benefits applicants who argued that the SSA ALJs presiding in their cases should have been appointed in accordance with the Appointments Clause.[252] The Supreme

248. At the time *Thunder Basin I* was decided, every circuit to have encountered the issue had held that the collateral order doctrine could apply to interlocutory rulings in agency adjudications. Donovan v. Occupational Safety & Health Rev. Comm'n, 713 F.2d 918, 923–24 (2d Cir. 1983); Marshall v. Oil, Chem. & Atomic Workers Int'l Union, 647 F.2d 383, 386, 388 (3d Cir. 1981); Donovan v. United Steelworkers, 722 F.2d 1158, 1160 (4th Cir. 1983); Donovan v. Oil, Chem. & Atomic Workers Int'l Union & its Local 4–23, 718 F.2d 1341, 1345–46 (5th Cir. 1983); Marshall v. Occupational Safety & Health Rev. Comm'n, 635 F.2d 544, 548–49 (6th Cir. 1980); Donovan v. Allied Indus. Workers, 760 F.2d 783, 785 & n.5 (7th Cir. 1985) (citing, *inter alia*, Donovan v. Int'l Union, Allied Indus. Workers, 722 F.2d 1415 (8th Cir. 1983)); Jim Walter Res., Inc. v. Fed. Mine Safety & Health Rev. Comm'n, 920 F.2d 738, 744 (11th Cir. 1990). The Tenth Circuit subsequently applied the doctrine to an agency decision without any express discussion of the fact that the order was not an appeal from an Article III court. *See* Osage Tribal Council v. U.S. Dep't of Lab., 187 F.3d 1174, 1179 (10th Cir. 1999).

249. *See* Gelblum, *supra* note 14, at 56–60 (describing how the ability to obtain expedited relief on controlling legal questions, combined with availability of judicial review under the collateral order doctrine, can protect any cognizable "right not to stand trial" in an allegedly unconstitutional agency proceeding).

250. *Id.* at 69 (citations omitted) ("Even facial challenges to statutes are often adjudicated based on scientific, economic, or other factual considerations . . . ."); *accord* Elgin v. Dep't of Treasury, 567 U.S. 1, 19–20 (2012) (even when an agency refuses to adjudicate facial challenges to statutes, it can develop a factual record that can facilitate subsequent judicial review); Borgmann, *supra* note 206, at 3, 5 (factual considerations "underlie most constitutional decision making").

251. *Thunder Basin I*, 969 F.2d 970, 976 (10th Cir. 1992) ("We have no reason to assume that [the DOL] would allow the [union-affiliated] miner representatives to act beyond the scope of their rights outlined in the Mine Act."); *Thunder Basin II*, 510 U.S. 200, 216–17 (1994) (citations omitted) ("The record before us contains no evidence that petitioner will be subject to serious harm . . . . [Any] abuse [is] entirely hypothetical on the record before us . . . .").

252. *Carr I*, 961 F.3d 1267, 1273 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

Court subsequently reversed,[253] primarily relying on the informal, nonadversarial nature of SSA ALJ hearings, while holding that the structural constitutional nature of the claim and purported futility of raising it before an agency that subsequently disclaimed authority to address constitutional questions "tip[ped] the scales" against requiring exhaustion.[254] Notwithstanding the reversal and claims of futility, the record and relevant administrative and legal background in *Carr I* demonstrate how many of the benefits associated with exhaustion can apply with equal force when litigants raise constitutional claims, including structural claims—even if the nonadversarial nature of SSA proceedings provides alternate grounds for excusing exhaustion. Despite the constitutional nature of the claim, unique aspects of the SSA adjudicative framework meant that the SSA may have had relevant expertise it could have applied to addressing threshold questions relevant to resolution of an Appointments Clause challenge to its ALJs. And notwithstanding the Court's assertion that exhaustion would have been futile, a close examination of the relevant administrative and legal background indicates that exhaustion of the Appointments Clause claim might have caused the SSA to take early corrective action by reappointing its ALJs in accordance with the Clause in order to mitigate its legal hazards, as did other agencies that had encountered such claims at the agency level, unlike the SSA.[255] Such action could have avoided court litigation on the Appointments Clause issue as well as avoiding the need for costly do-overs of administrative proceedings previously conducted by ALJs who had not been appointed in accordance with the Clause, at an agency that conducts a breathtakingly large number of hearings each year.

Carr concerned ALJ proceedings in what the Supreme Court has described as "probably the largest adjudicative agency in the western world."[256] These ALJ proceedings were held before an agency—the SSA—that employs more ALJs than all other agencies combined and conducts over half a million hearings a year.[257] These hearings differ drastically from ALJ hearings at most other agencies governed by the APA's formal adjudication provisions. Rather than being governed by these government-wide provisions, SSA hearings are instead conducted pursuant to agency regulations that create an "informal, nonadversarial" process in which the ALJ both develops the facts and acts as an adjudicator.[258]

At the time the Tenth Circuit decided *Carr I*, SSA regulations appeared to imply that benefits applicants bore at least some responsibility

253. *Carr II*, 593 U.S. 83, 96 (2021).
254. *Id.* at 92–93.
255. *See infra* notes 326–330 and accompanying text.
256. *See* Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983).
257. 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, 9583 & n.5 (Mar. 15, 2019) (citation omitted).
258. Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73138, 73139–40 (Nov. 16, 2020) (to be codified at 20 C.F.R. pts. 404, 408, 411, 416, 422) (citation omitted).

for raising relevant issues before a presiding ALJ.[259] Moreover, the weight of judicial authority suggested that prudential issue exhaustion applied to SSA ALJ proceedings. Although the Supreme Court had previously held in *Sims* that issue exhaustion was not required in SSA Appeals Council proceedings that review ALJ rulings, it did not extend this holding to the underlying ALJ proceedings.[260] In fact, the four dissenting Justices asserted the Court would presumably require issue exhaustion in those proceedings if directly confronted with the question.[261] Moreover, in post-*Sims* decisions that involved belated nonconstitutional objections to SSA ALJ decisions, all appellate courts considering the issue had held that issue exhaustion is required in SSA ALJ proceedings.[262]

The appellants in *Carr I* were unsuccessful disability benefits applicants who raised Appointments Clause objections for the first time on judicial review to the SSA ALJs who adjudicated their applications,[263] long after ALJ proceedings had ended and after the Appeals Council had denied discretionary review.[264] An attorney with three decades of experience in representing SSA claimants represented both appellants before the SSA, in district court, and on appeal.[265] In district court, the appellants had asserted various merits objections to the ALJ's decision, which the district court rejected[266] and which they did not pursue on appeal.[267] In addition, they argued for the first time in district court that the Supreme Court's holding in *Lucia*—that SEC ALJs had to be appointed in accordance with the Appointments Clause[268]—also applied to SSA ALJs, and sought new hearings on the basis that their presiding ALJs had not been appointed in accordance with the Clause.[269] Their counsel explained that he first thought of raising this argument after reading the *Lucia* decision,[270] which

