

FAIL TO COMMENT AT YOUR OWN RISK: DOES ISSUE EXHAUSTION HAVE A PLACE IN JUDICIAL REVIEW OF RULES?

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INTRODUCTION

The requirement that parties seeking judicial review of agency action first “exhaust” their administrative remedies initially developed as a prudential judicial construct¹ and now is also sometimes reflected in statutes.²

1. In 1938, the Supreme Court referred to it as “the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938) (holding that employers challenging National Labor Relations Board’s (NLRB’s) jurisdiction must complete administrative proceedings before seeking judicial intervention). Later, the Supreme Court explained:

[T]he exhaustion doctrine recognizes the notion, 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. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency’s discretionary power or when the agency proceedings in question allow the agency to apply its special expertise.

McCarthy v. Madigan, 503 U.S. 140, 145 (1992), *superseded by statute*, 42 U.S.C. § 1997(e) (1980), *as recognized in* *Campbell v. Chadbourne*, 505 F. Supp. 2d 191, 197 n.4 (D. Mass. 2007) (finding only the parts of the ruling regarding prisoner’s exhausting administrative remedies to be superseded).

The classic version of the exhaustion requirement generally requires a party to go through all the stages of an administrative adjudication before going to court. This ensures that the agency action being challenged is the final agency position and that the agency has had the opportunity to bring its expertise to bear and to correct any errors it may have made at an earlier stage. It also allows for the resolution of disputes before they come to court, thus avoiding potentially unnecessary additions to court dockets. I will refer to this as “remedy exhaustion.”

The orthodox application of the remedy exhaustion requirement involves cases where the petitioner for judicial review has eschewed available administrative appeal opportunities.³ In some cases, a court’s refusal to accept review will simply clear the way for the further administrative proceedings to take place;⁴ but in other situations, the foreclosure of judicial relief occurs after “the opportunity to invoke the relevant administrative processes had passed.”⁵

However, the doctrine has developed a new permutation, covering situations where a petitioner for judicial review did follow all the steps of the administrative appeals process, but had failed to raise in that process the issues now sought to be litigated in court. In those cases, which have been called “issue exhaustion” cases,⁶ the thwarted petitioner will likely be unable to prevail since normally there is no further opportunity to raise the issue at the agency. In that sense, application of issue exhaustion bears some

2. See *infra* pp. 58–62.

3. See, e.g., *Portela-Gonzalez v. Sec’y of Navy*, 109 F.3d 74 (1st Cir. 1997) (indicating that a civilian employee of the Naval Exchange challenging disciplinary action must pursue all available administrative appeals before seeking judicial review).

4. *Myers*, 303 U.S. at 50–51.

5. PETER L. STRAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW* 1241 (10th ed. 2003) (discussing *McGee v. United States*, 402 U.S. 479 (1971) in which Selective Service inductee was denied the opportunity to raise a conscientious objector defense to criminal conviction because he had not sought personal appearance before the local board and did not take administrative appeal to contest the denial).

6. See William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 11 (2000) (“‘Issue exhaustion’ is a term that refers to the need to raise an issue with an administrative agency before raising it on judicial review.”). Recently, some courts have used the term “waiver” to describe the action of the challenger who had failed to raise the issue during the agency proceeding. See *infra* text accompanying notes 146–154. I prefer the term “issue exhaustion” because “waiver” has another common meaning in administrative law more generally (referring to agencies granting a waiver from a generally applicable requirement), because it makes it sound like more of a strategic action on the part of the petitioner in court, and because the term would imply that a non-complying challenger would be barred even if another commenter had raised the issue—which is not the case.

resemblance to the requirement that a plaintiff seeking judicial review must have standing to sue⁷—a litigant is deemed unfit to challenge the agency’s action in court. Unlike remedy exhaustion, however, which only applies to agency adjudication, issue exhaustion can theoretically be applied to agency rulemaking. As this Article will show, this has started to become a reality—to the potential detriment of the rulemaking process if applied in an overbroad fashion.

I. DEVELOPMENT OF THE ISSUE EXHAUSTION DOCTRINE: IT BEGAN WITH A STATUTORY PROVISION APPLYING TO AGENCY ADJUDICATIONS—*L.A. TUCKER TRUCK LINES*

It is common for appeals courts to rule that they will not review issues not brought up first in the lower court. This principle was first analogized to judicial review of agency adjudication by the U.S. Supreme Court in the pre-Administrative Procedure Act (APA) case of *Hormel v. Helvering*.⁸ Six decades later, in *Sims v. Apfel*,⁹ involving review of a Social Security Administration (SSA) disability decision, the Court hearkened back to *Hormel*, quoting this passage from the earlier case:

Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding.¹⁰

After *Hormel*, the Supreme Court went on to apply the issue exhaustion doctrine to review of an agency adjudicative action in 1952 in *United States v. L.A. Tucker Truck Lines, Inc.*,¹¹ in the context of review of an Interstate Commerce Commission (ICC) order:

[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for

7. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (concluding that plaintiff seeking to challenge agency rule may not do so because of a lack of standing).

8. 312 U.S. 552 (1941).

9. 530 U.S. 103 (2000).

10. *Id.* at 109 (quoting *Hormel*, 312 U.S. at 556). For more on *Sims*, see *infra* text accompanying notes 31–42.

11. 344 U.S. 33 (1952).

correction in order to raise issues reviewable by the courts Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.¹²

In that case, a trucker petitioned the ICC for an extension of his route certificate. After a hearing by a hearing examiner, the petition was denied and the Commission affirmed. The trucker requested reconsideration by the full Commission, and then “extraordinary relief,” both of which were denied.¹³ The trucker appealed to the three-judge district court provided for by statute and raised for the first time the contention that the hearing examiner had been improperly appointed. The lower court allowed this, but the ICC appealed to the Supreme Court.¹⁴

Reversing, the Supreme Court noted:

[T]he Appellee did not offer nor did the court require any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding. Appellee does not claim to have been misled or in any way hampered in ascertaining the facts about the examiner’s appointment. It did not bestir itself to learn the facts until long after the administrative proceeding was closed and months after the case was at issue in the District Court, at which time the Commission promptly supplied the facts upon which the contention was based and sustained.¹⁵

It added that “[t]he issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice.”¹⁶

While the appeal in that court was heard under a statute that did not contain an issue exhaustion provision,¹⁷ the Court noted that “more than a

12. *Id.* at 37. A few years later, the Court made clear that the Administrative Procedure Act (APA) does “not require a different result. That Act purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review.” *Fed. Power Comm’n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 499–500 (1955). But see *Darby v. Cisneros*, 509 U.S. 137 (1993), discussed below, in which the Court read § 704 of the APA, (5 U.S.C. § 704 (1988)) to mean that federal courts do not have authority to require plaintiffs to exhaust available administrative remedies before seeking judicial review under the APA, where neither relevant statutes nor agency rules specifically mandate exhaustion as prerequisite to judicial review.

13. 344 U.S. at 34.

14. *Id.* at 34–35.

15. *Id.* at 35.

16. *Id.* at 36.

17. See Statement of Jurisdiction, *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (Jan. 28, 1952) (No. 18-621), 1952 WL 82373, at *8:

few statutes” did contain such provisions.¹⁸ Indeed, as the Supreme Court noted almost fifty years later in *Sims*, “requirements of administrative issue exhaustion are largely creatures of statute.”¹⁹ Recently, the Court clarified that even when a litigant failed to meet a statutory issue exhaustion provision, “we do not regard that lapse as ‘jurisdictional.’”²⁰

There are numerous statutes that contain either generic issue exhaustion provisions or those directed at objections to agency orders. The following is a list of exhaustion provision statutes (arranged by United States Code provisions):

- Federal Labor Relations Authority, Unfair Labor Practices, 5 U.S.C. § 7123 (“No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances.”). This exhaustion provision was first adopted in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 7123(c), 92 Stat. 1213 (1978).
- Department of Justice, Executive Office of Immigration Review, Removal Orders, 8 U.S.C. § 1252(d) (“A court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right. . . .”). This exhaustion provision was first adopted in the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 208 (1952). Although it does not specifically include an issue exhaustion requirement, it has been so interpreted.²¹
- Securities and Exchange Commission (SEC), Securities Act of 1933, 15 U.S.C. § 77i(a) (“No objection to the order of the

While most of the cases invoking this doctrine have arisen under statutes which specifically provide that the court can consider on review only matters raised before the agency—a limitation not contained in the Urgent Deficiencies Act, under which this action was brought—the settled policy against unduly protracting litigation requires application of the principle to review of Interstate Commerce Commission orders by statutory three-judge district courts.

18. 344 U.S. at 36.

19. *Sims v. Apfel*, 530 U.S. 103, 107 (2000). The Court cited *Marine Mammal Conservancy, Inc. v. USDA*, 134 F.3d 409, 412 (D.C. Cir. 1998). That opinion was a bit more expansive: “The requirement that objections must first be presented to the agency, although sometimes treated as part of the judicially-created exhaustion doctrine, is largely derived from statute.”

20. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602 (2014).

21. *Agha v. Holder*, 743 F.3d 609, 616 (8th Cir. 2014) (“Although this provision only refers to administrative ‘remedies,’ we have held that Congress likely intended by enacting § 1252(d)(1) to require that an alien not only pursue all stages of administrative review, but also raise all issues before the agency.”) (ellipsis and internal quotation marks omitted).

Commission shall be considered by the court unless such objection shall have been urged before the Commission.”). This exhaustion provision was first adopted in the Securities Exchange Act of 1934, Pub. L. No. 73-22, § 9(a), 48 Stat. 80 (1934).

- SEC, Securities Act of 1934, 15 U.S.C. § 78y(c)(1) (“No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.”). This exhaustion provision was first adopted in the Securities Exchange Act of 1934, Pub. L. No. 73-291, § 25(a), 48 Stat. 902 (1934); but the words “or rule” were added in Pub. L. No. 94-29, § 20, 89 Stat. 159 (1975).²²
- SEC, Investment Companies, 15 U.S.C. § 80a-42(a) (same). This exhaustion provision was first adopted in the Investment Company Act of 1940, Pub. L. No. 76-768, § 43(a), 54 Stat. 844 (1940).
- SEC, Investment Advisers, 15 U.S.C. § 80b-13 (same). This exhaustion provision was first adopted in the Investment Advisors Act of 1940, Pub. L. No. 76-768, § 213(a), 54 Stat. 856 (1940).
- Small Business Administration, 15 U.S.C. § 687a(e) (“No objection to an order of the Administration shall be considered by the court unless such objection was urged before the Administration or, if it was not so urged, unless there were reasonable grounds for failure to do so.”). This exhaustion provision was first adopted in the Small Business Act, Pub. L. No. 87-341, 75 Stat. 753 (1961).
- Bureau of Consumer Financial Protection (CFPB), Interstate Land Sales, 15 U.S.C. § 1710 (“No objection to an order or determination of the Director shall be considered by the court unless such objection shall have been urged before the Director.”). Thus, provision was enacted originally (referring to the Secretary of Housing and Urban Development (HUD) in the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, Title XIV, § 1411, 82 Stat. 595, amended to substitute the CFPB Director in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 Title X, § 1098A, 124 Stat. 2105 (2010).
- Presidential Board Concerning the Interstate Transportation of Petroleum Products, 15 U.S.C. § 715(d) (“No objection to the order of the board shall be considered by the court unless such

22. This is one of only two provisions that I have found that specifically apply issue exhaustion to rulemaking. See *infra* notes 52–53.

objection shall have been urged before the board.”). This provision was enacted as part of the Connally Act, ch. 18, § 1, 49 Stat. 30 (1935).

- Federal Energy Regulatory Commission (FERC), Natural Gas, 15 U.S.C. § 717r(b) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”). This exhaustion provision was first adopted in the Natural Gas Act, Pub. L. No. 75-688, § 19(b), 52 Stat. 831–32 (1938).
- FERC, Natural Gas Policy, 15 U.S.C. § 3416(a)(4) (“No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so.”). This exhaustion provision was first adopted in the Natural Gas Policy Act of 1978, Pub. L. No. 95-62, § 506(a)(4), 92 Stat. 3405 (1978).²³
- FERC, Electric Utilities, 16 U.S.C. § 825l(b) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”). This exhaustion provision was first adopted in the Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, § 313(b), 49 Stat. 860 (1935).
- Food and Drug Administration, 21 U.S.C. § 355(h) (“No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do.”). This exhaustion provision was first adopted in the Federal Food, Drug, and Cosmetic Act, ch. 675, § 505(h), 52 Stat. 1083 (1938).
- Department of HUD, Native American Housing Assistance and Self-Determination, 25 U.S.C. § 4161(d)(2) (“No objection to the action of the Secretary shall be considered by the court unless such objection has been urged before the Secretary.”). This exhaustion provision was first adopted in the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 401(d)(2), 110 Stat. 4038.
- Department of the Treasury, Alcohol, 27 U.S.C. § 204(h) (“No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the

23. Note that the word “order” in this statute was interpreted to include rules. *ECEE, Inc. v. Fed. Energy Regulatory Comm’n*, 611 F.2d 554, 559–66 (5th Cir. 1980).

Secretary or unless there were reasonable grounds for failure so to do.”). This exhaustion provision was first adopted in the Federal Alcohol Administration Act, Pub. L. No. 74-401, § 4(g), 49 Stat. 980 (1935) (there have been minor subsequent amendments).

