Nos. 19-1442, 20-105

In The
Supreme Court of the United States

WILLIE EARL CARR, *et al.*,
Petitioners,
v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

JOHN J. DAVIS, *et al.*,
Petitioners,
v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH & TENTH CIRCUITS

AMICI CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE & CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether claimants seeking disability benefits under the Social Security Act must exhaust Appointments Clause challenges before the Administrative Law Judge as a prerequisite to obtaining judicial review.

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INTERESTS OF *AMICI CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy a shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A.

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[1] Pursuant to Rule 37, *amici* state that both parties consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than the *amici curiae*, their members, or their counsel financed the preparation or submission of this brief.

Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

Amici are particularly concerned by the courts' invoking judicial-policy concerns to decline consideration of important legal issues that litigants present concerning the structure and authority of the administrative state. Our nation's constitutional structure depends on the judiciary to prevent administrative agencies from exceeding their statutory and constitutional bounds—regardless of whether a litigant raised such issues before the agency.

STATEMENT OF THE CASE

A. Administrative Exhaustion

In simple terms, "administrative exhaustion" refers to a requirement that litigants must pursue any legal arguments in support of their claim throughout the prescribed administrative appeals process until they receive a final decision at the highest level of the administrative hierarchy. Exhaustion, however, is not a single rule but an umbrella covering a set of related rules that courts sometimes apply when an administrative action reaches the judiciary. Exhaustion of "remedies" refers to rules encompassing ripeness and finality, akin to "judicial rules sharply limiting interlocutory appeals." *McKart v. United States*, 395 U.S. 185, 194 (1969). Relatedly, the doctrine of "issue exhaustion" can limit a court's review to only those issues raised

before or decided by the administrative agency. See *Sims v. Apfel*, 530 U.S. 103, 108 (2000).

To complicate matters further, the requirements under the exhaustion umbrella may come from any one of three distinct sources: (1) a statute; (2) an agency rulemaking process; or (3) a court-created requirement. See *Sims*, 530 U.S. at 108; *McKart*, 395 U.S. at 193–194. Depending on its source, an exhaustion requirement may be subject to different exceptions.

Statutorily imposed exhaustion "stands on a different footing" than its counterparts because, when "Congress sets the rules," courts can craft exceptions "only if Congress wants them to." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). By contrast, courts apply an agency's rule-based exhaustion requirement like other claim-processing rules, "when a party properly invokes them." *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 747 (6th Cir. 2019) (citing *Union Pac. R.R. Co. v. Locomotive Eng'rs*, 558 U.S. 67, 81 (2009)). Not only is rule-based exhaustion subject to express waiver or forfeiture "if the party asserting the rule waits too long to raise the point," *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004), but a court may also excuse the rule for "equitable considerations," *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 22 (2017), or to avoid "a plain miscarriage of justice." *Hormel v. Helvering*, 312 U.S. 552, 558 (1941).

This case concerns the third category of exhaustion: judge-made exhaustion requirements. Created for purely prudential reasons (and thus also known as "prudential exhaustion"), judge-made exhaustion rests solely within the courts' discretion. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Even

though courts sometimes describe prudential exhaustion as a generally applicable rule, it "remain[s] amenable to judge-made exceptions." *Ross*, 136 S. Ct. at 1857. Consequently, prudential exhaustion applies less rigidly than its statutory and rule-based counterparts, and it is subject to the most exceptions.

B. Administrative Appeals Within the Social Security Administration

Social Security claimants who seek benefits and are dissatisfied with the determination of the Social Security Administration ("SSA") proceed through a "four-step process" within that agency. *Smith v. Berryhill*, 139 S. Ct. 1765, 1772 (2019). The process begins with the SSA's initial determination and the agency's reconsideration thereof. 20 C.F.R. §§ 404.406, 404.907. Dissatisfied claimants may then have their claim heard by an Administrative Law Judge ("ALJ") within the SSA. *Id.* § 404.929. The fourth step, atop the agency's internal review hierarchy, is to seek discretionary review by the SSA's Appeals Council. *Id.* § 404.987. After exhausting these administrative remedies, claimants may then seek review in an Article III court. 42 U.S.C. § 405(g); see also *Smith*, 139 S. Ct. at 1772.