259. *See infra* note 275 and accompanying text.
260. Sims v. Apfel, 530 U.S. 103, 104–05, 107 (2000).
261. *Id.* at 117 (Breyer, J., dissenting).
262. Shaibi v. Berryhill, 883 F.3d 1102, 1109 (9th Cir. 2017); Maloney v. Comm'r of Soc. Sec., 480 F. App'x 804, 810 (6th Cir. 2012); Liskowitz v. Astrue, 559 F.3d 736, 744 (7th Cir. 2009); Street v. Barnhart, 133 F. App'x 621, 627–28 (11th Cir. 2005); Anderson v. Barnhart, 344 F.3d 809, 814 (8th Cir. 2003); Mills v. Apfel, 244 F.3d 1, 4–5 (1st Cir. 2001).
263. *Carr I*, 961 F.3d 1267, 1268 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).
264. Willie Earl C. v. Saul, No. 18-CV-272-FHM, 2019 WL 2613819, at *1 n.2 (N.D. Okla. June 26, 2019), *rev'd sub nom. Carr I*, 961 F.3d 1267 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021); Kim L. M. v. Saul, No. 18-CV-418-FHM, 2019 WL 3318112, at *1 n.2 (N.D. Okla. July 24, 2019), *rev'd sub nom. Carr I*, 961 F.3d 1267 (10th Cir. 2020), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).
265. Paul F. McTighe, Jr., *Reaching the Supreme Court: Willie Earl Carr et al. vs Saul*, TULSA LAW. MAG., June 1, 2021, at 7.
266. *Willie Earl C.*, 2019 WL 2613819, at *2–4; *Kim L. M.*, 2019 WL 3318112, at *2–5.
267. *Carr I*, 961 F.3d at 1274 (citation omitted).
268. Lucia v. SEC, 585 U.S. 237, 241, 251 (2018).
269. McTighe, *supra* note 265, at 7.
270. *Id.*

came down more than a year after his clients' ALJ proceedings had concluded.[271]

The district court ruled that *Sims*'s holding should apply with equal force to SSA ALJ proceedings and it was therefore unnecessary to exhaust the Appointments Clause argument to preserve it for judicial review.[272] But the Tenth Circuit reversed on appeal and was in turn reversed by the Supreme Court.[273] The Tenth Circuit reasoned that *Sims* did not control in SSA ALJ proceedings because Justice O'Connor had supplied the fifth vote in that case based on SSA rules and forms specific to Appeals Council proceedings that indicated that benefits applicants had no duty to identify issues for Appeals Council review.[274] In contrast, at the ALJ stage, regulations affirmatively required applicants to inform the ALJ of issues the ALJ fails to identify for resolution and to raise any arguments that the ALJ should be disqualified.[275] Given what it viewed as a lack of controlling precedent, the panel assessed as a matter of first impression whether exhaustion might be beneficial and determined that it was.[276] It reasoned that agencies have an interest in internal error correction and that had the issue been raised administratively, the SSA "might have changed its position on the Appointments Clause."[277] The panel quoted from the Supreme Court's reasoning in *United States v. L. A. Tucker Truck Lines, Inc.*[278] that even if an agency does not change course when litigants raise an argument administratively, it would "at least [have been] put on notice of the accumulating risk of wholesale reversals being incurred by its persistence."[279] The panel also reasoned that any corrective action the SSA took in response to the argument being raised administratively would have furthered administrative efficiency by avoiding the need to conduct second hearings for multiple claimants before newly reappointed ALJs[280] and conserved judicial resources by preventing litigation over the Appointments Clause issue.[281] In addition, the panel rejected the suggestion that the structural constitutional nature of the claim placed it "beyond the power of the agency to remedy" as "counter to our precedents."[282] It therefore reversed the district court.[283]

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271. The presiding ALJs held hearings on April 10, 2017, and March 29, 2017, and issued their decisions on June 15, 2017, and June 7, 2017. The Social Security Appeals Council denied discretionary review on March 16, 2018, and June 10, 2018. *See* Willie Earl C. v. Saul, No. 18-CV-272-FHM, 2019 WL 2613819, at *1 n.2 (N.D. Okla. June 26, 2019); Kim L. M. v. Saul, No. 18-CV-418-FHM, 2019 WL 3318112, at *1 n.2 (N.D. Okla. July 24, 2019).

272. *Willie Earl C.*, 2019 WL 2613819, at *5; *Kim L. M.*, 2019 WL 3318112, at *6.

273. *Carr I*, 961 F.3d 1267, 1268, 1273 (10th Cir. 2020); *Carr II*, 593 U.S. 83, 96 (2021).

274. *Carr I*, 961 F.3d at 1274–75 (citing 20 C.F.R. §§ 404.938(b)(1), 404.939, 404.940 (2020)).

275. *Id.* (citing 20 C.F.R. §§ 404.938(b)(1), 404.939, 404.940 (2020)).

276. *Id.* at 1273–74.

277. *Id.* at 1273 (quoting Malouf v. SEC, 933 F.3d 1248, 1257 (10th Cir. 2019)).

278. 344 U.S. 33 (1952).

279. *Id.* at 37 (quoted by *Carr I*, 961 F.3d at 1273).

280. *Carr I*, 961 F.3d at 1273–74.

281. *Id.* at 1273.

282. *Id.* at 1275 (quoting Cirko *ex rel.* Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 157 (3d Cir. 2020)).

283. *Id.* at 1276.

The Supreme Court reversed, primarily relying on nonadversarial aspects of SSA ALJ proceedings, while describing the structural constitutional nature of the Appointments Clause claim and purported futility of administrative exhaustion as factors that "tip[ped] the scales" against requiring exhaustion, despite some aspects of SSA ALJ proceedings that rendered them more adversarial than Appeals Council proceedings. The Court reasoned that structural challenges "usually fall outside [agency] adjudicators' areas of technical expertise,"[284] and further asserted that exhaustion would have been futile on two grounds. First, the SSA Commissioner, who was the only agency official constitutionally authorized to grant relief on the Appointments Clause claim by validly reappointing the agency's ALJs,[285] did not directly participate in adjudicating claims, so raising the matter administratively would not have brought the issue to the attention of the only agency official able to take corrective action.[286] Second, shortly after the Supreme Court granted certiorari in *Lucia*, approximately nine months after the ALJ hearings at issue in *Carr I*,[287] the SSA instructed its ALJs that because the SSA purportedly "lacks the authority to finally decide constitutional issues such as these," the ALJs should not address Appointments Clause claims that might be raised in their proceedings, and the agency did not provide guidance to its adjudicators on how to address these claims until nearly nine months after *Lucia* was decided.[288] The Court asserted that "as a practical matter," the SSA's actions "belie the Commissioner's suggestion that the SSA would have changed course if only it had been 'put on notice of the accumulating risk of wholesale reversals.'"[289] The Court concluded that "[t]aken together, the inquisitorial features of SSA ALJ proceedings, the constitutional character of petitioners' claims, and the unavailability of any remedy make clear that 'adversarial development' of the Appointments Clause issue 'simply [did] not exist' (and could not exist) in petitioners' ALJ proceedings."[290]

Setting aside the question of whether exhaustion should generally be required in the context of nonadversarial proceedings, a careful review of the relevant administrative and legal background demonstrates that several advantages typically ascribed to exhaustion could have applied with equal force to the constitutional claim at issue in *Carr*. The administrative and legal background also demonstrates that exhaustion was not clearly futile, as the Supreme Court had asserted. The unique nature of SSA proceedings arguably made agency expertise relevant to assessing the nature of the authority that SSA ALJs exercise for purposes of determining if they wield the "significant authority" of constitutional officers subject to the

284. *Carr II*, 593 U.S. 83, 92 (2021).
285. *See* U.S. CONST. art. II, § 2, cl. 2 (permitting Congress to vest the authority to make inferior officer appointments in "Heads of Departments").
286. *Carr II*, 593 U.S. at 93–94.
287. *See supra* note 271.
288. *Carr II*, 593 U.S. at 94–95 (citations omitted).
289. *Id.* at 94 n.7 (citations omitted).
290. *Id.* at 95–96 (quoting Sims v. Apfel, 530 U.S. 103, 112 (2000) (plurality opinion)).

Appointments Clause.[291] And had the issue been raised administratively at an early point in time by benefits applicants—which it was not—the SSA, rather than avoiding the issue, might have taken corrective action far sooner to mitigate its legal hazards, as other agencies that encountered Appointments Clause challenges in their administrative proceedings did.[292] Particularly in an adjudicatory system that conducts hundreds of thousands of ALJ hearings each year,[293] such early corrective action can conserve significant administrative and judicial resources.