- National Labor Relations Board, Unfair Labor Practices, 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”). This exhaustion provision was first adopted in the National Labor Relations Act, Pub. L. No. 74-198, § 10(e), 49 Stat. 454 (1935).
- Department of Labor, Fair Labor Standards Act, 29 U.S.C. § 210(a) (“No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do.”). This exhaustion provision was first adopted in the Fair Labor Standards Act, Pub. L. No. 75-718, § 10 (a), 52 Stat. 1065–66 (1938).
- SSA, Civil Money Penalties, 42 U.S.C. § 1320a-8(d)(1) (“No objection that has not been urged before the Commissioner of Social Security shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”). This exhaustion provision was first adopted in the Social Security Act, Pub. L. No. 103-296, § 1129(d)(1), 108 Stat. 1511 (1994).
- Department of HUD, Housing and Community Development Act of 1974, 42 U.S.C. § 5311(c)(2) (“No objection to the action of the Secretary shall be considered by the court unless such objection has been urged before the Secretary.”). This exhaustion provision was first adopted in the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 111(c)(2), 88 Stat. 650 (1974).
- Department of the Interior, Outer Continental Shelf Leasing Act, 43 U.S.C. § 1349(c)(5) (“Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.”). This exhaustion provision was first adopted in the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 23(c)(5), 92 Stat. 657 (1978).
- Federal Communications Commission (FCC), General, 47 U.S.C. § 405(a) (“The filing of a petition for reconsideration shall not be

a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.”). This exhaustion provision was first adopted in an Act to further amend the Communications Act of 1934, Pub. L. No. 82-554, § 405, 66 Stat. 720 (1952).

- National Transportation Safety Board, Aviation Matters, 49 U.S.C. § 1153(b)(4) (“In reviewing an order under this subsection, the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding.”). This exhaustion provision was first adopted in the Independent Safety Board Act of 1974, Pub. L. No. 103-272, § 1153(b)(4), 108 Stat. 757 (1994).

In addition, there are agency regulations that require issue exhaustion within the agency’s appeals system—in other words, an appellant cannot raise an issue before the agency head that was not raised before the Administrative Law Judge (ALJ).²⁴ Some agencies have successfully argued that these regulations should also be respected by courts on judicial review. The Supreme Court noted this in *Sims*, when it said:

[I]t is common for an agency’s regulations to require issue exhaustion in administrative appeals. *See, e.g.*, 20 C.F.R. § 802.211(a) (1999) (petition for review to Benefits Review Board must “lis[t] the specific issues to be considered on appeal”). And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues. *See, e.g.*, *South Carolina v. U.S. Dept. of Labor*, 795 F.2d 375, 378 (4th Cir. 1986); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 398 & n.26 (9th Cir. 1982). Yet, SSA regulations do not require issue exhaustion. (Although the question is not before us, we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion.)²⁵

While it might seem odd to think that an agency regulation could influence what arguments can be made in court, cases like the ones cited in the above passage have migrated the administrative adjudication rule into the judicial review process. Such regulations, not surprisingly, appear to be limited to agency adjudications, where issue exhaustion can be more readily

24. *See, e.g.*, Department of Labor, 20 C.F.R. §§ 641.900(e), 645.800(c), 667.830(b) (2016); Department of Justice (Bureau of Prisons), 28 C.F.R. § 542.15(b)(2); NLRB, 29 C.F.R. § 102.46(b)(2); Occupational Safety and Health Administration, 29 C.F.R. §§ 1979.110(a), 1981.110(a).

25. *Sims v. Apfel*, 530 U.S. 103, 108 (2000).

tied to remedy exhaustion. And no such regulation purporting to limit issues raised in judicial review of rules has been found.

II. APPLICATION OF ISSUE EXHAUSTION IN A RATEMAKING CASE— *COLORADO INTERSTATE*

Three years after the *L.A. Tucker Truck Lines* case, the above FERC natural gas statutory provision (formerly administered by the Federal Power Commission) was applied by the Supreme Court in *Federal Power Commission v. Colorado Interstate Gas Co.*²⁶ This case involved a ratemaking (within the APA's definition of rulemaking) of particular applicability in that the order in the case only applied to one company. The Commission's order had been reversed and remanded by the Tenth Circuit on a ground that that court had raised *sua sponte*, but one that had not been before the Commission at the time of the ratemaking.²⁷ The Supreme Court, citing the statute (and *L.A. Tucker Truck Lines*), reversed, brushing aside the argument that the statute, on its face, only precluded a *party* from raising an issue in court that had not been presented for rehearing, and did not preclude a *court* from taking up a new issue *sua sponte*: "To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission."²⁸ More importantly, the Court found support in the APA's scope-of-judicial-review section (5 U.S.C. § 706(2) (2012)), which states that in conducting its review: "To the extent necessary to decision *and when presented*, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."²⁹

The *Colorado Interstate* Court did not really examine this APA issue in any depth and I was unable to find any other federal court decision focusing on this phrase, so its importance to this issue is hard to judge. It is not immediately clear why "when presented" would necessarily imply that an issue must have been first presented to an agency before a litigant can "present" it to a court. In addition, even if read this way, the phrase's application is ambiguous in that it seemingly only applies to the questions of law enumerated in that sentence and not to all the matters covered by § 706(2).

A variation of the *sua sponte* issue decided in *Colorado Interstate* is presented when the court petitioner did not raise the issue with the agency, but another party did. Because the issue exhaustion doctrine was intended to be

26. 348 U.S. 492 (1955).

27. *Id.*

28. *Id.* at 499.

29. 5 U.S.C. § 706 (2012) (emphasis added).

protective of the agency, courts have understandably often ruled that it should not be applied to particular challengers in situations where *other* participants in the administrative process had raised the issues, even if the litigant in court had not. For example, the Third Circuit so ruled in an SEC case where the petitioner had not raised the challenge at the administrative level, but other party-intervenors to the administrative adjudication had:

The principal purpose of the [exhaustion] doctrine . . . is to make sure that it is the agency and not the courts which passes first on the contentions of the participants. It was the intention of Congress as evidenced by the statutory plan to give to the agency rather than to the courts the primary responsibility for enforcing and elaborating the regulatory scheme as set up in the law. This purpose is advanced so long as the contentions and exceptions raised on review have been in fact effectively and meaningfully raised before the regulatory agency. This is true regardless of whether the person who appeals the agency decision or some other person aggrieved by the decision happens to have raised the points before the agency.³⁰

III. REJECTION OF ISSUE EXHAUSTION IN A “NON-ADVERSARY” ADJUDICATION—*SIMS V. APFEL*

All the cases discussed so far have involved challenges to orders issued in administrative adjudications or ratemakings of particular applicability. But in one important case, the Supreme Court declined to apply the issue exhaustion doctrine in the context of a review of an agency adjudication. In *Sims*, in which the government argued that a social security claimant should be barred from raising an issue that she had failed to raise at the Social Security Appeals Council (the agency board that reviews denials of benefits by agency ALJs), the Supreme Court declined to apply issue exhaustion.³¹ The government had argued “that an issue-exhaustion requirement is ‘an important corollary’ of any requirement of exhaustion of remedies.”³² But the Court concluded, “[w]e think that this is not necessarily so and that the corollary is particularly unwarranted in this case.”³³

In reaching this decision, the Court began by noting “that requirements of administrative issue exhaustion are largely creatures of statute.”³⁴ It then read its precedents, including *L.A. Tucker Truck Lines*,³⁵ as suggesting that “the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.” Finding SSA adjudica-

30. *Hennesey v. SEC*, 285 F.2d 511, 515 (3d Cir. 1961).

31. 530 U.S. 103 (2000).

32. *Id.* at 107.

33. *Id.*

34. *Id.*

35. 344 U.S. 33 (1952).

tion to be “informal”³⁶ and “inquisitorial rather than adversarial,”³⁷ the Court held that “a judicially created issue-exhaustion requirement is inappropriate. Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council to preserve judicial review of those issues.”³⁸

The Court that decided *Sims* was a divided Court. Four Justices dissented, and Justice O’Connor supplied the fifth vote by emphasizing SSA’s failure to notify claimants of the issue exhaustion requirement.³⁹

Shortly thereafter, Professor Funk wrote:

Outside the Social Security context, it is unlikely that [*Sims*] has any force. Not only do the four dissenters indicate the view that issue exhaustion is the general rule, subject to only the rarest of exceptions, but Justice O’Connor clearly viewed the situation in [*Sims*] as unique. Even Justice Thomas’s opinion, by tying issue exhaustion to an analogy with adversarial litigation in the judicial context, suggests that in the vast range of formal and informal, but adversarial, administrative adjudication, issue exhaustion would be required.⁴⁰

Nevertheless, lower courts applying issue exhaustion in judicial review of adjudications have continued to accentuate the adversarial nature of the agency action below.⁴¹ As one court put it, the rule that issues not raised

36. *Sims*, 530 U.S. at 111.

37. *Id.*

38. *Id.* at 112. Justice Thomas wrote for the five-Justice majority. Justice O’Connor concurred because the agency had failed to warn claimants that issue preclusion might obtain. Justice Breyer (writing for Chief Justice Rehnquist and Justice Scalia) dissented because he did not “see why the nonadversarial nature of the Social Security Administration (SSA) internal appellate process makes a difference,” at least for claimants represented by counsel. *Id.* at 117.

39. *Id.* at 113 (O’Connor, J., concurring in part and concurring in the judgment). She also suggested that “[r]equiring issue exhaustion is particularly inappropriate here, where the regulation and procedures of the SSA affirmatively suggest that specific issues need not be raised before the Appeals Council.” *Id.*

40. Funk, *supra* note 6, at 15.

41. See, e.g., *Agha v. Holder*, 743 F.3d 609, 616 (8th Cir. 2014) (quoting *Sims*, 530 U.S. at 110): “Where the parties are expected to develop the issues in an adversarial administrative proceeding, . . . the rationale for requiring issue exhaustion is at its greatest.” In other words, “The strongest case for imposing an exhaustion requirement exists where the administrative proceedings closely resemble a trial.” (quoting *Frango v. Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006)). Here, the administrative proceedings before both the Immigration Court and the Board of Immigration Appeals were adversarial, and Agha was represented by counsel. Thus, a court-imposed exhaustion requirement is proper, in addition to the statutory requirement.

For a case refusing to apply issue exhaustion to a non-adversarial adjudication, see *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 632 (9th Cir. 2008):

Because ERISA and its implementing regulations create an inquisitorial, rather than

before an agency are waived and will not be considered by a court on review “holds special force where, as here, an appeal follows adversarial administrative proceedings in which parties are expected to present issues material to their case. In that setting, the rationale of requiring issue exhaustion is at its greatest.”⁴² With that in mind, query whether the issue exhaustion doctrine should have a place in rulemaking.

IV. EXHAUSTION IN RULEMAKING

It should be apparent that the remedy exhaustion doctrine, involving the need to go through all the available procedural steps and agency fora, while important in agency adjudication, has no real application to notice-and-comment rulemaking where there is typically a single proceeding that must be completed before there is a rule to challenge. The closely related, APA-based finality requirement⁴³ clearly rules out challenges to *proposed* rules.⁴⁴ On the other hand, the APA’s presumption of reviewability and the application of the prudential ripeness doctrine announced in *Abbott Laboratories v. Gardner*⁴⁵ in 1966 have served to allow pre-enforcement review of final rules in many situations. Rules can also normally be challenged in court at the enforcement stage too, absent a statutory preclusion,⁴⁶ or unless some opportunity existed to challenge them first in an agency adjudicatory forum.⁴⁷

In pre-enforcement challenges to rules, where the ripeness hurdle must

adversarial process, and because the [plan’s explanation of benefits] does not notify a claimant that issue exhaustion is required, *Sims* leads us to conclude that Vaught was not required to exhaust his issues or theories in the context of this case.

Accord *Wolf v. Nat’l Shopmen Pension Fund*, 728 F.2d 182, 186 (3d Cir. 1984) (“Section 502(a) of ERISA does not require either issue or theory exhaustion; it requires only claim exhaustion.”).

42. *Fritch v. U.S. Dep’t of State*, 220 F. Supp. 3d 51, 62 (D.D.C. 2016) (quoting *Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016)).

43. 5 U.S.C. § 704 (2012).

44. *See In re Murray Energy Corp.*, 788 F.3d 330, 334–35 (D.C. Cir. 2015).

45. 387 U.S. 136 (1967). But see *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158 (1967), the companion case, where the Court found a pre-enforcement challenge to another FDA rule to be unripe for review because it could be challenged at the enforcement stage without any potential harm to the challenger in the interim.

46. *See generally* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733 (1983). *See also* Ronald Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011).

47. *See* *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (noting that mine safety regulation may not be challenged in advance of an administrative enforcement action by the Labor Department because of the opportunity to defend in the comprehensive administrative adjudication system presided over by the Federal Mine Safety and Health Review Commission).

be surmounted, it is certainly possible to envision the government raising issue exhaustion concerns. An excellent student note in 1986 by Douglas David Spencer was critical of an emerging trend in this direction.⁴⁸ Professor Funk raised the question of issue exhaustion in rulemaking in his 2000 survey of “new dimensions” of the exhaustion doctrine, and found that “courts are hopelessly confused on the subject.”⁴⁹ The *Gellhorn and Byse* casebook in 2003 devoted a thoughtful note to this issue, suggesting that, while issue exhaustion might make sense in some rulemaking challenges, the “cases conspicuously lack discussion of whether, when, why, or how exhaustion doctrine developed in the context of adjudication should be applied to rulemaking.”⁵⁰ Gabriel Markoff’s recent useful survey of Clean Air Act rulemaking challenges found that, at least under that Act, which contains one of the few explicit statutory issue exhaustion requirements for rulemaking challenges, the D.C. Circuit has applied it in 80% of the cases in which the government raised it as a defense.⁵¹

As noted above, there are numerous statutes containing more generic issue exhaustion requirements, or ones applying to agency orders. But there are few statutes that contain explicit statutory issue exhaustion requirements for rulemaking challenges—I have found only two—the Clean Air Act⁵² and Securities Act of 1934.⁵³ And, of course, there are many other

48. David Douglas Spencer, Note, *The Duty to Participate in Agency Rulemaking*, 54 GEO. WASH. L. REV. 628 (1986). He wrote after another commentator had extolled the virtues of exhaustion generally and had supported denying the right of judicial review to a party who had failed to participate in rulemaking, suggesting that such parties could petition the agency to institute a new rulemaking proceeding and thereby obtain review. See Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 14–15, 34 (1984).