The purpose of SSA's administrative review process is to determine a claimant's right to benefits under the Social Security Act. 20 C.F.R. § 404.900(a). SSA describes the process as "informal" and "non-adversarial." *Id.* § 404.900(b). The ALJ serves as a neutral decision-maker and holds an "inquisitorial" hearing "to develop facts for and against a benefit claim." 85 Fed. Reg. 73,138, 73,140 (Nov. 16, 2020). Because the Appeals Council grants review in only

about 15% of cases, the ALJ's decision often becomes the final agency decision. SSA, Annual Data for Appeals Council Requests for Review Average Processing Time (Oct. 3, 2018).

No statute or regulation requires claimants to raise all objections during the Social Security proceedings or else forfeit those claims for judicial review. This Court has already held that claimants need not raise all issues before the Appeals Council to preserve those issues for judicial review. *Sims v. Apfel*, 530 U.S. 103 (2000). This case is about whether a similar rule excusing issue exhaustion also applies to at least some types of legal issues not raised before an SSA ALJ.

C. The Eighth & Tenth Circuits Closed the Courthouse Doors on the Petitioners' Appointments Clause Challenges

This Court held in *Lucia v. SEC* that ALJs within the Securities & Exchange Commission were "Officers of the United States" who must be—but were not—appointed by the president, a court of law, or a head of a department. 138 S. Ct. 2044, 2055 (2018). The Court remanded Mr. Lucia's case for a new hearing before a different, properly appointed ALJ. *Ibid.*

Prior to *Lucia*, Social Security staff members selected the agency's ALJs with no involvement by the SSA Commissioner. See *O'Leary v. OPM*, 708 Fed. App'x 669, 670 (Fed. Cir. 2017). Then, about a month after the *Lucia* decision, the Commissioner of Social Security "ratified" the appointment of all Social Security ALJs and Appeals Council judges. See 84 Fed. Reg. 9,583 (Mar. 15, 2019). SSA also decided that in any pending administrative appeals from ALJ decisions in which the claimants had raised an

Appointments Clause challenge before the ALJ *or* before the Appeals Council, the agency would vacate the decisions and remand for a new ALJ hearing. *Ibid*. For all those claimants who had *not* raised the issue during the administrative appeals process, however, SSA determined that those claimants would remain bound by the final decision of the ALJ, even though that ALJ had sat in violation of the Appointments Clause. SSA reached this conclusion despite the fact that—even after this Court granted review in *Lucia*—SSA's Office of General Counsel had instructed its ALJs and Appeals Council judges not to discuss or make any findings related to any Appointments Clause challenges. *Davis* C.A. App. 61–66.

Petitioners in this case fall into that category of Social Security claimants who exhausted their administrative remedies within the SSA before this Court issued its decision in *Lucia* and who raised an Appointments Clause challenge in court but not during the administrative process. See *Carr* Pet. App. 32a–33a, 58a; *Davis* Pet. App. 2a, 10a, 15a. The United States Courts of Appeals for the Eighth and Tenth Circuit both ruled that Petitioners forfeited the Appointments Clause issue by not raising it before the SSA. Each court refused to exercise its discretion to consider the claims. According to the Tenth Circuit, the claimants' "failure to exhaust their Appointments Clause challenges deprived the SSA of its interest in internal error-correction." *Carr* Pet. App. 21a. For its part, the Eighth Circuit imposed an issue-exhaustion rule even though the challenge presented an "important" and "fundamental" issue that Social Security ALJs lacked authority to remedy. *Davis* Pet. App. 6a–8a.

This Court granted review to consider whether it was proper to impose an issue-exhaustion requirement for an Appointments Clause challenge.

SUMMARY OF ARGUMENT

No federal law prohibits Petitioners and similarly situated Social Security claimants from raising a claim in federal court that they did not raise before a Social Security ALJ. The federal government nonetheless asks this Court to adopt such a forfeiture rule for prudential reasons, even if the claimant is asserting a constitutional right.

Prudential exhaustion rests solely within the Court's discretion, but that discretion is cabined by the need for a prudential rule. *Degen v. United States*, 517 U.S. 820, 829 (1996). Like other prudential rules, judge-made exhaustion is supposed to promote judicial efficiency, provide courts and litigants the benefits of an agency's expertise, and compile a record for judicial review. But the lower courts' refusal to consider Petitioners' constitutional claims did not advance any of those purposes. Whether a Social Security ALJ sits in violation of the Appointments Clause does not depend on agency expertise, discretion, or fact-finding.