First, SSA adjudicators' familiarity with their agency's unique adjudicatory scheme gave them specialized knowledge that may have been relevant to resolving threshold issues that are vital to the Appointments Clause analysis. The *Lucia* Court engaged in a three-step analysis to determine whether SEC ALJs are subject to the Appointments Clause. Two of these steps were specific to the particular legal scheme governing the agency's proceeding, and SSA adjudicators arguably had relevant expertise concerning these two steps when assessing an Appointments Clause claim directed at their positions. The *Lucia* Court first considered whether SEC ALJs occupy a "continuing office established by law."[294] It reasoned that SEC ALJs do occupy such an office by referencing two APA sections describing the authority of ALJs in formal hearings[295] and additional APA provisions governing the appointment and salary of ALJs who conduct proceedings pursuant to these sections.[296] The Court next identified the specific powers that SEC ALJs exercise in these formal proceedings, citing heavily to SEC regulations governing these ALJs' authority and SEC agency precedent concerning deference to ALJ fact-finding.[297] Only the third part of the *Lucia* Court's analysis assessed whether, as a matter of *constitutional law*, these powers vest SEC ALJs with the "significant authority" of officers subject to the Appointments Clause.[298] However, as previously explained, SSA proceedings are not conducted pursuant to the APA's government-wide procedures for formal hearings that the Court heavily relied on in *Lucia*, but are instead governed by agency-specific regulations.[299] Because agencies are presumed to "have a nuanced understanding of the regulations they administer,"[300] SSA adjudicators arguably had the type of "special expertise" often cited as a justification for

291. *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), *superseded in part by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

292. *See infra* notes 326–330 and accompanying text.

293. *See supra* notes 256–257 and accompanying text.

294. Lucia v. SEC, 585 U.S. 237, 247 (2018).

295. *Id.* at 248 (citing 5 U.S.C. § 556).

296. *Id.* (citing 5 U.S.C. § 3105, which describes procedures for appointing ALJs "necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title," and 5 U.S.C. § 5372, which sets the salary for "an administrative law judge appointed under section 3105").

297. *Id.* at 248–51 (citations omitted).

298. *Id.* at 244–45 (citations omitted).

299. *See supra* note 258 and accompanying text.

300. Kisor v. Wilkie, 588 U.S. 558, 578 (2019).

requiring exhaustion[301] with respect to two parts of *Lucia*'s three-part Appointments Clause analysis, and they could have applied this expertise when determining if the *Carr I* appellants correctly asserted that *Lucia*'s holding applies to SSA ALJs.[302]

Second, notwithstanding the Supreme Court's claim that exhaustion was futile due to the lack of a direct role for the SSA Commissioner in adjudications and the agency's initial reluctance to address the Appointments Clause issue, it was hardly speculative for the Tenth Circuit to presume that raising the issue administratively might have prompted corrective action. Several aspects of the SSA's adjudicative process make it likely that had benefits applicants objected to their ALJs' appointments at an early stage, their objections would have come to the Commissioner's attention. Given the legal landscape at the time, she might have had a strong incentive to respond to such objections by reappointing SSA ALJs in accordance with the Clause, as did other agencies that encountered administrative objections to ALJ appointments.[303] This corrective action would have furthered both administrative and judicial efficiency by preventing the need for time-consuming administrative do-overs in a large number of cases previously adjudicated by ALJs not appointed in accordance with the Clause, as well as court litigation over their appointments.

The SSA Commissioner—who was the only agency official able to make constitutionally valid appointments under the Appointments Clause[304]—does not directly participate in adjudications, but she was not hermetically sealed off from this process and would likely have become aware of Appointments Clause challenges to her agency's ALJs had benefits applicants raised these challenges administratively. Although the Commissioner's adjudicatory responsibilities are delegated to the SSA Appeals Council,[305] the Commissioner or staff reporting to the Commissioner still play a role in the adjudication process. The Commissioner acts as an "advisor to the [Appeals] Council regarding which cases are good candidates for the Council to review pursuant to its authority to review a case sua sponte,"[306] and therefore has a role in reviewing ALJ proceedings. In addition, the SSA Hearings, Appeals, and Litigation Law Manual (HALLEX) instructs ALJs who encounter legal issues that were not previously addressed in agency guidance (including constitutional questions)

301. McCarthy v. Madigan, 503 U.S. 140, 145 (1992) (citations omitted) (exhaustion permits agencies to apply "special expertise").

302. An association of current and former SSA ALJs in fact contended in an amicus brief that the distinct SSA hearing process made *Lucia* inapplicable to SSA ALJs. *See* Brief of Amicus Curiae Collective of Social Security Administration Administrative Law Judges in Support of Neither Party at 3, 5, 13, *Carr II*, 593 U.S. 83 (2021) (No. 19-1442).

303. *See infra* text accompanying notes 326–330.

304. *See supra* text accompanying note 285.

305. Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73138, 73139 (Nov. 16, 2020) (to be codified at 20 C.F.R. pts. 404, 408, 411, 416, 422).

306. Sims v. Apfel, 530 U.S. 103, 111 (2000) (citing 20 C.F.R. §§ 404.969(b)–(c) (2000)).

to seek an opinion from the agency's Office of General Counsel,[307] whose head reported to the Commissioner throughout the relevant time period.[308] There is therefore no reason to assume that had benefits applicants started making Appointments Clause objections to the agency's ALJs at the administrative stage the Commissioner would not have become aware of these objections. Notably, the Secretary of Agriculture has similarly delegated adjudicative responsibilities to his Department's "Judicial Officer,"[309] yet he still took corrective action by reappointing his agency's ALJs after a party raised an Appointments Clause objection at the administrative stage.[310]

There are also strong indicia that the SSA's initial reluctance to address the threat posed by *Lucia*, rather than demonstrating that the agency would have done nothing in response to *Lucia*-type objections raised administratively, as the Supreme Court asserted, may have actually *resulted* from the lack of applicants raising such objections. Had these objections been raised administratively, particularly at the early stage when the *Carr* appellants were proceeding before the agency when it had not yet adopted its guidance refusing to address Appointments Clause Claims, they might have prompted the SSA to take corrective action to reduce its legal hazards. SSA's guidance at the time the *Carr I* appellants were proceeding before its ALJs suggested that it might have considered these constitutional questions. Its subsequent guidance refusing to address Appointment Clause claims was legally risky given the legal landscape at the time, but the failure of any of the hundreds of thousands of benefits applicants who seek ALJ review each year to raise the issue before it became the subject of Supreme Court litigation may have caused the agency to underestimate its legal risk, reducing its incentives to take corrective action by reappointing its ALJs in accordance with the Clause. In contrast, other agencies that did face administrative objections to their ALJs' appointments prior to the *Lucia* ruling did take such corrective action.

As a preliminary matter, SSA's guidance in effect when its ALJs were considering the *Carr I* appellants' benefits applications tended to suggest that SSA might have been willing to address Appointments Clause claims. The SSA's regulations at the time suggested that the only constitutional issues that it would not address administratively were facial

307. *I-2-2-40. Administrative Law Judge Referrals for Possible Policy or Procedural Issues*, SOC. SEC. ADMIN.: HALLEX, https://www.ssa.gov/OP_Home/hallex/I-02/I-2-2-40.html (Jan. 19, 2016).

308. *See Social Security Administration*, SOC. SEC. ADMIN. (July 30, 2019), https://web.archive.org/web/20190823204835/https://www.ssa.gov/org/ssachart.pdf (organizational chart); *Social Security Administration*, SOC. SEC. ADMIN. (Feb. 10, 2017), https://web.archive.org/web/20170217164911/https://www.ssa.gov/org/ssachart.pdf (organizational chart).

309. 7 C.F.R. § 2.35 (2024).