49. Funk, *supra* note 6, at 18.

50. STRAUSS ET AL., *supra* note 5, at 1246.

51. Gabriel H. Markoff, Note, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 TEX. L. REV. 1065, 1079–83 (2012).

52. 42 U.S.C. § 7607(d)(7)(B) (2012) (“Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.”). This provision was adopted in the 1977 Clean Air Act Amendments, Pub. L. No. 95-95, § 305(a), 49 Stat. 885, 775 (1977).

53. 15 U.S.C. § 78y(c)(1) (2012) (“No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.”). More generally, the word “order” in some statutory review statutes has been construed to cover rules with respect to certain judicial review requirements. See, e.g., *Inv. Co. Inst. v. Bd. of Governors*, 551 F.2d 1270 (D.C. Cir. 1977) (treating a rule as an “order” for purposes of permitting direct review in the court of appeals). In one case involving a rulemaking, a court did the same for the purpose of enforcing the mandatory rehearing aspect of the Natural

agency statutes that lack any such provision. Courts have not done a good job of sorting through these distinctions. As Professor Funk notes, “Unfortunately, some courts have ignored the specific statutory origin for [issue exhaustion] and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute.”⁵⁴

The upshot is that, as explained below, courts seem to be increasingly applying issue exhaustion principles to the judicial review of informal rule-making, even though the doctrine was born in the adjudication context, and even though the Supreme Court has eschewed it in the informal adjudication context of social security disability claims.

As the American Bar Association Administrative Law Section’s *Blackletter Statement* states:

Courts enforce such issue exhaustion more stringently where the parties are expected to develop the issue in an adversarial proceeding than in circumstances in which they review the results of nonadversarial, informal hearings.

Some courts have also applied the issue-exhaustion doctrine to the notice-and-comment rulemaking process. Under this approach, a party that fails to raise an objection to a rule during notice-and-comment may not press that objection on direct judicial review of the rule unless (1) another party made the objection or (2) the agency’s decision [*sic*] indicates that it did in fact consider the issue.⁵⁵

V. THE RELEVANCE OF *DARBY V. CISNEROS*

Does the APA have anything to say about this issue? Section 704, as construed by the Supreme Court in *Darby v. Cisneros*,⁵⁶ seems to preclude the application of common law exhaustion principles to agency rulemaking “unless either a statute requires it . . . or an agency has required it by rule and provided that the rule would be inoperative pending its reconsidera-

Gas Policy Act, 15 U.S.C. § 3416(a)(4), which can be considered a form of issue exhaustion. *ECEE, Inc. v. FERC*, 611 F.2d 554, 559–66 (5th Cir. 1980). Also, while not a statute specifically addressing issue exhaustion, the Atomic Energy Act, 42 U.S.C. § 2239, (covering both licensing and issuance of rules governing licensing) in combination with the Hobbs Act, 28 U.S.C. § 2344, has been read to limit judicial review to “parties” in the underlying proceeding, even when that proceeding was a rulemaking. *See Gage v. Atomic Energy Comm’n*, 479 F.2d 1214, 1217–19 (D.C. Cir. 1973); *infra* text accompanying notes 68–75. In a sense, this is closer to remedy exhaustion because a court litigant must first be a party in the agency proceeding.

54. Funk, *supra* note 6, at 17.

55. SECTION OF ADMIN. L. & REG. PRACTICE, ABA, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 53–54 (2d ed. 2013).

56. 509 U.S. 137, 152–54 (1993).

tion.”⁵⁷ In *Darby*, in the context of a review of an adjudicative order by HUD, the Supreme Court held that § 704 of the APA superseded the common law prudential (or equitable) doctrine of exhaustion of administrative remedies—at least in the context of APA cases.⁵⁸ It found that the section precludes exhaustion unless either another statute requires it or the agency has required some form of administrative appeal or reconsideration by rule. If an agency does issue a rule requiring an appeal to the agency head or a designated review officer or board (as most have),⁵⁹ § 704 also requires that the rule specify that the initial decision is inoperative pending its decision on the appeal.⁶⁰

As Professor Funk has commented,

If one applies Section 704 faithfully with the Supreme Court’s guidance in *Darby*, there could be no exhaustion required as a precondition of judicial review of rulemaking unless either a statute requires it (as in Section 405(a) of the Communications Act of 1934) or an agency has required it by rule and provided that the rule would be inoperative pending its reconsideration.⁶¹

But if § 704, as construed by *Darby*, applies to rulemaking, what would that mean? That case involved remedy exhaustion, and after *Darby*, most agencies made sure they had issued a procedural rule that required parties to file an administrative appeal in agency adjudications before seeking judicial review.⁶² To meet the § 704 requirements, that rule also had to provide that the agency action “meanwhile is inoperative.”⁶³ That does not pose a problem in the adjudication context because agency heads typically want a chance to review first-level decisions before they might be appealed to court.⁶⁴ But in the rulemaking context, it is doubtful, even nonsensical, that

57. Funk, *supra* note 6, at 18 (quoting 5 U.S.C. § 704 (1994)).

58. *Darby v. Cisneros*, 509 U.S. 137 (1993).

59. Funk, *supra* note 6, at 18 and n.31.

60. 5 U.S.C. § 704 (2012).

61. Funk, *supra* note 6, at 18; *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 162 (1998). (“[T]he reasoning of *Darby*—focusing on the APA’s text and statutory structure—indicates that the [common law exhaustion doctrine] has no proper place” in APA cases). Note, however, that the “meanwhile . . . inoperative” clause in § 704 pertains to appeals to superior agency authority, not to petitions for reconsideration. 5 U.S.C. § 704 (1994). (Thanks to Professor Levin for highlighting this.)

62. Funk, *supra* note 6, at 16 (stating that “[m]ost [agencies and statutes], by now, are sufficiently explicit to satisfy the requirement of Section 704” and giving examples in a footnote).

63. *Id.* at 4.

64. *See* Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1, 5 (1986). (“Under the dominant pattern, the agency head retains, at least nominally, all residual authority. The agency head reviews the ALJ decision and decides whether to affirm, modify or reverse it. Of course, the nominal place-

agencies would want to issue such a procedural rule. Agencies would not want to delay the effectiveness of their hard-earned rule while opponents crafted a petition for reconsideration, potentially with new arguments.

After raising the question, Professor Funk, in describing *Darby* as a remedy exhaustion case arising in the context of administrative adjudication, notes that, “*Darby*, of course, did not address issue exhaustion, and because the question of issue exhaustion only arises when exhaustion of administrative remedies is required and satisfied, it is doubtful that *Darby* changes the legal landscape of issue exhaustion.”⁶⁵

I agree that *Darby* should not be read as bearing on issue exhaustion in rulemaking, but no court has really analyzed this question in any detail.⁶⁶

VI. THE EARLY APPLICATION OF ISSUE EXHAUSTION IN RULEMAKING CASES BY THE D.C. CIRCUIT

Not surprisingly, because issue exhaustion is an outgrowth of remedy exhaustion, which originated in the context of review of administrative adjudications, there appear to be few applications of it in the context of review of agency rulemakings until the 1970s. In that decade, the passage of numerous regulatory statutes with important rulemaking provisions led to an upsurge of rules and challenges to such rules in court, especially in the D.C. Circuit, which hears most such cases.⁶⁷

The D.C. Circuit began to raise issue exhaustion in the context of rulemaking in 1973 with two cases: (1) *Gage v. United States Atomic Energy Commission*,⁶⁸ involving an Atomic Energy Act rulemaking that was conducted under a quasi-adjudicative procedural statute; and (2) some overlooked dicta in its famous *Portland Cement Ass’n v. Ruckelshaus*⁶⁹ opinion involving a challenge to a rule issued by the Environmental Protection Agency (EPA) under the Clean Air Act.

ment of review authority in an agency head is not synonymous with the actual exercise of authority. Some authority frequently is informally delegated to subordinates.” (footnotes omitted).

65. Funk, *supra* note 6, at 12. Professor Levin also points out that the APA provision being construed in *Darby* was § 704, which is a finality provision, and that issue exhaustion “has no equivalency whatsoever with the ‘final agency action’ principle.” Letter from Ron Levin to author 2 (Feb. 6, 2015) (on file with author).

66. See the brief treatment by the court in *National Mining Ass’n v. Dep’t of Labor*, *infra* note 151.

67. For an illuminating history of rulemaking’s “collision” “with vigorous judicial review” in the D.C. Circuit, see Reuel Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1141 (2001).

68. 479 F.2d 1214, 1217–19 (D.C. Cir. 1973).

69. 486 F.2d 375 (D.C. Cir. 1973).

Gage involved a rulemaking to implement the newly enacted National Environmental Policy Act (NEPA)⁷⁰ that was conducted under the Atomic Energy Act's provisions (originally designed for adjudications) that entitled interested persons to become "parties" and have a "hearing" on their objections,⁷¹ and also that allowed direct judicial review (under the Hobbs Act) only by such "parties."⁷² In denying a party who had declined to participate in the rulemaking the right to invoke the court's jurisdiction, Judge Wilkey recognized that there was some incongruity in using these party designation procedures in rulemaking, but found that it made sense in cases involving direct review of rules to limit judicial review to persons who had participated in the rulemaking, if only to ensure a better record for judicial review:

Unlike requests for review of adjudicative orders, petitions for "direct" review of rule-promulgating orders demand judicial scrutiny of regulations, which may well not have been applied in a concrete case. Unlike adjudication, rule-making may proceed in the absence of those who may ultimately have a right to complain of the application of the regulations which result. Unlike those subject to adjudicative orders, persons who may ultimately be affected by regulations may have legitimate grounds for deciding not to join in the formulation of the rules. For example, the ultimate impact, or even the likelihood of enforcement, of proposed rules may be far from clear. Standing aside may not foreclose all opportunity to propose new regulations or to challenge the validity of the promulgated regulations when they are applied to such a person's detriment in a concrete case; but such abstinence will probably preclude the compilation of a record adequate for judicial review of the specific claims he has reserved. That is what happened in this case—and the effect of this void in the record on our ability to analyze petitioners' major claim highlights the flaw in their petition for relief from this court.⁷³

Thus, Judge Wilkey also recognized that some interested persons may not choose to, or be able to, participate in rulemakings, but nevertheless he was concerned that such non-participation could lead to a record that would be inadequate for judicial review of claims made for the first time in court. Notwithstanding this conclusion, *Gage* is rarely cited in later cases applying issue exhaustion to notice-and-comment rulemaking, probably because the rulemaking procedures used by the Atomic Energy Commission were quasi-adjudicative and different from the normal notice-and-comment rulemaking process. Moreover, Judge Wilkey's concern about the adequacy of the rulemaking record would have little application where the challenge was based on constitutional or procedural arguments or to

70. Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321–4347 (2012)).

71. *Gage*, 479 F.2d at 1217 (citing 42 U.S.C. § 2239 (1970)).

72. *Id.* at 1218 (citing 28 U.S.C. § 2344); *see supra* note 53 identifying the Hobbs Act.

73. *Gage*, 479 F.2d at 1218–19.

purely legal statutory challenges.⁷⁴ And there is an implication in the passage quoted above that non-participants could raise any issue in challenging a rule at the enforcement stage.⁷⁵

Portland Cement, on the other hand, is still one of the most oft-cited rule-making cases—most famous for Judge Leventhal’s groundbreaking pronouncement that agencies must disclose significant related studies or other relevant information in their possession at the time of the notice of proposed rulemaking.⁷⁶ But what is often forgotten is that he followed this principle with a corollary: “Conversely, challenges to standards must be limited to points made by petitioners in agency proceedings. To entertain comments made for the first time before this court would be destructive of a meaningful administrative process.”⁷⁷ This principle was not enforced against the particular challengers in that case because the EPA’s disclosure failings had necessitated a remand anyway, and the court directed EPA to “consider the contentions presented in briefs to this court, though not previously raised, unless EPA explains why they are not material.”⁷⁸ Shortly after that case, Congress amended the Clean Air Act to specifically require persons to raise issues in the agency rulemaking before they can seek judicial review of those issues.⁷⁹

VI. A CONTEMPORANEOUS DEVELOPMENT—ISSUE EXHAUSTION IN NEPA CASES

The issue exhaustion doctrine has also frequently arisen in the context of litigation over the adequacy of an agency environmental impact statement (EIS) prepared under NEPA. The origin dates back to the language from

74. The challengers’ arguments in *Gage* were that the agency’s National Environmental Policy Act (NEPA) regulations did not go far enough in failing to bar all land acquisitions prior to the granting of a permit to construct a nuclear power plant. *Id.* at 1217. The Court commented that “[a]n extensive factual record would clearly be required in order to judge whether or not the present regulations implement the policies of NEPA ‘to the fullest extent possible.’” *Id.* at 1219.

75. *Id.* at 1218–19.

76. *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir 1973) (“In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance.”).

77. *Id.*

78. *Id.* at 394–95.

79. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(a), 91 Stat 685, 775 (codified at 42 U.S.C. § 7607(d)(7)(B)) (adding subsection (d)); for text of provision, see *supra* note 52. The SEC provision, covering both orders and rules, see *supra* note 53, was enacted in 1975, Pub. L. No. 94-29, § 20, 89 Stat 97, 159, but I have found no cases involving rulemaking under this provision.

Portland Cement which was quoted approvingly by the Supreme Court in connection with the NEPA aspect of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁸⁰ which was in turn invoked by the Court in *Department of Transportation v. Public Citizen*,⁸¹ in ruling that a challenger forfeited particular objections to the EIS by failing to raise them in the available public comment process. The issue in *Public Citizen* was whether NEPA and the Clean Air Act required the Department to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, when promulgating regulations that would allow such operations. The Court disallowed certain challenges to the preliminary EIS (environmental assessment or EA) based on issue exhaustion:

What is not properly before us, despite respondents' argument to the contrary, . . . is any challenge to the EA due to its failure properly to consider possible alternatives to the proposed order Persons challenging an agency's compliance with NEPA must "structure their participation so that it . . . alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration. None of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the EA and none urged [the Department] to consider alternatives. Because respondents did not raise these particular objections to the EA, [the Department] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action.⁸²

The Court did acknowledge that "[a]dmittedly, the agency bears the primary responsibility to ensure that it complies with NEPA, . . . and an EA's or an EIS's flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."⁸³ The Ninth Circuit has since defined the "so obvious" standard as a variant of the "futility exception" where the agency has "independent knowledge of issues that concern [NEPA] plaintiffs."⁸⁴ In a more recent NEPA case, that circuit cited its "general rule"

80. 435 U.S. 519, 553–54 (1978) ("Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'") (citing *Portland Cement*, 486 F.2d at 394).