This case demonstrates that the lower courts need clear guidance about when—and if—it is prudent for courts to decline to exercise their jurisdiction over legal issues that do not depend on an agency's expertise, discretion, or fact-finding. *Amici* urge the Court to adopt an approach to prudential exhaustion that is limited to the rule's underlying purposes. The more expansive version of issue exhaustion that courts currently apply lacks any textual basis, often

exceeds the courts' inherent authority, and is not justified by any prudential concerns.

Because no prudential basis supporting an exhaustion requirement was present in these cases, this Court should reverse the judgments below and remand the cases for further proceedings.

ARGUMENT

I. The Court Should Limit the Application of Prudential Exhaustion

Unlike statutory or rule-based exhaustion requirements, prudential exhaustion "rests less on a statute's text and structure, and more on policy grounds unmoored from those sources[,]" such as "avoiding 'interruption' of agency autonomy, and promoting 'judicial efficiency.'" *Island Creek*, 937 F.3d at 749 (quoting *McKart*, 395 U.S. 194–195; and *McCarthy*, 503 U.S. at 145). Only in limited circumstances, however, will these policy concerns outweigh a litigant's right to a judicial determination of a legal issue on the merits. The Court should retether prudential exhaustion to the bases that supported the rule's development in the first place.

A. The Courts Have Expanded Prudential Exhaustion Beyond the Purposes the Rule Purportedly Serves

Courts first developed prudential exhaustion as a comity-based doctrine, while they grappled with the developing administrative state's role in our constitutional Republic. See *United States v. Abilene & S. Ry.*, 265 U.S. 274, 280–282 (1925) (considering administrative exhaustion to be an act of comity but nevertheless holding that a district court did not

abuse its discretion by denying a motion to dismiss that argued that the plaintiff failed to exhaust both administrative remedies and issues); *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 229 (1908) (Holmes, J.) (reasoning that our system gives "the last word upon constitutional questions to the courts" because "a citizen has a right to assume that the constitution will be respected" and "is not bound to be continually on the alert against covert or open attacks upon his rights in bodies that cannot finally take them away").

The "[m]ultiplication of federal administrative agencies and expansion of their functions to include adjudications[,]" had a "serious impact on private rights." *Sung v. McGrath*, 339 U.S. 33, 36–37 (1950), *modified*, 339 U.S. 908 (1950). It became incumbent on courts, as the "supervisors of the federal system" to "see to it that the law [wa]s enforced, not selectively but in all cases[.]" *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 40–41 (1952) (Douglas, J., dissenting). Initially, exhaustion requirements gave chancellors the discretion to *delay* equitable relief when a plaintiff "failed to pursue an available administrative remedy by which he might obtain the same relief." *Smith v. United States*, 199 F.2d 377, 381 (1st Cir. 1952); see also *United States v. Ill. Cent. R.R.*, 291 U.S. 457, 473 (1934) ("[A]dministrative process … must be completed before the extraordinary powers of a court of equity may be invoked[.]").

The Court, however, would eventually expand prudential exhaustion to become a general rule of "judicial administration," without ever providing the legal basis for doing so. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 155–156 (1998) (discussing the doctrine's expansion

through footnote 9 in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 n.9 (1938)). To date, the Court "has yet to identify the *source* of the judiciary's authority to impose [a] 'prudential' exhaustion mandate on top of a statutory scheme that does not expressly contain one." *Island Creek*, 937 F.3d at 747; see also Duffy, *Administrative Common Law*, 77 TEX. L. REV. at 156–157 (arguing that the Administrative Procedure Act rendered prudential exhaustion unnecessary and superfluous).

Over the last 110 years, the Court has offered several prudential reasons for requiring administrative exhaustion. Mainly, exhaustion is "grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *McCarthy*, 503 U.S. at 145. Exhaustion is meant to promote judicial efficiency, to "afford the parties and the courts the benefit of [the agency's] experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); see also *McKart*, 395 U.S. at 194 (noting that "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"); *Nat. Gas Pipeline Co. of Am. v. Slattery*, 302 U.S. 300, 310–311 (1937) (exhaustion ensures that litigants "resort in the first instance to the administrative tribunal" when an issue is "peculiarly within [the agency's] competence").