310. *See infra* notes 327–328 and accompanying text.

challenges to the Social Security Act.[311] Moreover, the agency's internal guidance instructed ALJs to obtain legal advice "to resolve an adjudication matter. . . . when [a] particular factual situation requires interpretation or clarification of . . . federal . . . constitutional [law]."[312] In contrast, the SSA only issued the guidance that the Court cited in *Carr*—in which the agency instructed ALJs not to address Appointments Clause objections—more than nine months *after* the ALJ proceedings at issue in *Carr I*.[313]

The SSA's decision to issue this guidance refusing to address Appointments Clause claims suggests that it underestimated significant legal hazards that it might have viewed as a more direct threat had benefits applicants like the *Carr I* appellants raised such claims administratively. In the decade prior to *Lucia*, both commentators and litigants had begun to focus on the potential applicability of the Clause to various agency adjudicators.[314] The issue reached the Tenth Circuit, which, in December 2016, held in *Bandimere v. SEC*[315] that SEC ALJs are "[o]fficers of the United States" who must be appointed in accordance with the Clause,[316] reaching the same conclusion that the Supreme Court did eighteen months later in *Lucia*. The Tenth Circuit decided *Bandimere* several months before the ALJ proceedings at issue in *Carr I*,[317] creating a risk that courts in the Tenth Circuit considering Appointments Clause objections by benefits applicants (such as the *Carr I* appellants) would treat *Bandimere* as controlling and consequently set aside decisions by SSA ALJs who had not been appointed in accordance with the Clause. There was also a risk that courts in other circuits would find *Bandimere*'s reasoning both persuasive and applicable to SSA ALJs,[318] and an even greater risk, once the Supreme

311. Although SSA had discretion to waive the Act's exhaustion of remedies requirement when it could not or did not wish to consider any open issues presented by a benefits claimant, Weinberger v. Salfi, 422 U.S. 749, 766–67 (1975), SSA had adopted procedures for granting such waivers and thereby terminating further administrative consideration only when the sole issue was a constitutional challenge to the Act. 20 C.F.R. §§ 404.900(a)(6), 404.924(d), 404.926(b)–(d) (2024).

312. *I-2-2-40*, *supra* note 307.

313. *Carr II*, 593 U.S. 83, 94–95 (2021); *see* authorities cited *supra* note 271.

314. John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201, 215–16 (2014) (discussing increasing attention paid to the issue); Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed*, 76 MO. L. REV. 1143, 1144 (2011) (same).

315. 844 F.3d 1168 (10th Cir. 2016).

316. *Id.* at 1170 (citation omitted).

317. *See* authorities cited *supra* note 271.

318. For example, nine months after the Tenth Circuit decided *Bandimere* and nine months before the Supreme Court's decision in *Lucia*, the Fifth Circuit stayed another agency's enforcement order pending resolution of an appeal raising an Appointments Clause objection to the presiding ALJ, in an opinion that cited to *Bandimere* to support its holding that the appellants demonstrated a high likelihood of success on the merits of an Appointments Clause objection, despite some differences in the authority of that agency's ALJs compared to ALJs at the SEC. *E.g.*, Burgess v. FDIC, 871 F.3d 297, 301 (5th Cir. 2017); *id.* at 301 n.27, 302 n.30, 303 nn.44–45 (citing *Bandimere*, 844 F.3d at 1179–85).

Court had decided *Lucia*, that courts around the country would apply *Lucia*'s reasoning to SSA ALJs.[319]

But the SSA may have underestimated this risk by assuming that benefits applicants would not litigate the issue, precisely because the *Carr I* appellants and other applicants did not raise it administratively. Consequently, it issued the guidance that the Supreme Court referenced in *Carr*, in which it refused to address Appointments Clause claims rather than taking prompt corrective action. Despite the hundreds of thousands of SSA ALJ hearings held each year—over two-thirds of which are requested by applicants represented by counsel[320]—no applicant had raised an Appointments Clause objection to SSA ALJs at the administrative stage before early 2018,[321] when the Supreme Court granted certiorari in *Lucia*,[322] and even after the *Lucia* decision, very few applicants did so.[323] The SSA may have therefore assumed that it was unlikely to face many court challenges on the Appointments Clause issue, particularly because the weight of authority at the time also suggested that litigants could not pursue arguments that they had not raised in SSA ALJ proceedings on judicial review of those proceedings.[324]

The experience of other agencies that encountered Appointments Clause claims administratively prior to *Lucia* further suggests that rather than refusing to address the issue, the SSA might have taken prompt corrective action had the *Carr I* appellants or other benefits applicants raised such claims administratively, thereby alerting the SSA to an "accumulating risk of wholesale reversals," as the Tenth Circuit suggested.[325] Other agencies that had encountered Appointments Clause objections in their administrative proceedings prior to the Supreme Court granting certiorari in *Lucia* did take corrective action well in advance of the *Lucia* decision by reappointing their ALJs in accordance with the Clause. For example, the

319. For example, less than a week after the *Lucia* decision, a district court in the Ninth Circuit sua sponte noted the possibility that "*Lucia* applies to SSA ALJs" but, relying on Ninth Circuit precedent requiring issue exhaustion in SSA proceedings, did not adjudicate the issue because it had not been raised administratively. Holcomb v. Berryhill, No. EDCV 17-1341-JPR, 2018 WL 3201869, at *3 n.3 (C.D. Cal. June 27, 2018).

320. *Annual Data for Representation at Social Security Hearings*, U.S. SOC. SEC. ADMIN., https://www.ssa.gov/open/data/representation-at-ssa-hearings.html (May 23, 2018).

321. Oral Argument at 19:40–20:14, Lopez v. Comm'r, SSA, No. 19-11747 (11th Cir. 2020), https://www.ca11.uscourts.gov/oral-argument-recordings?title=19-11747&field_oar_case_name_value=&field_oral_argument_date_value%5Bmin%5D=&field_oral_argument_date_value%5Bmax%5D=.

322. Lucia v. SEC, 583 U.S. 1089, 1089 (2018).

323. Oral Argument, *supra* note 321, at 20:14–21:00.

324. *See supra* notes 259–262 and accompanying text. It seems somewhat likely that the SSA had determined that legal risk only existed when applicants raised the issue administratively. Specifically, when the SSA finally issued instructions to its adjudicators on how to address Appointments Clause claims, it limited relief to only those applicants who had affirmatively raised the issue administratively. 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, 9583 (Mar. 15, 2009) (citation omitted).

325. *Carr I*, 961 F.3d 1267, 1273 (10th Cir. 2020) (citation omitted), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

FTC ratified the appointment of a presiding ALJ in 2015 in direct response to an Appointments Clause challenge raised administratively.[326] Nearly a year before the *Lucia* ruling and four months after a party to a Department of Agriculture proceeding raised an Appointments Clause objection to the presiding ALJ,[327] the Secretary of Agriculture ratified the appointments of the Department's ALJs in conformity with the Clause.[328] And half a year prior to the ruling in *Lucia*, even before the Supreme Court granted certiorari to resolve the Appointments Clause issue, the SEC—which first heard the Appointments Clause challenge at issue in *Lucia* and rejected it on the merits[329]—ratified the appointments of its own ALJs in conformity with the Appointments Clause.[330] It thus is hardly speculative to reason, as the Tenth Circuit did, that despite the structural constitutional nature of the Appointments Clause claim at issue in *Carr I*, the lack of direct participation by the SSA Commissioner in adjudications, and the SSA's subsequent recalcitrance to address the issue, applicants timely raising Appointments Clause objections might have prompted the SSA to take corrective action far sooner, which is a recognized benefit of exhaustion mandates.