81. 541 U.S. 752, 764 (2004).

82. *Id.* at 764–65 (quoting *Vermont Yankee*, 435 U.S. at 553).

83. *Id.* at 765.

84. *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092–93 (9th Cir. 2006) (quoting *Public Citizen*, 541 U.S. at 765). In distinguishing *Public Citizen* and allowing the procedural challenge to the agency environmental impact statement (EIS) in *Ilio'ulaokalani Coalition*, the

that “we will not consider issues not presented before an administrative proceeding at the appropriate time.”⁸⁵ But then it went on to add:

However, we have repeatedly held that the exhaustion requirement should be interpreted broadly. Plaintiffs fulfill the requirement if their appeal “provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged.” Plaintiffs need not state their claims in precise legal terms, and need only raise an issue “with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met.”⁸⁶

While it is true that NEPA procedures do call for notice to the public and solicitation of information from the public,⁸⁷ the analogy to notice-and-

court characterized the rationale of *Vermont Yankee* and *Public Citizen* as applying “in those instances in which an interested party suggests that certain factors be included in the agency analysis but later refuses the agency’s request for assistance in exploring that party’s contentions.” *Id.* at 1092 (quoting *Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir. 1984)). *But see* *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1171 (10th Cir. 2007) (although “a close question,” finding a comment challenging a U.S. Forest Service EIS insufficient to put the agency on notice of a substantial evidence soil standard claim, because the challenger’s placement of its comment relating to soil erosion in a section of its comment titled “Impacts to Water Quality” and not the section titled “Unstable Soils”); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) (indicating that arguments not raised before the agency during its compliance with NEPA’s procedural requirements are waived).

85. *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2010) (citing *Marathon Oil Co. v. United States*, 807 F.2d 759, 767–68 (9th Cir. 1986)). I note that *Marathon* and the cases it relied on were all cases of agency adjudication.

86. *Id.* (citations omitted); *see also* *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (“A party forfeits arguments that are not raised during the administrative process. However, a claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised. Accordingly, alerting the agency in general terms will be enough if the agency has been given ‘a chance to bring its expertise to bear to resolve [the] claim.’”) (citations omitted). On the other hand, in another NEPA case, the Sixth Circuit found that the challenger had failed to raise an issue concerning floodplains’ effect on potholes during the environmental impact comment period. The court concluded, after an analysis of the record, that the issues raised were not sufficiently clear in addressing floodplains, being too vague or describing other water issues like wetlands that would require too much interpretation on the agency’s part. Therefore, the court determined that the issue was not raised during the administrative proceedings and could not now be raised. *Karst Envtl. Educ. & Protection v. FHA*, 559 F. App’x 421 (6th Cir. 2014).

87. *Council of Envtl. Quality Regulations*, 40 C.F.R. § 1506.6 (2016). Note that issue exhaustion issues can readily come up in other natural resources planning contexts, such as approvals of timber sales on national forest land, *see* *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (9th Cir. 2002); approval of mines, *Idaho Sporting Cong. v. Rittenhouse*, 305

comment rulemaking is somewhat limited, because the comment process is less regularized and the substantive adequacy of agency compliance with NEPA is subject to a more limited scope of review.⁸⁸ Nevertheless, because *Public Citizen* was decided after *Sims*, some courts have viewed it as removing *Sims* as an obstacle to applying the issue exhaustion doctrine in the context of EIS challenges.⁸⁹

VII. GENERAL ISSUE EXHAUSTION STATUTES AND JUDICIALLY DEVELOPED EXCEPTIONS—THE *WATCH* CASE

As mentioned above, when the D.C. Circuit decided *Gage* and *Portland Cement*, there were already some statutes on the books, such as § 405(a) of the amended Communications Act, that *generally* required challengers to agency actions to first raise the issue with the agency in the form of a petition for rehearing.⁹⁰ In 1983, Judge Wald thoroughly examined the appli-

F.3d 957, 965 (9th Cir. 2002), and review of cancellation of grazing permits, *Buckingham v. Sec’y of the USDA*, 603 F.3d 1073, 1080–81 (9th Cir. 2010). These Ninth Circuit cases are collected in a very thoughtful NEPA issue exhaustion opinion in *Oregon Nat. Desert Ass’n v. McDaniel*, 751 F. Supp. 2d 1151 (D. Or. 2011). *See also* *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015) (applying issue exhaustion to a challenge to Interior Department approval of proposed leases for resource exploration and development on the outer continental shelf).

88. *See, e.g.*, *High Sierra Hikers Ass’n v. U.S. Forest Serv.*, 436 F. Supp. 2d 1117, 1149 (E.D. Cal. 2006) (“Judicial review of an agency’s EIS under NEPA is extremely limited.”); *see also* *Fixing America’s Surface Transportation Act*, Pub. L. No. 114-94, § 41007(a)(1)(B), 129 Stat. 1759 (2015) (codified at 42 U.S.C. §§ 4370m–6). This is an important new provision which bars judicial review of any environmental review conducted under NEPA concerning most large-scale infrastructure projects unless:

- (i) the action is filed by a party that submitted a comment during the environmental review; and
- (ii) any commenter filed a sufficiently detailed comment so as to put the lead agency on notice of the issue on which the party seeks judicial review, or the lead agency did not provide a reasonable opportunity for such a comment on that issue.

Id. at § (a)(1)(B).

89. *See High Sierra Hikers*, 436 F. Supp. 2d at 1147–48 (specifically disagreeing with the pre-*Public Citizen* NEPA review case of *Vermont Public Interest Research Group v. U.S. Fish & Wildlife Service*, 247 F. Supp. 2d 495, 515–17 (D. Vt. 2002), which relied on *Sims* in finding issue exhaustion inapplicable to the non-adversary context of NEPA proceedings). *But see* the post-*Public Citizen* case of *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 926 (D. Minn. 2005) (agreeing with *Vermont Public Interest Group*, albeit without citing *Public Citizen*).

90. *See* 47 U.S.C. § 405(a); *see supra* p. 62. This provision continues to be regularly enforced, *see* *FiberTower Spectrum Holdings, L.L.C. v. FCC*, 782 F.3d 692, 696–97 (D.C. Cir. 2015) (applying issue exhaustion to a statutory argument that a license applicant sought to make in court after failing to make it to the Commission in its application for review of the

cation of this provision to a licensing challenge in *Washington Ass'n for Television & Children (WATCH) v. FCC*.⁹¹ In this case, a watchdog group challenged the FCC's renewal of licenses of three television stations in Washington, D.C. on the grounds that the stations had failed to provide any regularly scheduled weekday children's programs, claiming that this was in contravention of the Commission's policy. More specifically, WATCH raised two issues in its petition to the D.C. Circuit. The first was the agency's approval of the license renewals without holding a hearing on the stations' failure to carry regularly scheduled children's programming, as demanded by the group in its petition to deny. This issue was properly raised with the agency, but the FCC had explained in denying the hearing "that although licensees had a duty to provide weekday children's programming, they had no duty to provide it on a *regularly scheduled basis*."⁹² The FCC relied on the fact that its policy statement on children's programming did not require such regular programming (a determination ultimately upheld by the D.C. Circuit).⁹³ However, the petition for judicial review also asked the court to review a second issue—the "general inadequacy" of the stations' children's programming—an argument that had not been presented to the Commission first.⁹⁴

A major issue in this case was whether, although the statutory language admitted of no exceptions, the provision should be treated like other exhaustion cases—subject to exceptions in extenuating circumstances.⁹⁵ Judge Wald concluded that it should be, although she went on to hold that none of these circumstances were present in this case.⁹⁶

What was especially interesting about her opinion in this case is that she analyzed how § 405(a) had been applied in prior D.C. Circuit cases. In addressing the blanket provision in the amended Communications Act, the court stated:

[Our] cases assume that § 405 contains implied exceptions without explaining why. We understand these cases, however, as implicitly interpreting § 405 to codify the judicially-created doctrine of exhaustion of administrative remedies, which permits courts some discretion to waive exhaustion. There is no useful legislative history to confirm or refute this interpretation, but it has the merit of requiring the same degree of exhaustion for the FCC as for other agencies. We adopt that interpretation here and thus construe § 405 to incorporate the traditionally recognized exceptions to the

license denial).

91. 712 F.2d 677 (D.C. Cir. 1983).

92. *Id.* at 679 (emphasis in original).

93. *Id.* at 684–85.

94. *Id.* at 681.

95. *Id.*

96. *Id.* at 683.

exhaustion doctrine.⁹⁷

Judge Wald cited similar general issue exhaustion statutes that also lacked specific exceptions such as the Securities Act of 1933 (15 U.S.C. § 77i(a)), along with others that did allow some exceptions, for example, the Securities Exchange Act of 1934, 15 U.S.C. § 78y(c)(1) (“reasonable ground for failure to do so.”), Fair Labor Standards Act, 29 U.S.C. § 210(a) (same), Public Utility Holding Company Act, 15 U.S.C. § 79x(a) (same), National Labor Relations Act, 29 U.S.C. § 160(e) (“extraordinary circumstances”),⁹⁸ and then commented:

The very senselessness of these differences in language suggests that Congress meant, in all these statutes, merely to codify the judicial doctrine of exhaustion of administrative remedies. That would explain Congress’ failure to give careful attention to the nuances of language that might, in another context, connote differences in intended meaning.⁹⁹

She then discussed some of the judicially recognized exceptions to the exhaustion requirement, although ultimately the court found that none of these exceptions applied in this case.¹⁰⁰ Among them are:

1. Issues, that “by their nature could not have been raised before the agency (e.g., a material change in circumstances or a serious impropriety in the administrative process),”¹⁰¹
2. where the challenged action is “patently in excess of [the agency’s] authority,”¹⁰²
3. where it would have been futile to raise before the agency,¹⁰³
4. where the agency has in fact considered the issue,¹⁰⁴

97. *Id.* at 681–82 (footnotes omitted). Indeed, as to the legislative history, she explains, The main thrust of the provision may have been to ensure that in the mine run of cases, where issues *had* been raised before the agency, a party could obtain judicial review without first petitioning the Commission for rehearing. Early case law had suggested that a petition for rehearing was sometimes a prerequisite to judicial review.

Id. at 681–82 n.5 (emphasis in original).

98. *Id.* at 682 n.6. All these statutes, except for the cited section of the Public Utility Holding Company Act of 1935, remain on the books.

99. *Id.*

100. *Id.*

101. *Id.* at 682 (citing *Greater Bos. Television Corp. v. FCC*, 463 F.2d 268, 283–84 (D.C. Cir. 1971) (reviewing cases)).

102. *Id.* (quoting *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 312 n.10 (1979)). The Court also noted a disagreement among the commentators as to whether a party should be required to raise a jurisdictional challenge with the agency first. *Id.* at 682 n.8.

103. *Id.* at 682. But the court cautioned that “[f]utility should not lightly be presumed, however.” *Id.* at 682 n.9.

104. *Id.* at 682 (citing cases where the issue was raised by dissenting commissioners (*Office of Comm’n of the United Church of Christ v. FCC*, 465 F.2d 519, 523–24 (D.C. Cir.

5. where “the obvious result would be a plain miscarriage of justice.”¹⁰⁵

WATCH's issue exhaustion analysis was applied in the context of a challenge to a licensing order, not to a challenge of the underlying rule, much less of a pre-enforcement challenge to a rule. Indeed, most of the dozen cases construing § 405(a) cited by Judge Wald¹⁰⁶ also involved individual licensing or application cases. But there was a sprinkling of FCC rulemaking cases. For example, in *Gross v. FCC*,¹⁰⁷ the court reviewed the constitutionality of a rule banning the transmission of commercial messages by amateur radio stations, but barred petitioners from raising “the sundry other grounds upon which petitioners seek for the first time on the instant petition to review to challenge.”¹⁰⁸ In *American Radio Relay League, Inc. v. FCC*,¹⁰⁹ the court, in reviewing a substantive challenge to a rule limiting the manufacture and sale of certain amplifiers used by citizens band operators, brushed aside in a footnote the challenger's contention that the Commission did not comply with the APA's rulemaking procedures because that argument had not been made before the Commission.¹¹⁰ And finally, *United States v. FCC*¹¹¹ involved a challenge to an FCC ratemaking involving AT&T (technically a rulemaking under the APA) brought by other federal agencies who argued in court that the rate of return granted to the company was unsupported. The court upheld the rate, pointing out, after citing § 405(a), that the FCC had sought comments on the rate, and the

executive agencies did comment in response to that invitation, but they did not in their response raise any argument even resembling the one made here. Had the government brought what it now contends to be a failure to provide a full explanation to the Commission's attention, the Commission could easily have elaborated to cure any defect.¹¹²

In another case cited in *WATCH*, where the FCC's *failure to issue* a rule

1972)) or by another party (*Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 951 (6th Cir. 1971); *N.Y. State Broad. Ass'n v. United States*, 414 F.2d 990, 994 (2d Cir. 1969)). The court then comments: “This exception can be seen as a variant of the futility exception, since it would almost surely be futile for a party to raise an objection already made by someone else.” *Id.* at 683 n.10.

105. *Id.* at 683 n.11 (quoting *Hormel v. Helvering*, 312 U.S. 552, 558 (1941)). These factors are similar to those later propounded by the Supreme Court in *McCarthy v. Madigan*, 503 U.S. 140, 144–48 (1992).

106. *See WATCH*, 712 F.2d at 681 & n.3.

107. 480 F.2d 1288 (2d Cir. 1973).

108. *Id.* at 1290 n.5.

109. 617 F.2d 875 (D.C. Cir. 1980).

110. *Id.* at 879 n.8.

111. 707 F.2d 610, 619 (D.C. Cir. 1983).