Despite these few, discrete policy goals underlying the rule, some courts have expanded prudential exhaustion into a blanket rule that applies without

regard for the doctrine's purpose. In many instances, the unexhausted issue that a plaintiff raises in court does not at all implicate an agency's expertise, discretion, or fact-finding. See *McKart*, 395 U.S. at 197–198 (distinguishing questions "solely [] of statutory interpretation" that "do[] not require any particular expertise" by the agency from those that "involve expertise or the exercise of discretion"). Without the impetus that supported the judge-made policy in the first place, courts can no longer support the rule's application on prudential grounds.

Take, for instance, the lower courts' reflexive application of prudential exhaustion to the Petitioners' Appointments Clause challenges in these cases. Whether a Social Security ALJ is an officer of the United States is not a matter within the SSA's expertise at determining benefit awards, does not involve any exercise of the agency's discretion, and does not depend on any factual development during the administrative process. Nor did the lower courts' refusal to consider Petitioners' claims promote judicial efficiency.

Whether or not Petitioners had raised their Appointments Clause challenge before the SSA made no practical difference. We know this for two reasons. First, the SSA's Office of General Counsel instructed Social Security ALJs and the Appeals Council judges not to discuss or make any findings related to any Appointments Clause challenges—even *if* raised by claimants. *Davis* C.A. App. 61–66. Second, even if the SSA *had* allowed Social Security ALJs to consider Appointments Clause challenges, such constitutional claims are "outside the [agency's] competence and expertise." *Free Enterprise Fund v. Public Co. Account. Oversight Bd.*, 561 U.S. 477, 491 (2010).

Regardless of whether Petitioners had challenged their ALJ's appointment before the ALJ, the Petitioners, the agency, and the court would all have been in the same position once the parties reached the district court. Punishing Petitioners for not raising an Appointments Clause challenge before the SSA, therefore, would not promote "good administration" as the Court suggested in *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952).

L.A. Tucker insisted that courts should require issue exhaustion even when an agency will inevitably reject an argument based on "a predetermined policy" because, the Court predicted, "[r]epetition" of the argument might *eventually* "lead to a change of policy." 344 U.S. at 37. For better or worse, agencies respond to the courts, not to futile constitutional challenges raised in an administrative context.[2] Cf. *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976) (describing it as "unrealistic to expect" that an agency would respond to a single claimant's constitutional objection). Agencies began to address the unconstitutional appointment of their ALJs only after this Court granted the petition for *certiorari* in *Lucia v. SEC*, after having repeatedly ignored the issue when raised by litigants. The record on appeal shows just that: the SSA's Acting Commissioner's ratification of ALJ appointments was a direct response to *Lucia*—not to the many claimants'

[2] If repetition of arguments matters, that would be a reason for Congress or agencies to require ALJs to consider these arguments when raised, but it is not a reason for courts to force litigants to raise them (or risk forfeiting them before a subsequent Article III forum where they are far less likely to be futile).

objections raised in administrative proceedings. See 84 Fed. Reg. 9,583.

The same was true at other agencies. The Secretary of Labor, for instance, "ratified the appointments of the existing administrative law judges" of that department in anticipation "that the Supreme Court might review th[e] question." *Island Creek*, 937 F.3d at 744. So, too, at the Department of Agriculture. See USDA, Order Ratifying ALJ Clifton's Instructions & Rulings (Mar. 9, 2018) (ratifying and revising a USDA ALJ's actions in light of this Court's grant of review in *Lucia*).

Besides, even *if* the repetition of a claim eventually were to cause an agency to rethink, that does nothing to remedy the unmitigated harm suffered in the meantime by all those claimants whose rights the agency has ignored. Litigants should be able to rely on the courts regardless of how responsive an agency may be to legal questions that Congress vested Article III courts with the authority to resolve. See *L.A. Tucker*, 344 U.S. at 39 (Frankfurter, J., dissenting) (arguing that limitations on agency power should be "unwaivable" because they "bind and confine" the agencies, regardless of whether a litigant raised the issue before the agency). The repetition theory, by contrast, takes an unduly aggregate view of individual SSA claimants. It envisions each claimant as obligated to add his or her own voice to a chorus, not for the sake of his own benefit in his own case, but because the combined voices of many claimants might one day effect change in agency policy. Those who fail to join that chorus are punished once they reach the courts, the first venue likely to validate their *individual* claim.