The Tenth Circuit also reasonably concluded that exhaustion of the constitutional issue could conserve administrative and judicial resources by prompting corrective action, particularly in an administrative scheme like the SSA's that adjudicates a breathtaking number of claims. As previously noted, the *Carr I* appellants had abandoned any objections to the merits of the ALJ's decision in their matter[331] and consequently sought a new hearing based entirely on an asserted legal error that the agency could have corrected at an early stage had it been on notice of the issue and the associated legal hazards. Given the hundreds of thousands of SSA ALJ hearings held each year, which remain pending for well over a year due to substantial backlogs,[332] the potential cost and delay of do-overs when litigants are allowed to raise structural constitutional objections to these proceedings after the fact is enormous.[333] These do-overs potentially impact

326. LabMD, Inc., No. 9357, 2015 WL 13879762, at *2 (F.T.C. Sept. 14, 2015), *final decision entered*, 2016 WL 4128215 (F.T.C. July 28, 2016), *and rev'd on other grounds*, 894 F.3d 1221 (11th Cir. 2018).

327. Beasley, Nos. 17-0119, 17-0120, 17-0121, 17-0122, 17-0123, 17-0124, 17-0125, 2017 WL 9473090, at *1 (U.S.D.A. Oct. 26, 2017), *vacated sub nom.* Harris, No. 17-0126 (U.S.D.A. July 20, 2021), https://www.aphis.usda.gov/sites/default/files/harris.pdf.

328. *Harris*, No. 17-0126, at 2 n.2.

329. Raymond J. Lucia Cos., No. 4190, 2015 WL 5172953, at *21 n.94 (Sept. 3, 2015), *petition denied*, 832 F.3d 277 (D.C. Cir. 2016), *adhered to on reh'g en banc*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd and remanded sub nom.* Lucia v. SEC, 585 U.S. 237 (2018).

330. *Lucia*, 585 U.S. at 252 n.6 (citation omitted).

331. *See supra* notes 266–267 and accompanying text.

332. OFF. OF INSPECTOR GEN., SSA, REP. NO. A-05-22-51159, AUDIT REPORT: THE SOCIAL SECURITY ADMINISTRATION'S HEARINGS BACKLOG AND AVERAGE PROCESSING TIMES 7 (2023), https://oig.ssa.gov/assets/uploads/a-05-22-51159r.pdf.

333. Some courts that issued decisions conflicting with *Carr I* dismissed these concerns because the impact of their holdings were limited to several hundred pending court cases that had been timely filed in which a *Lucia* challenge to SSA ALJs had been raised. *See* Ramsey v. Comm'r, SSA, 973 F.3d 537, 547 n.5 (6th Cir. 2020); Cirko *ex rel.* Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 159 (3d Cir. 2020). But the prospective impact of *Carr II*'s holding is potentially staggering if it allows any *future* structural objections to SSA proceedings to be raised after the conclusion of these proceedings.

not only the public fisc but also other benefits applicants who must wait longer to have their own proceedings heard and decided. Early error correction also conserves judicial resources by avoiding unnecessary and piecemeal litigation because it eliminates the possibility of a court having to consider Appointments Clause objections and having to later encounter a separate action challenging the merits of the agency's ruling on the resulting do-over if it were to remand based on the Appointments Clause issue. By correcting any constitutional error during the pendency of administrative proceedings, the agency can moot any constitutional question, resulting in a single appeal that only requires a court to address the agency's merits ruling. Accordingly, notwithstanding the Supreme Court's reversal of the Tenth Circuit's exhaustion ruling in *Carr I* based in part on the constitutional nature of the claim at issue, the administrative and legal background of the case demonstrate that the benefits normally associated with exhaustion could have applied had the constitutional claim been raised administratively.

3. *Smith*: Preventing Sandbagging and Allowing the Agency to Apply Expertise, Grant Relief, and Compile a Record on Structural Claims and a Facial Challenge to a Statute

In *Smith*, the Tenth Circuit held that an issue exhaustion mandate applied to a structural constitutional challenge concerning an ALJ who presided over a Federal Reserve Board enforcement proceeding, and the court consequently refused to consider the constitutional issue because it had not been raised before the Board.[334] Despite the Supreme Court's prior reversal of the Tenth Circuit's holding on prudential issue exhaustion of similar claims in *Carr I* three years earlier and the Court's recent disparagement of agency adjudication of structural claims in *Axon*, a unanimous panel refused to consider the petitioners' constitutional arguments. Instead, it reaffirmed the Tenth Circuit's pre-*Carr* reasoning that unexhausted "structural challenges 'have no special entitlement to review' on appeal from the agency."[335]

A review of *Smith*'s procedural history—before both the Board and the Tenth Circuit—as well as the relevant legal background reveals the presence of multiple advantages typically associated with exhaustion, lending further support to the Tenth Circuit's presumption that exhaustion is just as beneficial when litigants raise constitutional claims. These benefits include (1) the agency's ability to grant relief at an early stage that can completely prevent the alleged constitutional harm, (2) the prevention of costly and potentially manipulative sandbagging by litigants, (3) the potential relevance of an agency's familiarity with the statutes it administers to resolving even seemingly generic structural challenges, and (4) the

334. Smith v. Bd. of Governors of Fed. Rsrv. Sys., 73 F.4th 815, 822–24 (10th Cir. 2023).
335. *Id.* at 823 (quoting Turner Bros., Inc. v. Conley, 757 F. App'x 697, 700 (10th Cir. 2018)).

agency's ability to develop a record to resolve multiple factual disputes relevant to these challenges.

The *Smith* petitioners failed to administratively raise the constitutional arguments they later attempted to raise in the Tenth Circuit despite vigorously litigating various nonconstitutional procedural and merits issues at the agency level. The case concerned an administrative Federal Reserve Board enforcement proceeding seeking to bar two bank officials from the banking industry based on allegations that they had misused a bank's trade secrets to assist a rival bank that had offered them employment.[336] The Board initiated the proceeding in December 2018 and referred it to an ALJ for adjudication.[337] The parties litigated the administrative proceeding over a period of twenty-seven months.[338] During this time, the ALJ adjudicated dozens of motions that addressed procedural, discovery, and evidentiary matters, issued a partial summary adjudication ruling in excess of 100 pages, held a five-day trial involving hundreds of exhibits, and authored a 127-page recommended decision following the trial.[339] In addition, early in the proceeding, the employees sought interlocutory review of a claim that the Board lacked statutory authority under the Federal Deposit Insurance Act to proceed against them.[340] They did so pursuant to a procedural rule providing for discretionary Board review of interlocutory ALJ rulings on dispositive legal issues which there are substantial grounds for disagreement.[341] The Board denied their request because it determined that there were no grounds for substantial disagreement.[342] Pursuant to an issue exhaustion requirement in the Board's procedural rules,[343] the employees also filed a seventy-seven-page brief raising nine distinct exceptions to the ALJ's recommended decision on procedural, evidentiary, and substantive grounds.[344] The Board rejected these exceptions in a sixty-four-page decision and ordered the employees barred from the banking industry,[345] prompting their petition to the Tenth Circuit. At no point during the administrative proceedings, however, did the employees raise any

336. Smith, No. 18-036-E-I, 2021 WL 1590337, at *1 (F.R.B. Mar. 24, 2021), *aff'd*, 73 F.4th 815 (10th Cir. 2023).

337. Notice of Intent to Prohibit ¶ 32, Smith, No. 18-036-E-I, 2021 WL 1590337 (F.R.B. Mar. 24, 2021), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20181213a1.pdf.

338. *See* Certified Index of Administrative Record at R2, *Smith*, 73 F.4th 815 (No. 21-9538).

339. *See generally id.* at R2–29; Smith, No. 18-036-E-I, 2020 WL 13157336 (F.R.B. Apr. 13, 2020), *aff'd*, 2021 WL 1590337 (F.R.B. Mar. 24, 2021), *aff'd*, 73 F.4th 815 (10th Cir. 2023) (providing the pretrial materials, trial materials, and final judgment).

340. *Smith*, 2021 WL 1590337, at *1, *7.

341. *See* 12 C.F.R. § 263.28 (2024).