112. *Id.*

had been challenged by a petition for rehearing, which had been denied, the D.C. Circuit had allowed petitioners to argue for the first time that the FCC had improperly accepted and considered *ex parte* communications in the rulemaking proceedings.¹¹³ The court first chided the petitioner (ACT) for

offer[ing] no justification for its failure to raise the issue of “closed door bargaining” in its petition for rehearing beyond unsupported conclusory assertions that it is “most unlikely” that the Commission would have attempted to cure its “error” had ACT in fact raised the issue in time for the Commission to do so. . . . Such an assertion would be unconvincing in the absence of any concrete indication that reconsideration would have been futile, . . . and, in other circumstances, we would be constrained from entertaining the objection.¹¹⁴

Nevertheless, the court allowed the objection to be made:

That objection, however, essentially alleging a denial of administrative due process, raises neither a novel factual issue for which an initial Commission determination is quite clearly both necessary and appropriate, nor a legal issue on which the Commission, . . . and even this court, . . . has not already made known its general views to the contrary. Thus, we believe that a thorough airing of the merits of ACT’s procedural challenge would not be inappropriate in this case, especially in light of the agency’s tentative conclusion of these informal rulemaking proceedings shortly after *ex parte* discussions with regulatee representatives.¹¹⁵

This examination of the § 405(a) cases leading up to the D.C. Circuit’s decision in *WATCH* shows how the issue exhaustion doctrine had been applied sporadically, but not uniformly—and not as a jurisdictional matter—in rulemaking review cases in the context of an explicit, generally applicable statutory exhaustion provision.

VIII. THE INCREASING APPLICATION TO RULEMAKING CASES

In recent years the issue exhaustion doctrine has grown to cover more and more rulemakings, even where there is no such statutory provision, albeit with some inconsistently applied exceptions.¹¹⁶ My concern is, while

113. *Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

114. *Id.* at 469.

115. *Id.* The court rejected that procedural challenge, thereby limiting the scope of its earlier decision prohibiting *ex parte* communications in informal rulemaking. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 15 (D.C. Cir. 1977). It is likely that the court bent over backwards to allow this challenge so as to have an opportunity to limit the scope of *Home Box Office*.

116. For a recent application of the issue exhaustion doctrine to a typical rulemaking in the D.C. District Court, see *Hunteo Pawn Holdings, L.L.C. v. U.S. Dep’t of Def.*, 240 F. Supp. 3d 206 (D.D.C. 2016), involving a challenge to Department of Defense (DOD) changes in its regulations under the Military Lending Act. The court rebuffed several challenges on the

the doctrine has an appropriate place in some rulemaking challenges, that if it becomes as fully entrenched as it appears to be becoming, it could serve as a significant barrier to judicial review of rules, or at least a trap for the unwary. In addition, it may lead the “wary” to feel the need to file “shotgun” comments on rules to preserve their right to seek judicial review.¹¹⁷

It is difficult to know how often courts have, without commenting, allowed issues raised in review petitions to be decided, even where the challenger had not raised the same issues in rulemaking comments. To some extent, this may depend on whether the government raises this issue as a defense. But as the government succeeds more often in disposing of issues by raising issue exhaustion questions in rulemaking cases, one can expect the government to be more vigilant about raising it. And there are numerous examples of successful defenses on this ground. As Markoff documents, the EPA has succeeded 80% of the time since 1993 when it presents the Clean Air Act issue exhaustion provision as a defense in rulemaking cases.¹¹⁸

While the post-1977 Clean Air Act cases are unique because they involve the only litigated statutory provision that explicitly covers rulemaking challenges, the D.C. Circuit also decides numerous other rulemaking-review cases involving rules issued by other agencies (or by the EPA) under other statutes that lack the type of provision found in the Clean Air Act. Two

ground that plaintiffs had not adequately presented them during the rulemaking comment period. As the court put it, one challenge faulted the Department

for not considering the Final Rule’s effect on pawnshops based on the fact that the list of “affected businesses” in the Final Rule does not include the [North American Industry Classification] code for pawnbrokers. However, the Department’s [notice of proposed rulemaking] included the exact same list of “affected business[]” codes as was ultimately included in the Final Rule, . . . and [plaintiff] never raised this issue to the Department. This argument is accordingly waived.

Id. at 228. Another challenge was to the Department’s certification that the Final Rule would not have a “significant economic impact on a substantial number of small entities,” under the Regulatory Flexibility Act (RFA). *Id.* The court held, “Plaintiffs argued that ‘commenters did address the obvious fact that the rule would have greater impact in military communities,’ but point to no comments that suggested the Department conduct its RFA analysis ‘depending on whether a business is located near a military base.’” *Id.* at 229. The court cited another case that disallowed a claim that the RFA analysis was arbitrary and capricious in failing to consider certain costs because “petitioners did not object to that omission.” *Id.* (citing *Lake Carriers’ Ass’n v. EPA*, 652 F.3d 1, 12 (D.C. Cir. 2011)).

117. *See, e.g.*, *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 983 n.69 (11th Cir. 2008) (“Shotgun pleadings are a significant part of the contemporary litigation culture. They are fueled in no small part by the lawyers’ fear that if they do not include everything but the kitchen sink in their pleadings, they may be sued for malpractice.”).

118. *See* Markoff, *supra* note 51, at 1079.

cases in 1991 involved a notice-and-comment proceeding (technically a rulemaking of particular applicability) to add hazardous waste sites to the Superfund National Priorities List (NPL) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In one, a challenger sought to contend in court for the first time that the EPA lacked authority to aggregate sites for NPL listing purposes.¹¹⁹ The court, per Judge Mikva, disallowed that argument, citing *WATCH*.¹²⁰ In another, a challenger sought to contend that the EPA's errors in computing the score given to a release of a hazardous metal due to erroneous wind direction data led to an overall score that caused the listing of the site on the NPL. The court rejected this claim:

Absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue. *Tex Tin* failed to object to the wind direction data on the date in question when it made its comments to the agency, although it raised this very objection regarding wind direction on other test dates, which EPA then chose not to rely upon. . . . Raising an objection as to a different test date is insufficient to alert the agency; it is more likely to exclude the date not objected to from the agency's focus.¹²¹

Two years later, in *Ohio v. EPA*,¹²² the court examined, and mostly upheld, a broader-based EPA rulemaking to amend the National Contingency Plan (NCP) to conform it with CERCLA. A group of states made several arguments that the rule was contrary to language in CERCLA, one of which was disallowed because they had not first made the argument to the agency. But in this case, the court made clear that it was so ruling because "Neither the States *nor any other party* raised" the issue.¹²³

119. *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1302 (D.C. Cir. 1991).

120. *Id.* at 1308.

121. *Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. 1991) (per curiam) (citing *Eagle-Picher Indus. v. EPA*, 822 F.2d 132, 146 (D.C. Cir. 1987)). By 2001, the D.C. Circuit declared that "It is black-letter administrative law that 'absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue.'" *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (citing *Tex Tin*, 935 F.2d 1321; *Eagle-Picher Indus. v. EPA*, 822 F.2d 132, 146 (D.C. Cir. 1987)). In *Appalachian Power*, the Court added, "Generalized objections to agency action or objections raised at the wrong time or in the wrong docket will not do." *Id.* It went on to find that challengers had waived their argument even though the arguments had been made by other commenters, but in a different docket. *Id.*

122. 997 F.2d 1520 (D.C. Cir. 1993).

123. *Id.* at 1529 (emphasis added). For similar conclusions, see *City of Portland v. EPA*, 507 F.3d 706, 710 (D.C. Cir. 2007) ("Because neither [amicus] Walla Walla nor any other party raised this argument before the Agency during the rulemaking process, however, it is waived, and we will not consider it.") and *Military Toxics Project v. EPA*, 146 F.3d 948, 956 (D.C. Cir. 1998) ("We need not reach this challenge on the merits, however, because as the

This “any other party” codicil was recognized a year later in *Natural Resources Defense Council, Inc. v. EPA*,¹²⁴ when the court’s description of the *Ohio* case contained this blurb: “(court may excuse one party’s failure to raise an issue in administrative forum where another party pressed and agency in fact considered identical issue).”¹²⁵ In *NRDC v. EPA*,¹²⁶ the Natural Resources Defense Council (NRDC) challenged an EPA rule issued under the Resource Conservation and Recovery Act (RCRA), in which the agency did not include used oils on its listing of covered hazardous wastes, instead explaining that it relied on other federal regulations to prevent any harm from used oil disposal. In court, NRDC wanted to argue that the “EPA’s reliance on other federal regulations was forbidden by the statutory and regulatory command that the EPA list substances that pose a substantial threat when “‘improperly managed.’”¹²⁷ The court noted that, “Petitioners do not deny that they failed to raise their ‘improper management’ argument before the agency. Instead, they contend that their raising ‘various technical, policy, and legal’ objections to the EPA’s proposed non-listing was sufficient to preserve their right to press their statutory construction argument in court.”¹²⁸

Rejecting that argument, Judge Sentelle, writing for the court, concluded that if it were sufficient for parties to argue that they had made other “technical, policy, or legal” arguments before the agency,

[A] party could never waive a legal claim as long as the party in fact appeared and argued something before the agency. While there are surely limits on the level of congruity required between a party’s arguments before an administrative agency and the court, respect for agencies’ proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency’s interpretation of its governing statute are first raised in the administrative forum.¹²⁹

This case also illustrates how difficult it can be for a reviewing court to determine if the petitioner had in fact made a similar argument in the rulemaking proceeding. As the court noted:

EPA also points out neither the [Military Toxics Project (MTP)] nor anyone else commented during the rulemaking process that the Rule as drafted would permit the DOD unilaterally to free itself from the strictures imposed by the Resource Conservation and Recovery Act (RCRA). The MTP has thus waived the argument and may not raise it for the first time upon appeal.”).

124. 25 F.3d 1063 (D.C. Cir. 1994).

125. *Id.* at 1074.

126. 755 F.3d 1010 (D.C. Cir. 2014).

127. *Id.*

128. *Id.*

129. *Id.* (referring to *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (providing that agencies’ interpretations of their own ambiguous statutes should be upheld if reasonable)).

At oral argument, counsel suggested that petitioners' comments had at least implied that the EPA's proposal to rely on other federal regulations would be inconsistent with the agency's duty to consider the "improper management" of used oil. We asked counsel to supply the court with the full text of petitioners' comments. After examining these comments, however, we are still unable to discern any place in which petitioners could fairly be said to have raised this issue of statutory and regulatory construction.¹³⁰

As the D.C. Circuit recently phrased the test in a case challenging an Interior Department offshore leasing decision that was subject to notice-and-comment, "The question in determining whether an issue was preserved, however, is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it."¹³¹ In that case, the court acknowledged that it did

see a connection between the comment and the current objection, [but that] Interior did not have anything close to the kind of explanation we do now, however, nor the same opportunity to parse the record and decipher the claims arguably latent in only a few sentences. . . . Interior received 280,189 comments on the 2012–2017 Program, some of them dense and lengthy. We cannot conclude on this record that [Center for Sustainable Economy] fairly raised the objection it now presses to Interior's method of assessing [the Outer Continental Shelf] drilling's coastal and onshore effects.¹³²

It went on to explain:

When the government argues an issue is forfeited because it was not fairly raised, petitioners must explain why the issue was raised in a fashion sufficient to preserve it. Whether an objection is fairly raised depends on, among other things, the size of the record, the technical complexity of the subject, and the clarity of the objection.¹³³

In a non-EPA environmental case, *National Ass'n of Manufacturers v. United States Department of the Interior*,¹³⁴ the National Association of Manufacturers (NAM) also was tripped up by this doctrine. It attempted to argue that models within the Department's CERCLA natural resource damage (NRD) rule were arbitrary and capricious because they failed to evaluate restoration alternatives in terms of the effect they might have on "natural resource 'services.'"¹³⁵ But the court rejected this line of argument because "NAM failed to raise this argument in the rulemaking proceedings below, and we find no reason to excuse NAM's failure to exhaust its administrative reme-

130. *Id.* at 1074 n.7.

131. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015).

132. *Id.*

133. *Id.*

134. 134 F.3d 1095 (D.C. Cir. 1998).

135. *Id.* at 1111.

dies.”¹³⁶

In response, NAM argued that, among other things, “the relationship between services and restoration was ‘a general point applicable to any NRD assessment,’ because it ‘had been emphasized repeatedly in prior rulemakings,’ . . . ‘other documents in the record highlighted the services concept,’ [and therefore] DOI was given a ‘fair opportunity’ to consider the issue below.”¹³⁷

Taking a hard line, Judge Henderson rejected that argument: “The fact that, buried in hundreds of pages of technical comments NAM submitted, some mention is made of the resource services concept and its relation to compensable values (rather than restoration alternatives) is insufficient to preserve the issue for review on appeal.”¹³⁸

These environmental cases demonstrate the potency of the issue exhaustion doctrine (sometimes referred to as a “waiver” rule) and provide some basis for the judicial attitude that gives rise to it. As the court stated in *Ohio v. EPA*:

[T]he waiver doctrine is also concerned with notions of agency autonomy and judicial efficiency. The doctrine promotes agency autonomy by according the agency an opportunity to discover and correct its own errors before judicial review occurs. Judicial efficiency is served because issues that are raised before the agency might be resolved without the need for judicial intervention. The efficiency concern is especially germane to this challenge to the NCP, involving an extremely complex rulemaking in which a multitude of issues might be raised for the first time before this court in the absence of the waiver doctrine.¹³⁹

The doctrine has also been justified as sparing the agency from the burden of having to respond to vague comments. As Judge Randolph wrote in a Clean Air Act case:

A citation to the section of the rule or a description of it may be all that is needed. If a comment lacking even that low level of specificity sufficed, the agency would be subjected to verbal traps. Whenever the agency failed to detect an obscure criticism of one aspect of its proposal, the petitioner could claim not only that it had complied with Section 307 but also that the agency acted arbitrarily because it never responded to the comment. Rulemaking proceedings and the legal doctrines that have grown up around them are intricate and cumbersome enough. Agency officials should not have to wade through reams of documents searching for “‘implied’ challenges.”¹⁴⁰

This argument has some appeal, especially in complex rulemakings such as those involved in CERCLA cases, where expedition is of particular con-

136. *Id.*

137. *Id.*

138. *Id.*

139. 997 F.2d 1520, 1528–29 (D.C. Cir. 1993).