Petitioners in this case exhausted their administrative remedies before resorting to judicial review. There was nothing the SSA could have or would have done differently if, while exhausting administrative remedies, Petitioners had raised the Appointments Clause issue before a Social Security ALJ. Everything about the SSA hearing process led Petitioners to reasonably understand that they were before an ALJ to make arguments about why *they* should have won *their* case—not to add to the chorus of challenges to the SSA system as a whole. An Article III court was the first body that could have resolved the Petitioners' specific structural claim in this case, see *Free Enterprise. Fund*, 561 U.S. at 491, which is why it was eminently reasonable for Petitioners to make that claim there first.[3] Despite

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[3] Simple fairness dictates that SSA can't have it both ways. If SSA ALJs can simply decline to address an issue, then issue exhaustion can't apply to that issue. Cf. *Eldridge*, 424 U.S. at 330 (noting that the agency "would not be required even to consider such a challenge"). Conversely, if SSA wants issue exhaustion to apply during its administrative processes, it should adopt such a rule through the rulemaking process and account for the fact that Social Security ALJs cannot competently resolve certain types of claims. In the two decades since *Sims*, the SSA still has not chosen to do so.

Absent any formal rule, courts should not defer to the agency's promises of benevolence in deciding when exhaustion should apply in SSA appeals. Cf. *Sims*, 530 U.S. at 118 (Breyer, J., dissenting) (accepting the SSA's representation "that it does not apply its waiver rule where the claimant is not represented" by counsel). Doing so would permit the agency—a powerful government litigant and the entity responsible for writing the rules for the administrative process—to sandbag the private citizens who participate in the administrative process by invoking exhaustion after hearings at which the agency rules did not require exhaustion.

this, the lower courts imprudently refused to fulfill their judicial office and "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 145 (1803).

B. Even if Prudential Exhaustion May Be Appropriate in Some Instances, It Should Not Apply Here

The courts of appeals should have excused Petitioners' failure to raise their Appointments Clause challenges before a Social Security ALJ. This Court has recognized that "judge-made exhaustion doctrines … remain amenable to judge-made exceptions." *Ross*, 136 S. Ct. at 1857. Courts frequently excuse unexhausted remedies (*i.e.*, a litigant's failure to advance through each required stage of an administrative process) based on several established exceptions. Cf. *McKart*, 395 U.S. at 193 ("The doctrine of exhaustion of administrative remedies … is, like most judicial doctrines, subject to numerous exceptions."). When the policy justifications for requiring exhaustion are absent, the rationale for recognizing such exceptions is even stronger in the context of issue exhaustion. See *Eldridge*, 424 U.S. at 229 & n.10 (noting that Eldridge had not exhausted all administrative review procedures but reasoning that, had he done so, his "failure to have raised his constitutional claims [before the agency] would not bar him from raising it later in court"); see also *Priester v. Balt. Cty.*, 232 Md. App. 178, 200–201 (2017) (applying the same exceptions to all types of administrative exhaustion).

The numerous exceptions that courts have developed for remedy exhaustion reflect the fact that the supposed prudential justifications for *issue*

exhaustion are absent in many instances. The exceptions for remedy exhaustion focus almost exclusively on the type of *issue* the plaintiff did not exhaust, suggesting that whenever a remedy exhaustion requirement is unjustified, an issue exhaustion requirement will never be appropriate. The Court has not provided an exhaustive list of these exceptions, but, as relevant here, they include issues that would be futile to bring before the agency, such as:

- Issues for which the agency is not "empowered to grant effective relief," *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973), even when "an agency may be competent to adjudicate the issue presented" if the agency "still lack[s] authority to grant the type of relief requested," *McCarthy*, 503 U.S. at 148;
- Collateral constitutional challenges, *Eldridge*, 424 U.S. at 330–31; see also *McCarthy*, 503 U.S. at 147–148 (issues which the agency "lacks institutional competence to resolve … such as the constitutionality of a statute");
- Facial challenges to the administrative review system, *Bowen v. New York*, 476 U.S. 467, 482 (1986); see also *Smith v. Berryhill*, 139 S. Ct. 1765, 1774 & n.7 (2019); and
- Issues that the agency has "predetermined" or is otherwise biased against, *McCarthy*, 503 U.S. at 148.

The common thread that ties together these exceptions is that the issues raised do not require the agency's expertise, discretion, or fact-finding. When

those three elements that support prudential exhaustion are absent, courts *should* excuse the requirement regardless of whether a litigant failed to exhaust a remedy *or* an issue. No reason remains to apply such a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged." *Hormel*, 312 U.S. at 557.