342. Determination on Requests for Interlocutory Appeal, Smith, No. 18-036-E-I (F.R.B. Mar. 9, 2020).

343. 12 C.F.R. § 263.39 (2024) (requiring parties to file exceptions to ALJ rulings or risk waiver).

344. *See* Administrative Record, *supra* note 338, at R39–R127 (Parts Designated by the Parties).

345. *See id.* at R128–86.

constitutional objection to the proceeding or to the authority of the presiding ALJ.[346]

Instead, in their opening brief to the Tenth Circuit, submitted more than two and a half years after the Board assigned the matter to the ALJ, the petitioners—who did not challenge the merits of the agency's ruling[347]—for the first time attacked the constitutionality of what they contended were the ALJ's multiple layers of for-cause removal protections.[348] Relying on the Supreme Court's 2010 holding in *Free Enterprise Fund*,[349] they demanded a remand for new "proceedings before an adjudicator accountable to the President."[350] They argued that ALJs are subject to government-wide civil service for-cause removal protections that interfere with the President's ability to hold them accountable.[351] They also argued that ALJs at the Federal Reserve Board are even more protected because the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[352] requires federal bank regulatory agencies to establish a shared pool of ALJs,[353] and the interagency agreement governing this pool requires all agencies to agree on "[a]ll decisions" affecting the arrangement,[354] which the petitioners claimed prevented the Board from unilaterally removing its ALJs.[355] After the Board's opposition pointed out that the Supreme Court's recent decision in *Collins v. Yellen*[356] barred relief from the actions of a properly appointed official allegedly subject to unconstitutional removal protections absent an actual showing of harm,[357] the petitioners raised yet another new structural argument in their reply brief. They sought to recast their constitutional claim as an Appointments Clause objection to the presiding ALJ[358] and questioned whether the Board had actually appointed him.[359]

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346. Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 823 (10th Cir. 2023) (noting concession to this effect at oral argument).

347. Although the petitioners raised their objection to the Board's statutory jurisdiction that had been the subject of their administrative interlocutory appeal before the court, they did not contest the Board's merits findings that they had committed a breach of fiduciary duty and participated in unsafe and unsound practices while employed at a depository institution. *Id.* at 818.

348. Opening Brief for the Petitioners at 7, Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815 (10th Cir. 2023) (No. 21-9538).

349. *Id.* at 12–13, 17.

350. *Id.* at 17.

351. *Id.* at 16–17 (citing 5 U.S.C. § 7521(a)).

352. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

353. *Id.* § 916(1), 103 Stat. 486.

354. Opening Brief for the Petitioners, *supra* note 348, at 5–6.

355. *Id.*

356. 594 U.S. 220 (2021).

357. Brief for Respondent at 33–36, Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815 (10th Cir. 2023) (No. 21-9538) (citation omitted).

358. *See, e.g.*, Corrected Reply Brief for Petitioners at 1–2, *Smith*, 73 F.4th 815 (No. 21–9538) (citation omitted) ("The Board argues that because Petitioners did not raise an exception under the Appointments Clause to the ALJ's recommended decision, that their argument is waived."); *id.* at 7 (citation omitted) ("The Board alleges that . . . the mere capability of elect[ing to remove an ALJ by replacing him with a different adjudicator] precludes an Appointments Clause argument.").

359. *Id.* at 10–11.

Smith highlights the multiple advantages typically associated with exhaustion that can apply even when litigants raise seemingly generic structural constitutional claims or facial constitutional challenges to statutes. *Smith* was a case where the agency could have taken early corrective action that might have wholly prevented the alleged constitutional injury had the Appointments Clause issue been brought to its attention. But the petitioners belatedly attempted to raise the issue—which they claimed was controlled by a decade-old Supreme Court precedent—at a point when it was too late for the Board to take such corrective action, following the expenditure of significant resources over a period of years in connection with administratively litigating and adjudicating the action. Therefore, permitting such belated objections to proceed might encourage the type of prejudicial sandbagging that exhaustion mandates are intended to prevent. And despite the seemingly generic nature of the petitioners' structural claims and the supposedly facial nature of their challenge to government-wide statutory civil service tenure protections, the Board had specialized legal expertise that was relevant to determining if its ALJs were even subject to removal protections in the first place, as well as the ability to develop a record to address multiple factual assertions that the petitioners made in support of their constitutional arguments.

The Board could have taken early corrective action had the matter been raised administratively, which, apart from preventing the alleged constitutional injury, would have conserved the resources of the parties and the court. The petitioners' attempt to obtain a remand by objecting for the first time when it was too late for the Board to do so thus highlights the risk of prejudicial sandbagging that issue exhaustion mandates aim to prevent.[360] As the Tenth Circuit noted, the Board—whose members are a "'Hea[d]' of a 'Department[]'" in whom Congress may constitutionally vest authority to appoint inferior officers[361]—could have made a constitutionally valid appointment had the issue been brought to its attention.[362] And notwithstanding the seemingly facial nature of the challenge to ALJ removal protections in the civil service laws, if the Board had determined that its ALJs were subject to constitutionally invalid double-layer removal protections, then it could have also exercised its prerogative under the APA to adjudicate the matter itself or assign it to one of its members to adjudicate,[363] as at least one other agency had previously done.[364] This action would have ensured that the matter would be adjudicated by officials

360. *See supra* note 11 and accompanying text.

361. U.S. CONST. art. II, § 2, cl. 2; Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 512–13 (2010).

362. Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 823 (10th Cir. 2023) (indicating that the Board "could remedy the[] Appointments Clause challenge[]"); *see also* 5 U.S.C. § 3105 (authorizing agencies to appoint ALJs).

363. *See* 5 U.S.C. § 556(b)(1)–(2) (2024).

364. Inova Health Sys. Found., No. 9326, 2008 WL 2307161, at *1, *2 n.2 (F.T.C. May 29, 2008) (citing cases), *dismissed on other grounds*, 2008 WL 2556051 (F.T.C. June 17, 2008).

subject to only one layer of removal protections.[365] Moreover, as the Tenth Circuit noted, the Board's procedural rules permitted interlocutory appeals to the Board on dispositive legal issues,[366] allowing the Board to take prompt remedial action to address any purported infirmity related to the presiding ALJ at the outset of the administrative process. And the panel noted that the petitioners—who had in fact utilized these rules to pursue immediate review of their nonconstitutional collateral attack on the Board's proceedings[367]—conceded that nothing precluded them from seeking relief from the Board on their constitutional claim.[368] Countenancing their attempt to object for the first time based on judicial precedents issued years earlier, after the Board had ruled against them on the merits and once it was too late for the Board to take corrective action, would have encouraged sandbagging by unsuccessful litigants aiming to obtain the proverbial second bite at the apple. It would have also resulted in a tremendous waste of agency resources by requiring a complete do-over of the wide-ranging and lengthy administrative litigation.

Moreover, the Board could have applied specialized legal expertise to address a number of nonconstitutional legal questions that were relevant to resolving the constitutional claims or assessing whether any relief was available based on these claims. In particular, the Board's expertise was relevant to assessing if Board ALJs even enjoyed removal protections in the first place—which it argued in court was not the case[369]—thereby potentially mooting the constitutional removal objection. Pursuant to Tenth Circuit precedent, the Board, as one of the agencies charged with implementing FIRREA's ALJ pool requirement,[370] arguably had "special competence" warranting deference to its construction of the resulting interagency agreement,[371] which underlay a significant portion of the petitioners' constitutional argument concerning purported limitations on removal. The Board could have also applied specialized expertise when determining whether the plenary authority over personnel matters and exemption from government-wide civil service laws granted to it under its enabling act[372] made any civil service removal protections otherwise available to ALJs inapplicable to ALJs employed by the Board,[373] which was yet another

365. *See* 12 U.S.C. § 242 (2024) (making Board members directly "remov[able] for cause by the President").