140. *Nat. Res. Def. Council, Inc. v. EPA*, 559 F.3d 561, 564 (D.C. Cir. 2009).

cern and the overall program to prioritize the clean-up of particular toxic waste sites should not be hamstrung by challenges at every decision point.¹⁴¹ On the other hand, while the doctrine might spare the courts from new arguments and the agencies from vague comments, it might also stimulate more specific “shotgun” comments to the agency as a defense mechanism.¹⁴² Nor does the doctrine seem well suited for certain challenges. It seems less necessary or even useful for challenging parties to raise constitutional, procedural, or statutory authority questions to the agency before raising them in court. A rulemaking record is less necessary in such cases and it is more likely that it would be futile to make such arguments to the agency. Finally, even in fact-based challenges, the doctrine should not be applied in cases where the agency has adequate notice or knowledge of the factual issues raised by the challenger.

IX. WHAT ABOUT *SIMS V. APFEL*?

Policy arguments aside, one might have thought that the Supreme Court’s refusal to apply the doctrine to Social Security “informal” adjudication in the 2000 decision of *Sims v. Apfel*, might have arrested this trend of applying it to the more informal and non-adversarial rulemaking context.¹⁴³

In 2004, the Ninth Circuit addressed this issue saying, “The Court’s decision [in *Sims*] turned on the unique nature of Social Security benefit proceedings and offers no guidance relevant to rulemaking.”¹⁴⁴ It then went on to apply issue exhaustion in a rulemaking context. However, more recently it did apply the *Sims* rationale to a Surface Transportation Board (STB) exemption proceeding (which it denominated a rulemaking), on the grounds that “the STB’s procedures were informal and provided no notice to interested parties that to later challenge the STB’s decision one must submit comments during the exemption process. In other cases, the STB, or its predecessor the ICC, explicitly requested public comment on exemptions.”¹⁴⁵

141. See generally Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339 (1996).

142. Markoff also argues that doctrine might result in a less “diverse, pluralistic array of parties represented” in post-rulemaking settlement discussions taking place in the judicial review phase because less well-financed interests are less able to participate in rulemakings. Markoff, *supra* note 51, at 1083–85. But without gainsaying that such settlement discussions are a key aspect of ultimate rule implementation, wouldn’t this concern instead give such groups a greater incentive to file extensive comments more proactively in order not to lose their seat at the negotiating table?

143. *Sims v. Apfel*, 530 U.S. 103 (2000); see *supra* text accompanying notes 31–42.

144. *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004).

145. *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1080 (9th Cir. 2013).

The D.C. Circuit was presented with this argument in 2005 in the case of *Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Administration*¹⁴⁶ involving a challenge to a safety rule applying to trucking and bus companies. The petitioner in the case raised several issues that it had not made in its comments to the agency in support of its claim that the agency had acted arbitrarily and capriciously. The government maintained that the petitioner had “waived” these arguments, but petitioner cited *Sims* for the proposition that in this kind of informal rulemaking proceeding, “there can be no ‘waiver.’”¹⁴⁷

Judge Edwards for the unanimous panel agreed that “*Sims* indicates that this administrative-waiver doctrine does not represent an ironclad rule. And, as a general matter, a party’s presentation of issues during a rulemaking proceeding is not a *jurisdictional* prerequisite to judicial review.”¹⁴⁸ He acknowledged that petitioner’s argument that “[r]ulemakings are classic examples of non-adversarial administrative proceedings” was “not unreasonable, because there appears to be no statute or regulation compelling exhaustion in advance of judicial review, and no argument has been made analogizing the agency’s rulemaking to adjudication.”¹⁴⁹

However, he pointed to three D.C. Circuit cases, post-dating *Sims*, which continued to apply the rule in rulemaking-review cases. In two of those cases, the court failed to address *Sims*.¹⁵⁰ But in the third case, *National Mining Ass’n v. Department of Labor*,¹⁵¹ involving a challenge to the Department of Labor’s regulations under the Black Lung Benefits Act, the court, in a one-line dismissive conclusion, found *Sims* “inapplicable, for it addresses issue exhaustion, not issue waiver.”¹⁵² That case also dealt summarily with *Darby*, dismissing its impact on the issue exhaustion doctrine as “wholly inapposite” because it “addresses exhaustion of remedies, not waiver of claims.”¹⁵³

To his credit, Judge Edwards blanched at this distinction: “The distinction between ‘issue exhaustion’ and ‘issue waiver’ is illusive, to say the least. Indeed, both terms appear in the case law without apparent distinction, and they are sometimes treated as if synonymous.”¹⁵⁴

146. 429 F.3d 1136 (D.C. Cir. 2005).

147. *Id.* at 1148.

148. *Id.* (emphasis in original).

149. *Id.* at 1149.

150. *Id.* (citing *Appalachian Power Co. v. EPA*, 251 F.3d 1026 (D.C. Cir. 2001); *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554 (D.C. Cir. 2002)). Both cases cited only pre-*Sims* precedent.

151. 292 F.3d 849 (D.C. Cir. 2002).

152. *Id.* at 874.

153. *Id.* at 874 (citing *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d at 562).

154. *Advocates for Highway & Auto Safety*, 429 F.3d at 1149 (footnote omitted).

In the end, Judge Edwards accepted *National Mining Ass'n's* conclusion anyway, for two reasons:

First, the courts are not authorized to second-guess agency rulemaking decisions; rather, the role of the court is to determine whether the agency's decision is arbitrary and capricious for want of reasoned decisionmaking Therefore, it is unsurprising that parties rarely are allowed to seek "review" of a substantive claim that has never even been presented to the agency for its consideration. Second, as noted above, "[s]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body . . . has erred against objection made at the time appropriate under its practice." *L.A. Tucker Truck Lines*.¹⁵⁵

The court's reference to "simple fairness" makes a legitimate point, but does not go very far in identifying the specific circumstances when issue exhaustion is most appropriate, especially in a challenge to a rulemaking.¹⁵⁶ However, Judge Edwards' first argument that arbitrary and capricious challenges should implicate application of the doctrine is helpful, and points to the possibility of applying the issue exhaustion doctrine differently in rulemaking cases depending upon the type of challenge being made in court. This idea is discussed further below.

X. OTHER CIRCUITS

Several other circuits have now joined the D.C. Circuit in applying the issue exhaustion doctrine in rulemaking cases, most of them, but not all, in environmental cases. Conspicuously, after originally strongly rejecting the doctrine, the Fifth Circuit seems to be having second thoughts. In its 1981

155. *Id.* at 1150 (second ellipsis in original) (citations omitted). The *Sims* issue has also come up in the context of Court of Appeals for the Federal Circuit (CAFC) review of a decision by the U.S. Court of Appeals for Veterans Claims (Veterans Court) that had affirmed the Department of Veterans Affairs' (VA's) denial of veterans' benefits. *Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015). Scott failed to raise a legal issue regarding his VA hearing with before the Veterans Court, and then sought to raise it before the CAFC. Scott argued for no issue exhaustion, saying that the VA board proceedings were non-adversarial, citing *Sims*. *Id.* at 1377–78. However, the court distinguished *Sims* by finding that that in *Sims* no statute or regulation required issue exhaustion, *id.* at 1379, n.4, and previous circuit case law had construed the relevant statute to impose an issue exhaustion requirement in cases appealed from the Veterans Court to the CAFC. Therefore, the court found issue exhaustion prevented it from hearing the claim. The CAFC also noted that an earlier case, also decided after *Sims*, had construed the statute to also uphold the Veterans Court's application of issue exhaustion to arguments that the veteran had failed to raise before the VA's board. *Id.* at 1379 (citing *Bernklau v. Principi*, 291 F.3d 795 (Fed. Cir. 2002)).

156. *Advocates for Highway & Auto Safety*, 429 F.3d at 1149 (noting that the petitioners argued that "Rulemakings are classic examples of non-adversarial administrative proceedings.>").

decision in *City of Seabrook v. EPA*,¹⁵⁷ the court squarely rejected the EPA's claim that a petitioner's failure to object to a conditional State Implementation Plan (SIP) approval during the notice-and-comment procedure prevented it from challenging the action in court:

The rule urged by the EPA would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register*, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated. This is a fate this court will impose on no one.¹⁵⁸

Moreover, the court drew a strong distinction between applying the issue exhaustion doctrine in rulemaking and doing so in cases such as *L.A. Tucker Truck Lines*, which involved appeals by a party to an essentially adversarial administrative proceeding, where a hearing was held and evidence was received.¹⁵⁹

The Fifth Circuit explicitly reaffirmed the *City of Seabrook* decision in 1988, in *American Forest & Paper Ass'n v. EPA*,¹⁶⁰ but in a 1998 case the court went the other way. In *Texas Oil & Gas Ass'n v. EPA*,¹⁶¹ a challenge to EPA new source performance standards under the Clean Water Act, in a footnote, and without even acknowledging the circuit precedents, the court applied issue exhaustion to several challenges, invoking only the same *L.A. Tucker Truck Lines* case that had been explicitly disavowed in the *City of Seabrook* case.¹⁶² Then in 2003, in *BCCA Appeal Group v. EPA*,¹⁶³ another panel with an unusual make-up¹⁶⁴ distinguished *City of Seabrook* and *American Forest & Paper Ass'n* and followed *Texas Oil & Gas*. In so doing, this panel recognized the conflict, but after citing several other cases, none of which involved rulemaking, it said only, “[b]ecause the present case is distinguishable from *Seabrook* on the law and the facts, the court need not resolve the conflict in the circuit at this time. Rather, the court finds *Texas Oil & Gas* controlling here.”¹⁶⁵ The Fifth Circuit's departure from its earlier view,

157. 659 F.2d 1349 (5th Cir. 1981).

158. *Id.* at 1360–61 (footnote omitted).

159. *Id.* at 1360 n.17.

160. 137 F.3d 291, 295 (5th Cir. 1998).

161. 161 F.3d 923 (5th Cir. 1998).

162. *Id.* at 933 n.7.

163. 355 F.3d 817 (5th Cir. 2003).

164. Apparently this was a panel of two, consisting of Judge Davis and a Court of International Trade Judge sitting by designation.

165. 355 F.3d at 829 n.10. Judge Stephen Williams has recently recounted this set of Fifth Circuit cases in an interesting concurring opinion. *Koretov v. Vilsack*, 707 F.3d 394, 399 n.1 (D.C. Cir. 2013) (Williams, J., concurring) (describing the conflict as “apparently not resolved,” while acknowledging that “*Seabrook's* . . . fate has wobbled”). Judge Williams' views on the doctrine's application to rulemaking cases are expressed in that concurrence.

thus, is quite unsatisfying.

The Ninth Circuit has applied issue exhaustion in the context of a Health and Human Services Medicare reimbursement ratemaking proceeding¹⁶⁶ and an EPA rulemaking approving fuel standards set by a revised Nevada SIP.¹⁶⁷ However, more definitively, in a case considering challenges to a Bonneville Power Administration (BPA) settlement with investor-owned utilities, the court noted:

As a general rule, we will not review challenges to agency action raised for the first time on appeal. [However,] we will [generally] not invoke the waiver rule in our review of a notice-and-comment proceeding if an agency has had an opportunity to consider the issue. This is true even if the issue was considered *sua sponte* by the agency or was raised by someone other than the petitioning party We have also recognized that, so long as a statute does not require exhaustion, we may excuse waiver in exceptional circumstances.¹⁶⁸

It explained:

BPA sought broad public participation and invited comments in these proceedings. If we required each participant in a notice-and-comment proceeding to raise every issue or be barred from seeking judicial review of the agency's action, we would be sanctioning the unnecessary multiplication of comments and proceedings before the administrative agency. That would serve neither the agency nor the parties.¹⁶⁹

The Third Circuit, in an opinion by then-Judge Alito, applied the issue exhaustion doctrine to a challenge to an EPA rule that denied Pennsylvania's request to re-designate part of the state from a nonattainment area to attainment status for ozone, pursuant to the Clean Air Act.¹⁷⁰ Although this was technically a rulemaking, it primarily involved the Commonwealth of Pennsylvania as the principal "party." After first stating that "[g]enerally, federal appellate courts do not consider an issue that has not been passed on by the agency . . . whose action is being reviewed,"¹⁷¹ the court engaged in a long analysis to determine that Pennsylvania had insufficiently raised the question in its comments of whether the EPA had acted in

See infra text accompanying notes 222243.

166. *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1020 n.3 (9th Cir. 2004).

167. *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246 (9th Cir. 2000). Note that the only circuit precedent cited in this case involved the review of a Department of Labor formal adjudication. *Id.* at 1249 (citing *Johnson v. Office of Workers' Comp. Programs*, 183 F.3d 1169, 1171 (9th Cir. 1999)).

168. *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1023–24 (9th Cir. 2007).

169. *Id.* at 1024 n.13.

170. *Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 112 (3d Cir. 1997).

171. *Id.* (quoting *N.J. Dep't of Educ. v. Hufstедler*, 724 F.2d 34, 36 n.1 (3d Cir. 1983) *rev'd on other grounds sub nom. Bennett v. New Jersey*, 470 U.S. 632 (1985)).

a timely manner on its re-designation submittal.¹⁷² The court's basis for the application of this doctrine was surprisingly thin. It quoted from a footnote in another decision by Judge Alito in a case that concerned a state seeking review of a final decision by the Secretary of Education that made an argument for the first time in its brief.¹⁷³

Even so, in that earlier case, Judge Alito had allowed the argument to be made:

This is a rule of discretion, rather than jurisdiction, however, and our practice has been to hear issues not raised in earlier proceedings when special circumstances warrant an exception to the general rule. . . . Since New Jersey raises an issue of national importance, which is singularly within the competence of appellate courts and is not predicated on complex factual determinations, we will consider the State's argument as to the retroactivity of the 1978 ESEA amendments.¹⁷⁴

The Fourth Circuit, has not specifically applied the issue exhaustion doctrine in a rulemaking review case, but has recognized the principle.¹⁷⁵ The

172. *See Sw. Pa. Growth All.*, 121 F.3d at 111–12.