When an issue first raised in judicial proceedings does not implicate an agency's expertise, discretion, or fact-finding, invoking an issue-exhaustion requirement to bar judicial review leads to intolerably anomalous results, as this case demonstrates. The exceptions for remedy exhaustion may well have permitted Petitioners to seek judicial intervention on the Appointments Clause issue if they had skipped one or more of the SSA administrative steps entirely, seeking judicial review of that collateral constitutional question before the SSA issued a final decision. See, *e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 878–879 (1991); *Eldridge*, 424 U.S. at 330. It makes no sense to preclude judicial review of unexhausted issues but not unexhausted remedies when, in all cases, the claimant did not raise the issue before the agency. Precluding a claimant's legal issue just because he or she did not skip the administrative process *entirely* does not promote any of the stated policy bases for demanding prudential exhaustion.

It is the *issue itself*—not whether a case is framed as one of remedy or issue exhaustion—that should dictate if or when courts require

exhaustion.[4] Cf. *Probst v. Saul*, 980 F.3d 1015, 1021 (4th Cir. 2020) (concluding that the "nature of the claim presented" did not favor exhaustion because "neither the agency's expertise nor its discretion is implicated here, which dampens the impact of the traditional pro-exhaustion rationales"); *Ramsey v. Comm'r of Soc. Sec.*, 973 F.3d 537, 540, 545 (6th Cir. 2020) (holding that a prudential exhaustion requirement is inappropriate for an Appointments Clause issue because such a "challenge involves neither an exercise of discretion, nor an issue within the agency's special expertise"); *Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 154–155 (3d Cir. 2020) (concluding that the nature of Appointments Clause challenges does not necessitate an exhaustion requirement "given their importance to separation of

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[4] If anything, an exhaustion requirement should apply *less* rigidly in the issue-exhaustion context when, as here, the courts' consideration of the litigants' issue in no way would have disrupted the agency's processes. Like the hope that repetitive objections might lead to agency-wide policy changes, the idea that claimants and respondents at administrative hearings—in which the government is the cop, prosecutor, trial judge, and appellate judge—could somehow sandbag the agency by waiting to raise a structural issue before an Article III court does not reflect reality.

The prize for winning an Appointments Clause challenge like this one is a date with a new agency ALJ. See *Lucia*, 138 S. Ct. at 2055. There is no strategic advantage for litigants to delay the issue until the judicial-review stage; such delay is simply a necessary byproduct of the court's being the first tribunal competent to review the constitutional question. The best outcome a litigant can hope for in raising an Appointments Clause challenge is that she eventually receives a constitutionally sound hearing, at which point the agency process would begin and proceed exactly as Congress has designed it. Any attempt at sandbagging would just exhaust litigants before they can secure such a hearing.

powers and, ultimately, individual liberty" and noting that "a hearing on the merits is favored").

This rule is more workable than asking courts to try to determine "the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims*, 530 U.S. at 109. The *Sims* plurality did not provide a clear and workable standard that lower courts are likely to apply consistently across different agencies when trying to discern when a proceeding is sufficiently non-adversarial to excuse otherwise applicable exhaustion requirements. The Court need look no further than the lower courts in this case, each of which determined that the inquisitorial SSA process was not sufficiently non-adversarial. See, *e.g.*, *Carr* Pet. App. 28a ("[E]ven if SSA ALJ review of disability claims is largely non-adversarial, Appointments Clause challenges are 'adversarial' as described in *Sims*."). To the extent the non-adversarial nature of the SSA ALJ hearing is relevant, it is to bolster the conclusion that the hearing was one in which raising a structural constitutional claim is outside the decisionmaker's competence, discretion, and expertise. Non-adversarial hearings are not designed to resolve legally complex challenges to the hearing's very structure; raising such questions before an SSA ALJ would be futile.

Petitioners in this case raised a structural constitutional question before the district court. There was no statute or rule requiring them to do so at an earlier stage. Cf. *Eldridge*, 424 U.S. at 329 (noting that the failure to exhaust a constitutional claim was not controlling because all the statute required was "that there be a 'final decision' by the Secretary"). Regardless of how trial-like that

proceeding may or may not seem, imposing a court-made policy on Petitioners contravenes the "duty of the judicial department" to resolve the structural constitutional issue that Petitioners raised. *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014). This Court should not perpetuate a rule that leads courts to abdicate their duty to resolve such questions.