366. *Smith*, 73 F.4th at 823 (citing 12 C.F.R. § 263.28 (2023)).

367. *See supra* notes 340–342 and accompanying text.

368. *Smith*, 73 F.4th at 823.

369. Brief for Respondent, *supra* note 357, at 19–25.

370. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 916, 103 Stat. 183, 486–87 (1989).

371. Nw. Pipeline Corp. v. FERC, 61 F.3d 1479, 1486 (10th Cir. 1995) (holding that when an agency acts "within the scope of the agency's Congressionally delegated powers . . . we [should] defer to the [agency's] interpretation of [contractual] language").

372. 12 U.S.C. § 244 (2024) (stating that Board employment "shall be governed solely by" the Federal Reserve Act).

373. *Cf.* Rules Regarding Equal Opportunity, 66 Fed. Reg. 7703, 7703 (proposed Jan. 25, 2001) (to be codified at 12 C.F.R. pt. 268) (citation omitted) ("Section 10(4) of the Federal Reserve Act

issue the parties disputed.[374] And as an agency charged with implementing FIRREA, the Board potentially had expertise concerning whether FIRREA's ALJ pool requirement limited the Board's appointment or removal discretion with respect to ALJs. To the extent that this provision unconstitutionally did so, this expertise might have also allowed the Board to assess whether the provision could be severed.[375]

Lastly, the petitioners' constitutional arguments raised various factual questions on which the Board could have developed a record for review. Their assertion that the Board had not actually exercised its constitutional authority as head of department to appoint the ALJ presiding over their proceeding was an issue that often requires factual development to resolve.[376] The petitioners also asserted that "[a]s a practical matter," the Board could not exercise any prerogative it might enjoy under its enabling act or the FIRREA agreement to remove an ALJ serving as a Board adjudicator without causing enforcement proceedings to "grind to a halt."[377] To the extent this contention were legally relevant, the Board could have gathered evidence concerning its enforcement caseload and the availability of Board members or an ALJ detailed from another agency[378] to "preside at the taking of evidence" in lieu of an ALJ from the FIRREA pool.[379] And the determination of whether the alleged removal protections caused actual harm, as required to obtain relief under *Collins*, is typically fact-intensive[380] and thus a subject on which the Board could have developed a helpful record for judicial review.

Consequently, *Smith* further illustrates the reasonableness of the Tenth Circuit's presumption that the typical benefits associated with

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(Act), 12 U.S.C. 244, provides that the 'employment, compensation, leave, and expenses' of Board employees is governed solely by that Act rather than by the laws governing federal employers generally."). The Board also argued that the presiding ALJ was not in fact its employee because pursuant to the interagency agreement he was employed by the Federal Deposit Insurance Corporation and that whatever statutory protections the ALJ enjoyed concerning removal from *federal employment* therefore did not impact on the Board's ability to "remove" him from serving as an adjudicator in *Board* proceedings. Brief for Respondent, *supra* note 357, at 19–22.

374. *Compare* Opening Brief for the Petitioners, *supra* note 348, at 17 (asserting that the Board's ALJ was protected from removal under the government-wide civil service laws pursuant to 5 U.S.C. § 7521(a)), *with* Brief for Respondent, *supra* note 357, at 22 n.10 (asserting that to the extent the ALJ was a Board employee, the Board's enabling act rendered any removal protections that ALJs otherwise enjoy under § 7521(a) inapplicable).

375. *See* Gelblum, *supra* note 14, at 66–67.

376. *See, e.g.*, Rodriguez v. Dep't of Veterans Affs., 8 F.4th 1290, 1308–09 (Fed. Cir. 2021) (refusing to consider an Appointments Clause objection because "Mr. Rodriguez has not made a record that enables us to determine [the issue]. In particular, Mr. Rodriguez failed to offer evidence as to how the Board's administrative judges generally, and the administrative judge in this case in particular, were appointed."); Timbervest, LLC, No. 3-15519, 2015 WL 3398239, at *1 (S.E.C. May 27, 2015) (ordering discovery concerning how ALJs were appointed in connection with an Appointments Clause challenge), *vacated per stipulation*, No. 3-15519, 2018 WL 6722760 (Dec. 21, 2018).

377. Petitioners' Corrected Reply Brief, *supra* note 358, at 8–9.

378. *See* 5 U.S.C. § 3344 (2024) (permitting interagency details of ALJs to address staffing shortfalls).

379. *Cf. id.* § 556(b) (specifying officials who may "preside at the taking of evidence").

380. *E.g.*, Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1137 (9th Cir. 2021) (citation omitted) (denying relief for a claim that an adjudicator was improperly shielded from removal because no evidence of any resulting harm was presented to the agency).

exhaustion may apply with equal force when litigants raise constitutional claims, including structural constitutional claims and purportedly facial challenges to statutes. In *Smith*, proper exhaustion could have allowed the agency to take early corrective action, prevented potentially prejudicial sandbagging, allowed the agency to apply relevant expertise to threshold legal questions relevant to constitutional claims at issue, and permitted the development of a factual record for appellate review.

IV. STRATEGIC IMPLICATIONS OF THE TENTH CIRCUIT'S APPROACH TO EXHAUSTION OF CONSTITUTIONAL CLAIMS

The Tenth Circuit's general reluctance to treat constitutional claims differently for purposes of administrative exhaustion mandates has important strategic ramifications for agencies and litigants engaged in or potentially facing litigation in the Tenth Circuit challenging agency action on constitutional grounds. Both litigants and agencies subject to the Tenth Circuit's jurisdiction should consider the implications of its jurisprudence on exhaustion of constitutional claims well before any controversy reaches the courts. At the administrative stage, litigants who may intend to raise constitutional claims should carefully ensure compliance with exhaustion mandates to avoid dismissal of their claims—potentially without an opportunity to refile—or potential waiver of their claims on judicial review of the agency's actions. And agencies wishing to enforce exhaustion mandates should consider the potential hazards of adopting administrative precedents and policies that may undermine the Tenth Circuit's starting presumption that exhaustion is beneficial even when litigants raise constitutional claims. In litigation, both sides should prepare to make particularized arguments about why an administrative scheme can or cannot adequately address a particular claimant's constitutional arguments.

An obvious implication of the Tenth Circuit's reluctance to exempt constitutional claims from exhaustion mandates is that litigants intending to pursue these claims or at least wanting to leave open the possibility of doing so should scrupulously comply with any applicable exhaustion mandate to avoid forfeiture. Thus, parties to administrative proceedings before an agency should be sure to proactively identify and timely raise any constitutional argument administratively in order preserve it for subsequent judicial review. Although attorneys who specialize in administrative litigation falling under an agency's jurisdiction may potentially overlook collateral constitutional arguments that are not tied to the substance of the merits, in the Tenth Circuit, they do so at their clients' peril. Litigants should be sure to timely raise such arguments administratively regardless of any express exhaustion mandate, because even in the absence of an express issue exhaustion requirement, the Tenth Circuit is more likely than other circuits to require prudential exhaustion of these challenges.[381]

381. *See, e.g.*, *Carr I*, 961 F.3d 1267, 1275 n.7 (10th Cir. 2020) ("[W]e hold exhaustion of Appointments Clause challenges is necessary even without a statutory or regulatory requirement."), *rev'd sub nom. Carr II*, 593 U.S. 83 (2021).