173. *Id.* at 122; *Hufstедler*, 724 F.2d at 36 n.1, states: “New Jersey raises this argument for the first time in its brief upon remand. Generally, federal appellate courts do not consider issues that have not been passed on by the agency or district court whose action is being reviewed.” It cites *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), but *Singleton* merely states, “It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.” Moreover, no agency action was at issue in *Singleton*.

174. *Hufstедler*, 724 F.2d at 36 n.1 (citations omitted).

175. *1000 Friends of Md. v. Browner*, 265 F.3d 216, 228 (4th Cir. 2001). This case involved an EPA approval of a revised motor vehicle emissions budget (MVEB) for the Baltimore area submitted by Maryland to meet the attainment criteria applying to its State Implementation Plan under the Clean Air Act. The environmental group challenged the approval on the ground that additional modeling was needed. The EPA raised the issue exhaustion defense. The court, after ruling that, for jurisdictional purposes, the case did not involve a rulemaking challenge, *id.* at 224, said that the issue exhaustion rule (which it characterizes as the “waiver rule”) has been rather routinely applied in cases similar to this one. *Id.* at 228 n.7 (citing *Mich. Dep't of Env'tl. Quality v. Browner*, 230 F.3d 181, 183 n.1 (6th Cir. 1996)); *Military Toxics Project v. EPA*, 146 F.3d 948, 956–57 (D.C. Cir. 1998); *Nat. Res. Def. Council, Inc. v. EPA*, 25 F.3d 1063, 1073–74 (D.C. Cir. 1994). But then the court concluded that:

[T]he comments made by the Petitioner sufficiently raised the question of whether additional modeling was required. . . . While the Petitioner's comments do not include a separately delineated section devoted to a claim that the revised MVEB cannot be approved without additional modeling and perhaps are phrased somewhat generally, the comments nonetheless refer (at least implicitly) to photochemical grid modeling three times, twice mentioning the process by name. Although the Petitioner stated in its comments that the modeling question would be “addressed more comprehensively” in other comments directed to another EPA action, this statement does not, as the EPA contends, suggest that the Petitioner was expressly declining to raise

Sixth Circuit has applied it in the context of an EPA rulemaking to disapprove Michigan’s revisions to its SIP under the Clean Air Act—technically a rulemaking proceeding, but not one covered by the Act’s issue exhaustion provision.¹⁷⁶ However, in a later case, it indicated it was not prepared to apply this rule broadly to all rulemaking cases:

There are cases involving environmental law determinations that fall on the rulemaking side of the rulemaking/adjudication dichotomy for certain purposes holding that a party challenging a rule can waive an issue by not making a comment on point during the comment period. However, all of these cases nonetheless contain some characteristics of adjudications, and should not be applied broadly.¹⁷⁷

In two recent cases, involving the EPA Clean Air Act provision and the FCC provision involved in the *WATCH* case, discussed above, the Tenth Circuit has applied issue exhaustion in rulemaking. In *In re FCC 11-161*,¹⁷⁸ challengers to an FCC rulemaking were deemed to have waived challenges to aspects of the rule that were not raised with sufficient specificity in their petition for reconsideration.¹⁷⁹ And in *Oklahoma v. EPA*,¹⁸⁰ the Court reached the same result in an action challenging EPA’s rejection of the state’s SIP and the issuance of a Federal Implementation Plan to limit the emissions of sulfur dioxide. The Court rejected three of the petitioners’ arbitrary and capricious arguments because they were not raised with “reasonable specificity” during the public comment period.¹⁸¹

the issue in this action. Instead, the statement merely placed the EPA on notice that the issue would *also* be raised in connection with the other action. We therefore conclude that the Petitioner’s comments sufficiently raised the question of whether additional modeling was required before the revised MVEB could be deemed adequate, and we now proceed to address the merits of this question.

Browner, 265 F.3d at 228.

176. *Mich. Dep’t of Env’tl. Quality*, 230 F.3d at 183 n.1 (“Petitioners also argued that the EPA approved similar rules in other states and the EPA’s rulemaking violates the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2000). However, petitioners failed to sufficiently raise these issues during the comment period and thus have waived them for purposes of appellate review.”).

177. *Citizens Coal Council v. EPA*, 447 F.3d 879, 905 n.25 (6th Cir. 2006) (en banc) (citing *Univ. Health Servs. Inc. v. Thompson*, 363 F.3d 1013, 1019–20 (9th Cir. 2004); *Mich. Dep’t of Env’tl. Quality*, 230 F.3d at 183 n.1; *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 798 (6th Cir.1996)).

178. 753 F.3d 1015 (10th Cir. 2014).

179. *Id.* at 1063–64.

180. 723 F.3d 1201 (10th Cir. 2013).

181. *Id.* at 1214–15, 1220–22.

XI. POSSIBLE LIMITS TO APPLYING THE DOCTRINE IN RULEMAKING CASES

Despite this increasing acceptance of the doctrine among the circuits, there have been some limits.

A. *Futility Exception*

At least one district court has recognized and applied a futility exception. In *Comite de Apoyo a los Trabajadores Agricolas v. Solis*,¹⁸² the court held that the agency cannot complain that the challenger had failed to comment on an issue when the agency rejected similar comments from others as outside the scope of the rulemaking. And even in a Clean Air Act case, the D.C. Circuit allowed challenges by petitioners who failed to raise a particular issue in the rulemaking when the application of the rule to the challengers was not clear and the agency had denied a petition for reconsideration.¹⁸³ In that case, the per curiam court wrote:

While we certainly require some degree of foresight on the part of commenters, we do not require telepathy. We should be especially reluctant to require advocates for affected industries and groups to anticipate every contingency. To hold otherwise would encourage strategic vagueness on the part of agencies and overly defensive, excessive commentary on the part of interested parties seeking to preserve all possible options for appeal. Neither response well serves the administrative process.¹⁸⁴

B. *The “Agency is Already on Notice” Exception*

In the long-running litigation over EPA’s authority to curtail air pollution in upwind states, the D.C. Circuit twice overturned EPA rules. In 2008, the court overturned (but did not vacate) the EPA’s Clean Air Interstate Rule (CAIR) in *North Carolina v. EPA*.¹⁸⁵ One of the key bases for its overturning of the rule was that “EPA may not use cost to increase an upwind State’s obligation under the good neighbor provision—that is, to force an upwind State to ‘exceed the mark.’”¹⁸⁶ After remand, the EPA produced its Cross-State Air Pollution Rule, which used modeling to produce annual emission budgets for each upwind state. Industry and state peti-

182. No. 09-240, 2010 WL 3431761, at *18 (E.D. Pa. 2010).

183. *Portland Cement Ass’n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011).

184. *Id.*

185. 531 F.3d 896 (D.C. Cir. 2008) (per curiam). The court later issued a ruling that “we will remand the case without vacatur for EPA to conduct further proceedings consistent with our prior opinion.” 550 F.3d 1176, 1178.

186. *EME Homer City Generation, LLP v. EPA*, 696 F.3d 7, 14–15 (D.C. Cir. 2012), *rev’d* *EPA v. EME Homer City Generation, LLP*, 134 S. Ct. 1584 (2014) (quoting *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008)).

tioners challenged the rule, suggesting that the agency had improperly determined which states would “contribute significantly” to downwind states’ non-attainment of air quality standards, and the court agreed.¹⁸⁷ More specifically, the court found that EPA lacked the statutory authority for its conclusion that “an upwind State that exceeded the significance threshold at even one downwind State’s receptor was drawn wholesale into the Rule’s second stage—cost-based emissions reductions.”¹⁸⁸ Judge Rogers dissented, arguing, among other things, that the petitioners had not made that argument in the underlying rulemaking, in violation of the Clean Air Act’s issue exhaustion provision.¹⁸⁹ For the majority, Judge Kavanaugh explained that EPA was on notice due to the court’s earlier *North Carolina* opinion: “In sum, EPA knew from the beginning that it was required to comply with *North Carolina*, including that part of the Court’s holding on which petitioners rely here.”¹⁹⁰ He added the additional ground that “EPA considered—and rejected—precisely the same argument in [the] CAIR [rulemaking].”¹⁹¹

The Supreme Court reversed the D.C. Circuit and upheld the rule on the merits, but only briefly addressed the issue exhaustion claim.¹⁹² First the court held that the Clean Air Act provision, although “mandatory” was not “jurisdictional.”¹⁹³ It then shrugged off the need to decide this issue because EPA had not “pursued [this] argument vigorously before the D.C. Circuit.”¹⁹⁴ It did this, despite an unacknowledged amicus brief by a group of law professors devoted entirely to urging the Court to invoke the issue exhaustion argument against the respondents in the case.¹⁹⁵

C. The Agency’s Response to a Comment Showed Awareness of the Issue

In *NRDC v. EPA*, a challenge to an EPA rule under RCRA, which has no

187. *Id.* at 19.

188. *Id.* at 23.

189. *Id.* at 52–54 (Rogers, J., dissenting).

190. *Id.* at 24 n.18.

191. *Id.*

192. *EPA v. EME Homer City Generation LLP*, 134 S. Ct. 1584, 1602–03 (2014).

193. *Id.* at 1602.

194. *Id.* at 1603. The Court acknowledged that “[h]ad EPA pursued the ‘reasonable specificity’ argument vigorously before the D.C. Circuit, we would be obligated to address the merits of the argument.” *Id.* It should be noted that the two dissenting Justices specifically “agree[d] with the majority’s analysis turning aside EPA’s threshold objections to judicial review.” *Id.* at 1610 n.1 (Scalia, J., dissenting).

195. Amicus Curiae Brief of Law Professors on Issue Exhaustion in Support of Petitioners, *EPA v. EME Homer City Generation LLP*, 134 S. Ct. 1584 (2014) (Nos. 12-1182, 12-1183), 2013 WL 4875111.

statutory exhaustion provision, the court found that the petitioners' comments did not properly raise the question of EPA's statutory authority to adopt a

"comparable fuel exclusion" from coverage by the Act, but "[n]onetheless, EPA's response to [a commenter's] comment suggests that EPA understood [that comment] to challenge EPA's statutory authority to exclude comparable fuels in the first place and affirms its authority to do so. . . . Thus, the issue was expressly addressed by EPA and is proper before the court."¹⁹⁶

D. The Agency Has a Duty to Examine Key Assumptions as Part of Its Affirmative Burden of Promulgating and Explaining a Non-Arbitrary, Non-Capricious Rule

In *NRDC v. EPA*, the court applied an alternative ground for not applying issue exhaustion to petitioners. It stated,

Moreover, even if a party may be deemed not to have raised a particular argument before the agency, EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule and therefore EPA must justify that assumption even if no one objects to it during the comment period.¹⁹⁷

Note that Judge Sutton suggested that there was good reason that "the key-assumption doctrine most often applies [to] the D.C. Circuit's authority to review (often exclusively) nationwide rules promulgated by federal agencies."¹⁹⁸ As he put it, "The validity of a nationwide rule—and the assurance that it is non-arbitrary—should not turn on the caprice of who happens to challenge it or not challenge it and what arguments are made or not

196. 755 F.3d 1010, 1022–23 (D.C. Cir. 2014).

197. *Id.* at 1023 (quoting *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998), with prior quotations from *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534 (D.C. Cir. 1983) and *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C. Cir. 1980)); see also *NRDC v. EPA*, 804 F.3d 149, 172 n.18 (2d Cir. 2015) (following this case in the context of a challenge to a pollution discharge permit); *St. Mary's Cement, Inc. v. EPA*, 782 F.3d 280, 288 (6th Cir. 2015) (recognizing the exception but finding waiver because the EPA had not made any assumptions, but rather had relied on record evidence in this rule-making that was focused on the stringency of air pollution control requirements at a particular plant); *Okla. Dep't of Env'tl. Quality v. EPA*, 740 F.3d 185, 192 (D.C. Cir. 2014) ("Because the EPA did not examine the key assumption concerning the applicability of a SIP in Indian country, the issue was not forfeited and will be considered here."); *Emhart Indus., Inc. v. New England Container Co.*, 274 F. Supp. 3d 30 (D.R.I. 2017) ("[W]hile the Court will generally not consider Emhart's arguments that were not presented to EPA during the notice and comment period, the Court will consider several obvious issues relating to key assumptions that formed the basis of EPA's selected remedy").

198. *St. Mary's Cement*, 782 F.3d at 288.

made during the rulemaking process.”¹⁹⁹

*E. Lack of Notice to Commenter that Issue Needed to be Raised in the Comments—
Logical Outgrowth Challenges*

In the Fifth Circuit’s *City of Seabrook* case, the court made the oft-quoted statement that a strict application of issue exhaustion in rulemaking might require a prospective litigant to be a “psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated.”²⁰⁰ This relates to the requirement that agencies give adequate notice to the public about its proposed rule, and to the corollary that if an agency final rule deviates too far from the terms of the proposed rule, the agency should re-propose the rule. The test that courts use to determine this procedural challenge is the “logical outgrowth test”—whether the final rule is a logical outgrowth of the proposed rule such that commenters should have fairly anticipated that an agency might go there.²⁰¹

The relevance to the issue exhaustion doctrine should be apparent. If there is a true logical outgrowth problem, it would be illogical to require a challenger raising this procedural failure to have made this argument before the agency, and I have not found any cases where the government raised such a defense. However, it is possible that in some circumstances, a litigant may make the similar claim that there was no reason to suspect that such an issue was going to be presented by the agency’s rule until it was too late to comment. This argument did prevail in a review of an STB adjudication in *Riffin v. Surface Transportation Board*.²⁰² Riffin petitioned for review of a decision by the STB after the Board rejected his application for a certificate authorizing the acquisition and operation of a length of railroad track.²⁰³ In the proceeding below, Riffin had included in his application a reservation about shipping certain hazardous materials. The Board sought comment, and a commenter objected, raising the argument that the application was incomplete and defective. The Board noted that comment but rejected the application because the application’s reservation violated the statutory duty of common carriers to transport hazardous material where appropriate agencies have promulgated comprehensive regulations.²⁰⁴ Riffin sought review on the ground that he had a common-law right to not carry hazardous materials, but the government sought to prevent him from

199. *Id.*

200. 659 F.2d 1349, 1361 (5th Cir. 1981); *see supra* text accompanying notes 157–165.