II. It Would Be Prudent to Abandon Most Judge-Made Exhaustion Requirements

Prudential exhaustion is an atextual, judge-made policy; *amici* urge that it "should[] go the way of other atextual doctrines." *Island Creek*, 937 F.3d at 749. "Just as the 'common law is not a brooding omnipresence in the sky,' so too administrative law is not a hazy body of policy choices that courts are free to 'discover.'" *Id.* at 746 (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), and *Patsy v. Bd. of Regents*, 457 U.S. 496, 501–502 (1982)).

A. There Is No Textual Basis for Prudential Exhaustion

As this Court explained in *Darby v. Cisneros*, the courts' discretion to impose an exhaustion requirement "depends, at least in part, on whether Congress has provided otherwise." 509 U.S. 137, 144–145 (1993). The issue "of paramount importance to any exhaustion inquiry is congressional intent." *Ibid.* (quoting *McCarthy*, 503 U.S. at 144) (cleaned up). And the best indicator of congressional intent is the text of the statute, as construed using traditional tools of interpretation. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

Approaching the exhaustion issue as a textual analysis, it quickly becomes apparent that the basis

for prudential exhaustion is shaky. For starters, prudential exhaustion, by definition, has no textual basis given that the judge-made rule applies only when the statutory and regulatory text have *not* called for such a requirement. Moreover, a traditional tool of textual interpretation provides that when Congress creates different rules for similar situations, Congress intended to treat those situations differently. Cf. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (cleaned up). For instance, when Congress provided for attorneys' fees in some statutes and attorneys' fees plus expert fees in other statutes, the clear inference was that Congress did not intend for a grant of attorneys' fees to include expert fees. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 92 (1991). Otherwise, the "dozens of statutes referring to the two [fees] separately [would] become an inexplicable exercise in redundancy." *Ibid.*; see also *Rusello*, 464 U.S. at 23 ("Had Congress intended to restrict [the definition of an interest subject to forfeiture under RICO], it presumably would have done so expressly as it did in the immediately following subsection [of the statute].").

Likewise, Congress clearly knows how to adopt issue-exhaustion requirements by statute when it deems them a necessary policy. Courts should therefore presume that Congress did not intend for issue exhaustion to apply when a statute does not require it. See *Island Creek*, 937 F.3d at 748 (noting that prudential exhaustion "may be a relic of the

'*ancien regime*' of statutory interpretation in which federal courts, acting like common-law courts, imposed judicial glosses on legislative texts to make statutes work 'better'") (citations omitted). By overlaying judicial policymaking on top of Congress's statutory schemes, the courts are filling statutory gaps that Congress meant to leave empty. Cf. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) ("[S]ometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion."). As a textual matter, the default rule would be that, when the applicable text is silent on exhaustion, Congress intended for courts to consider *all* issues within their subject-matter jurisdiction—whether exhausted or not. See *Lexmark Int'l, Inc. v. Static Ctrl. Components, Inc.*, 572 U.S. 118, 128 (2014) ("A court cannot apply its independent policy judgment to … limit a cause of action that Congress has created merely because prudence dictates.") (cleaned up).

B. Prudential Exhaustion Often Exceeds the Inherent Power of Article III Courts

This text-based default rule would comport with "the traditional rule that courts have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Island Creek*, 937 F.3d at 749 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.)). "Chief Justice Marshall did not add the disclaimer: except courts may refuse to hear an issue if they think it makes sense to demur under a balancing test that juggles the interests of the plaintiff, the agency, and the court." *Ibid.*; *see also McCarthy*, 503 U.S. at 146 ("Federal courts are vested with a virtually

unflagging obligation to exercise the jurisdiction given them.") (cleaned up).

Of course, Article III vests courts with "certain 'inherent powers,' not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (citation omitted). But "[a] court's inherent power is limited by the necessity giving rise to its exercise." *Degen*, 517 U.S. at 829. Any rule the courts adopt pursuant to their inherent power should be a carefully crafted, "reasonable response to the problems and needs that provoke it." *Id.* at 823–824. Otherwise, "there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Ibid.*

As *amici* outlined in Argument Section I.A., the courts' application of the issue-exhaustion rule is unmoored from its putative policy bases. This untethering is particularly troubling given the context in which the rule applies. When a litigant arrives in court to challenge an agency proceeding, it is often the litigant's first opportunity to present legal questions wholly unrelated to the agency's expertise, discretion, and fact-finding to an impartial adjudicatory body competent to decide those claims.