Similarly, mere uncertainty about the agency's ability or willingness to address a constitutional argument is a risky basis for not exhausting the claim if the Tenth Circuit will ultimately have appellate jurisdiction over the matter because the court is relatively unforgiving when litigants fail to exhaust based on such uncertainty.[382] Litigants should therefore make sure to identify and timely raise any potential constitutional arguments at the administrative stage and do so with sufficient specificity rather than making general allegations.[383]

Apart from taking action to avoid forfeiture due to failure to comply with issue exhaustion mandates while litigating before an agency, litigants may also need to consider whether they must proceed before an agency in the first place. A failure to comply with exhaustion of remedies mandates by suing in court without having first pursued administrative remedies can lead to forfeiture should it belatedly turn out, after the time to pursue administrative remedies has run out, that administrative exhaustion is required.[384] For example, a litigant who pursues a court action instead of timely initiating administrative proceedings under the statutory scheme at issue in *Thunder Basin I*, which set a thirty-day deadline for seeking relief from the agency,[385] may find all relief foreclosed if the court holds that parties must pursue administrative proceedings prior to suing. Parties that wish to litigate constitutional challenges to agency action in the Tenth Circuit would therefore do well to avail themselves of any available administrative remedies. And when proceeding before the responsible agency, these parties should explore, at an early stage, whether they may wish to raise any constitutional claims and take appropriate action to preserve these claims for judicial review.

For their part, agencies that are regular litigants in the Tenth Circuit would do well to consider how their procedural policies and precedents may factor into the Tenth Circuit's distinct approach to exhaustion of constitutional claims. In contrast to many circuits that simply presume that broad classes of constitutional claims are not suitable for administrative resolution and therefore need not be exhausted,[386] the Tenth Circuit conducts a more nuanced analysis to determine if exhaustion is actually futile or prejudicial.[387] This makes the agency's demonstrated willingness and ability to grant relief on constitutional claims—or lack thereof—highly

382. *See supra* notes 100–109 and accompanying text.

383. *Cf.* Chairez-Perez v. Holder, 570 F. App'x 779, 782 (10th Cir. 2014) (generalized assertion of "due process" violation at the administrative stage did not suffice to preserve a due process challenge to agency action); *see also* Garcia-Carbajal v. Holder, 625 F.3d 1233, 1237 (10th Cir. 2010) (stating that a petitioner "must present the same specific legal theory to the [agency] before he or she may advance it in court").

384. Hopkins v. Sparks, No. 91-1304, 1992 WL 19865, at *1 (10th Cir. Feb. 5, 1992) (holding that failure to exhaust remedies prior to suing required dismissal of a complaint, despite it being "too late now for plaintiff to exhaust the administrative remedies," and that the resulting forfeiture did not provide grounds "to permit us to review plaintiff's claim on its merit[]").

385. *See* 30 U.S.C. § 815(a), (d) (2024).

386. *See supra* notes 61–65 and accompanying text.

387. *See supra* notes 66–76 and accompanying text.

relevant to determining if exhaustion is required. For example, agency litigators often attempt to argue that administrative adjudicators should deny relief on constitutional claims because the agency lacks authority to resolve constitutional questions,[388] and adjudicators at a number of agencies have categorically refused to consider such claims.[389] These practices may provide the agency with an easy way to avoid granting relief in individual cases, but they may backfire—even when applied to cases subject to review in other circuits—when the agency subsequently seeks to enforce exhaustion mandates against litigants raising constitutional claims in the Tenth Circuit. In such a scenario, these agency precedents may provide grounds for rebutting the Tenth Circuit's presumption that administrative exhaustion is not futile simply because constitutional claims are involved. Thus, the Tenth Circuit has refused to require exhaustion of facial challenges to statutes before the Board of Immigration Appeals, which had previously claimed it could not resolve similar constitutional claims[390] but required exhaustion of a facial challenge to a statute before the Mine Safety and Health Review Commission partly because that agency previously claimed authority to resolve such challenges.[391] And given that the Tenth Circuit has cited favorably to agency procedural rules allowing for expedited proceedings or immediate appeal of interlocutory ALJ rulings to the agency head, thereby facilitating the ability to grant immediate relief on threshold constitutional objections to elements of the administrative process itself,[392] adopting these or other rules allowing for timely relief on collateral constitutional objections may increase the likelihood that the Tenth Circuit will require exhaustion of such claims. Thus, agencies that hope to persuade the Tenth Circuit to subject litigants who raise constitutional claims to exhaustion mandates should consider whether their precedents and policies tend to confirm, rather than undermine, the Tenth Circuit's general presumption that exhaustion of such claims is neither futile nor prejudicial.

Lastly, given the Tenth Circuit's nuanced approach to exhaustion of constitutional claims, parties on both sides of litigation implicating exhaustion of such claims should prepare to make specific arguments about the benefits or drawbacks of exhausting a particular constitutional claim through the particular administrative scheme at issue. The Tenth Circuit has generally refused to indulge categorical presumptions that agencies

388. *E.g.*, Creighton, No. SW030133, 2005 WL 1125361, at *1, *21 (N.O.A.A. Apr. 20, 2005) ("Agency counsel argues that it is not appropriate for this judge to rule on the Constitutionality of statutory provisions in an administrative hearing . . . ."); Sec'y of Lab., MSHA v. Richardson, 3 F.M.S.H.R.C. 8, 18 (1981) ("The Secretary argues . . . that the Commission lacks the authority to decide the constitutional question raised.").

389. *See, e.g.*, authorities cited *supra* note 180.

390. *See* discussion *supra* note 66.

391. *See supra* notes 91–93 and accompanying text.

392. Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 823 (10th Cir. 2023) (citing 12 C.F.R. § 263.28 (2023)); *Thunder Basin I*, 969 F.2d 970, 976 (10th Cir. 1992) (citing 29 C.F.R. § 2700.52 (1992)).

lack expertise or authority to resolve constitutional claims[393]—even when the Supreme Court has appeared to endorse such presumptions in dicta or reasoning that fell short of an express holding[394]—describing these assertions as "counter to our precedent[s]."[395] In contrast, the Tenth Circuit has been receptive to arguments based on specific indicia that an administrative scheme can or cannot effectively address a particular type of constitutional claim, such as agency rulings addressing or refusing to address similar constitutional claims[396] or procedural rules providing for conclusive resolution of constitutional objections to the agency's procedural scheme at an early stage.[397] And because the Tenth Circuit is generally reluctant to treat constitutional claims differently than other claims for purposes of administrative exhaustion, typical arguments in favor of exhaustion—such as the availability of prompt relief at the agency level[398]—as well as typical arguments against requiring exhaustion—such as irreparable harm from delayed judicial review[399]—remain highly relevant when a constitutional claim is at issue.

CONCLUSION

In contrast to most other courts of appeals, the Tenth Circuit is relatively reluctant to treat constitutional claims differently for purposes of administrative exhaustion mandates. Consequently, the Tenth Circuit tends to apply exhaustion mandates to these claims absent a particularized showing of futility or undue burden, in two instances causing a circuit split that the Supreme Court subsequently resolved. Notwithstanding the disparagement of administrative exhaustion of constitutional claims in some Supreme Court rulings, the Tenth Circuit's approach comports with the Court's precedents because the Tenth Circuit has applied the Court's relatively modest holdings on the issue while refraining from relying on broader reasoning or dicta disparaging agency adjudication of constitutional claims as grounds for declining to require exhaustion in other situations. The Tenth Circuit's presumption that the benefits of exhaustion can apply with equal force to constitutional claims is reasonable, as demonstrated by the record as well as the legal and administrative background of several significant Tenth Circuit cases concerning exhaustion of constitutional claims. Given this presumption, both agencies and nonagency litigants would do well to consider the strategic implications of the Tenth Circuit's nuanced approach to administrative exhaustion of constitutional claims both at the administrative stage and when litigating an exhaustion question in the Tenth Circuit.

393. *See supra* Section I.A.
394. *See supra* Sections I.B, II.A.
395. *Carr I*, 961 F.3d 1267, 1275 (10th Cir. 2020).
396. *See supra* text accompanying notes 390–391.
397. *See supra* text accompanying note 392.
398. Woodford v. Ngo, 548 U.S. 81, 89 (2006).
399. McCarthy v. Madigan, 503 U.S. 140, 147 (1992).