That an Article II tribunal is the only other body that could have considered the litigant's legal issues only compounds that problem. In this way, the courts' application of prudential exhaustion doctrines affects the balance of power among the coordinate branches of government. See *F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940) ("What is in issue is not the

relationship of federal courts [among themselves]—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution."); see also *Sims*, 530 U.S. at 110 ("The relation of administrative bodies and the courts" does not mirror "the relationship between lower and upper courts.") (cleaned up).

"Questions of law form the appropriate subject of judicial determinations." *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 276 (1933). "Whether the [agency] applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short," the agency complies "with the legal requirements which fix the province of the [agency] and govern its action, are appropriate questions for judicial decision." *Id.* at 276. An exhaustion requirement is not some "minor technicality;" it has a substantial "effect on the outcome of disputes between government agencies and private citizens." Robert C. Power, *Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 553 (1987).

The very purpose of administrative appeals differs vastly from appeals within the judiciary. *Pottsville Broad.*, 309 U.S. at 142. Congress has vested agencies with power "far exceeding and *different from* the conventional judicial modes for adjusting conflicting claims." *Ibid.* (emphasis added).

Consequently, Congress has permitted agencies to prescribe rules of procedure intended "to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 143. Just last month, a report from the Administrative Conference of the United States recognized that agencies have predominantly adopted an "administrative model" of appeals that blends adjudication with the formulation of policy. Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems, at 10–11 (Dec. 14, 2020) (Final Report to the Admin. Conf. of the U.S.) (observing that it was "immediately apparent that the judicial model of appellate review is not the predominate one within agencies"). Many agencies don't even require issue preservation during an administrative appeal; litigants can submit "new evidence on appeal" either "for good cause" or because the appeal is essentially a *de novo* trial. *Id.* at 34.

Moreover, agencies are creatures of statute and can only exercise those powers that Congress has properly delegated. See *Stark v. Wickard*, 321 U.S. 88, 310 (1944). So, even those agencies that adopt a judicial model of appeals still lack the competence to decide many legal issues a litigant may later raise before an Article III court.

The ALJs in this case were particularly ill-suited to decide an Appointments Clause challenge to their own legitimacy premised on the structural biases they inhabit in their position. Cf. *McCarthy*, 503 U.S. at 148 (explaining that exhaustion is unnecessary when "the administrative body is shown to be biased"). And on top of that institutional bias, an SSA ALJ simply could not rule that he or she sits in violation of the Appointments Clause. Such a self-destructive order

would be void *ab initio* given that the ruling admits the ALJ had no power to issue that—or any—decision in the case.

Given these differences in the form and function of administrative appeals, courts should hesitate to superimpose their "technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system." *Pottsville Broad.*, 309 U.S. at 141. Applying issue exhaustion "mechanically" distorts the effect of that rule and undermines the structural check the judicial branch was designed to impose on administrative overreach and any legislative action that might have impermissibly allowed for such overreach. *Ibid.* Even though a policy requiring issue preservation during appeals within the hierarchical judicial system serves a legitimate policy interest of the courts, applying that same rule to a litigant's failure to raise an issue before an Article II tribunal implicates a much broader and more complicated set of policy considerations. "Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." *Ibid.*

To the extent the courts' inherent authority under Article III supports an exhaustion requirement that binds parties based on the manner of their litigation before an Article II body, restraint and prudence command a more limited rule than that which courts presently apply. *Amici* suggest a rule confined to protecting the courts' dockets from instances in which litigants have affirmatively waived their rights before an agency or when there is reason for the court to believe that a party has intentionally sandbagged the

agency-opponent or otherwise attempted to manipulate the process of judicial review. See *McKart*, 394 U.S. at 194–195 (exhaustion is justified to prevent the "frequent and deliberate flouting of the administrative process"); *Hormel*, 312 U.S. at 557 (noting that the Court's precedent imposing an exhaustion requirement had relied on "an express waiver of any reliance upon [the statute at issue]"); see also *L.A. Tucker*, 344 U.S. at 39 (Frankfurter, J., dissenting) (distinguishing between forfeiture of an issue and an "explicit waiver" of one's rights). Anything further likely exceeds the courts' inherent authority.

CONCLUSION

The Court should clarify that prudential exhaustion is required in only limited circumstances not present in cases such as this one, in which the issue raised does not implicate the agency's expertise, discretion, or fact-finding. Because prudential concerns do not support imposing an issue-exhaustion requirement in this case, the Court should reverse the courts of appeals and remand the cases for further proceedings.

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