201. *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007). *See generally* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 258–68 (5th ed. 2012).

202. 733 F.3d 340 (D.C. Cir. 2013).

203. *Id.* at 341.

204. *Id.* at 342.

making the argument because he had not made it before the STB.²⁰⁵ The D.C. Circuit rejected that position, ruling that because “the Board *sua sponte* raised the hazardous materials issue in its Decision without first providing Riffin an opportunity to address the issue. . . . Riffin had no reason to think he had to make his common-law arguments part of his application to the Board.”²⁰⁶

F. Constitutional Issues and Other Cases Where the Court Does Not Need the Agency’s View

Because agencies cannot determine constitutional questions, courts normally conclude that they can decide such issues without requiring the petitioner to have presented the issue to the agency first. In some sense this thinking relates to the futility exemption. A recent high-profile case involving the National Labor Relations Act’s strong issue exhaustion provision²⁰⁷ illustrates this. The Noel Canning Company had been found by the Board to have committed an unfair labor practice. Only at the court level did it make the argument that the Board was improperly constituted due to a lack of a quorum because several members had not been properly appointed under the Recess Appointment Clause of the Constitution.²⁰⁸ The D.C. Circuit, before addressing the constitutional issue, raised *sua sponte* the issue exhaustion provision and decided that

the objections before us concerning lack of a quorum raise questions that go to the very power of the Board to act and implicate fundamental separation of powers concerns. We hold that they are governed by the “extraordinary circumstances” exception to the 29 U.S.C. § 160(e) requirement and therefore are properly before us for review.²⁰⁹

A similar example is presented by *Kuretski v. Commissioner*²¹⁰ where a taxpayer was allowed to raise a new constitutional argument in a motion for reconsideration to the Tax Court. The contention was that the statutory provision allowing the President to remove Tax Court judges violated separation of powers principles. The D.C. Circuit allowed this, citing *Freitag v. Commissioner*:²¹¹

Just as the Supreme Court in *Freitag* elected to consider a belated constitutional challenge to the validity of a Tax Court proceeding, . . . we do so here. In *Freitag*, as here,

205. *Id.* at 343.

206. *Id.* at 343–44.

207. *See supra* p. 61 for the statutory text.

208. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

209. *Id.* at 497, *aff’d* *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The Supreme Court did not address the exhaustion issue.

210. 755 F.3d 929, 943 (D.C. Cir. 2014).

211. 501 U.S. 868 (1991).

the petitioners raised a nonfrivolous constitutional challenge to the validity of a Tax Court proceeding after the Tax Court's initial decision, and the petitioners' claim implicated the federal judiciary's strong interest in maintaining the separation of powers.²¹²

Another example of a case where the court felt it was not necessary to require issue exhaustion on a purely legal, quasi-constitutional issue is *Action for Children's Television v. FCC*,²¹³ discussed earlier, where the court said,

That objection, however, essentially alleging a denial of administrative due process, raises neither a novel factual issue for which an initial Commission determination is quite clearly both necessary and appropriate, nor a legal issue on which the Commission, and even this court has not already made known its general views to the contrary.²¹⁴

However, in a later case, the D.C. Circuit concluded that some constitutional challenges could not be brought if they have not been presented to the agency. In *Nebraska v. EPA*,²¹⁵ petitioners argued both that the statute and an agency regulation violated the Commerce Clause and the Tenth Amendment, but neither issue was raised during the rulemaking comment period. With respect to the claims regarding the statute, the court (per Judge Randolph) allowed the claim, because “[a]gencies do not ordinarily have jurisdiction to pass on the constitutionality of federal statutes” and “[p]etitioners would have accomplished nothing if they had presented these objections to EPA.”²¹⁶ But as to the claim that the rule itself was unconstitutional, the court disallowed the claim, because the agency could have formulated a rule to address petitioners' concerns, “gather[ed] evidence to evaluate their claims, or interpret[ed] the Act in light of their position.”²¹⁷ The court suggested:

Perhaps EPA could have formulated a rule setting a national standard applicable to all public water systems to the extent the system shipped or received water across state lines, or a rule containing an exception for any public water system that could prove it had no connection to interstate commerce—rules that might have met petitioners' objections to the regulation of entirely intrastate water.²¹⁸

Nebraska was followed in a recent district court decision upholding the Department of Labor's rule that modified regulation of financial professionals' conflicts of interest when giving retirement investment advice (the

212. *Kuretski*, 755 F.3d at 937.

213. 564 F.2d 458 (D.C. Cir. 1977).

214. *Id.* at 469; *see also supra* text accompanying notes 113–115.

215. 331 F.3d 995 (D.C. Cir. 2003).

216. *Id.* at 997.

217. *Id.*

218. *Id.* at 998.

“fiduciary rule”).²¹⁹ One of the challengers’ arguments was grounded on the First Amendment, but the court found that the rationale stated in *Nebraska* applied, and that plaintiffs should have given the agency the opportunity to address those arguments.²²⁰ However, it is notable that the court did not discuss how the agency could have adjusted its rule to take account of the asserted constitutional deficiency, and in any event, the court went on to hold that “[e]ven if Plaintiffs’ First Amendment challenge were not waived, the [Department of Labor’s] rules do not violate the First Amendment.”²²¹ While I think that Judge Randolph’s approach in *Nebraska* makes some sense, I think it would be the rare case where constitutional claims should be disallowed due to issue exhaustion. Perhaps the EPA could have tailored its public water systems rule differently, but I think it is unlikely (and even more unlikely where the challenge is based on the First Amendment). Moreover, if the court rules out such challenges, the upshot might be allowing an unconstitutional rule to stand.

XII. THE *KORETOFF* CASE AND JUDGE WILLIAMS’ QUALMS

Judge Stephen Williams has also recently sounded some alarm bells on the extension of this doctrine to rulemaking in *Koretov v. Vilsack*,²²² a pre-enforcement challenge to a Department of Agriculture rule issued under the authority of an almond marketing order.²²³ The challengers made a se-

219. *Chamber of Commerce v. Hugler*, 231 F. Supp. 3d 152 (N.D. Tex. 2017).

220. *Id.* at 203–04.

221. *Id.* at 204.

222. 707 F.3d 394 (D.C. Cir. 2013). I note that lower courts, citing *Koretov*, have read it quite broadly. *See* *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014) (“[C]ourts require that a party in an APA action raise only the ‘specific argument’ that was raised to the agency and ‘not merely the same general legal issue.’”). In that case involving a challenge to the Department of Interior’s decision to hold land in trust under the Indian Reorganization Act, the court held that because an objecting county government had not raised the issue of the tribe’s alleged overstated membership figures with the agency, it could not raise them with the court, even though the county pointed to communications—one newspaper editorial and two legal correspondences—in which they had done so, *see also* *Prop. Cas. Insurers Ass’n of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1053 n.14 (N.D. Ill. 2014) (holding that insurance industry cannot raise the argument that HUD’s burden-shifting approach in disparate impact lawsuits violates APA § 556(d), even though industry commenters had argued that the burden of persuasion must remain with the plaintiff at each step of the disparate impact analysis because these comments did not specifically address the APA provision).

223. Petitioners had claimed in district court that the formal rulemaking procedures required to issue or amend a marketing order were required. *See* 7 U.S.C. § 608c(15)(A)–(B) (2012) (providing that any handler subject to an order may file a petition with United States Department of Agriculture alleging a violation of law, seeking a modification or exemption,

ries of arguments to the district court “that the treatment rule exceeded the Secretary’s authority under both the [statute] and the Almond Order,”²²⁴ and also that the Secretary had failed to make one of the statutorily required findings. The district court allowed the ultra vires argument to be made, but ruled against the challenge on the merits; that court also found that the challengers had “waived” their other argument by failing to make it in its comments to the agency. On appeal, the government argued that under *Advocates for Highway & Auto Safety*,²²⁵ all the arguments should be disallowed, and the D.C. Circuit, after closely examining whether the challengers had actually made these arguments before the agency, agreed.²²⁶ However, it did throw the challengers a lifeline by concluding at the end of the opinion, “[w]e emphasize that nothing in this opinion affects the producers’ ability to raise their statutory arguments if and when the Secretary applies the rule.”²²⁷

In carving out this exception for an as-applied challenge, the court cited *Murphy Exploration & Production Co. v. United States Department of Interior*.²²⁸ In *Murphy Exploration*, the court had held that a failure to challenge a rule while participating in rulemaking proceedings did not stop a challenger from challenging the rule in a separate proceeding in which the rule was being applied. In that case, the court recognized that “because administrative rules and regulations are capable of continuing application, were we to limit review to the adoption of the rule without further judicial relief at the time of its application, we would effectively deny many parties ultimately

and requesting a hearing; rulings on such petitions are reviewable in federal district court). The D.C. Circuit had earlier held that this rule was not an amendment to the order, but instead constituted minimum quality and inspection requirements. *Korettoff v. Vilsack*, 614 F.3d 532, 539 n.3 (D.C. Cir. 2010). Therefore, this was an *informal* rulemaking and the statutory exhaustion requirement did not apply.

224. *Korettoff*, 707 F.3d at 397.

225. 429 F.3d 1136 (D.C. Cir. 2005).

226. The court stated: “We require the argument [petitioner] advances here to be raised before the agency, not merely the same general legal issue.” *Korettoff*, 707 F.3d at 398 (internal quotation marks omitted). This formulation has been read as a strict one by lower courts. See *Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 186 (D.D.C. 2017) (“The waiver standard in the administrative context is demanding: the question is whether the ‘specific argument’ advanced by the plaintiffs—rather than ‘the same general legal issue’—was raised before the agency.”) (quoting *Korettoff*, 707 F.3d at 398).

227. *Korettoff*, 707 F.3d at 399.

228. 270 F.3d 957, 958 (D.C. Cir. 2001) (“Nothing . . . prevents [plaintiff] from pursuing its claim in a second forum, i.e., apart from the original rulemaking, if such a forum is otherwise available. As we have held before, such a forum is available to a party when a rule is brought before this court for review of further agency action applying it.” (internal quotation marks omitted in original)).

affected by a rule an opportunity to question its validity.”²²⁹

Judge Williams concurred in *Koretoff*, but in a separate opinion expressed some doubts about the developing doctrine:

I write separately primarily to note that in the realm of judicial review of agency rules, much of the language of our opinions on “waiver” has been a good deal broader than the actual pattern of our holdings, and that that pattern itself may unfairly disadvantage parties that generally are not well represented by interest groups.²³⁰

He first recognized the different view proffered by the Fifth Circuit in the *City of Seabrook* case, and chastised the government for, in its brief in this case,

[S]tretch[ing] the principle still further, throwing into the hopper a case involving an adjudication rather than a rulemaking, even though parties to a litigation obviously have a far clearer burden to speak up to protect their interests than do all of the potentially millions of persons that may be affected by a rulemaking.²³¹

Then, focusing on the court’s recognition that an “application challenge” would be allowed, he pointed out that in the *Murphy Exploration* case cited for that exception the court had

[drawn] an analogy to our cases holding that a party’s missing a statutory deadline for *facial* review of a regulation would not bar its challenge on “review of further [agency] action *applying* it.” Of course where a statute specifically precludes even an application challenge if the claim was not timely raised before the agency, we necessarily honor the statute unless the challenger poses a valid constitutional objection.²³²

He concluded:

229. *Id.* at 958–59 (internal quotations omitted).

230. *Koretoff*, 707 F.3d at 399 (Williams, J., concurring).

231. *Id.* at 399–400 (citing *Orion Reserves Ltd. P’ship v. Salazar*, 553 F.3d 697 (D.C. Cir. 2009)).

232. *Id.* at 400 (citing *Murphy Exploration*, 270 F.3d at 958).

Generally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking. This system probably operates quite well for large industry associations and consumer or environmental groups (and the firms and individuals thus represented). But for some the impact is more severe. Firms filling niche markets, for example, as appellants appear to be, may be ill-represented by broad industry groups and unlikely to be adequately lawyered-up at the rulemaking stage. As the Fifth Circuit observed, we presumably do not want to “require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register*, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated.”²³³

Then he proposed a solution:

A decision of our court has suggested a principle that would open the door to facial challenges by such mavericks. In an [earlier vacated decision²³⁴] we said that where a party had participated in the rulemaking, “it made sense to speak of [the party’s] failure to raise [its argument] below.” But that could not rightly be said where there was no indication that the plaintiff had participated in the rulemaking in any way. Thus we found no waiver.

Such a principle would provide facial review for parties who don’t bother to participate in the rulemaking—probably a group largely coincident with parties who fail to anticipate its inflicting serious costs on their interests. . . . The argument for allowing facial review under these circumstances is of course at its strongest where the issue posed cannot require a remand to the agency (e.g., a claim under *Chevron*’s “first step”) and the hardship to the plaintiff from delay is especially acute.²³⁵

This idea of limiting the issue exhaustion rule to parties who actually participated in the rulemaking is worth considering. It has the advantage of being easy to apply,²³⁶ but there is a real risk that some participants might game the system. In a parenthetical, Judge Williams acknowledges “there

233. *Id.* at 401 (quoting *City of Seabrook v. EPA*, 659 F.2d 1349, 1360–61 (5th Cir. 1981)).

234. The case is an earlier round of the *Murphy Exploration* litigation, *Murphy Expl. & Prod. Co. v. U.S. Dep’t of Interior*, 252 F.3d 473 (D.C. Cir. 2001) (vacated). In *Koretzoff*, Judge Williams explained the vacation as follows:

After the opinion was issued, the government submitted evidence that the challenger had, in fact, participated in the rulemaking proceeding, and the panel—in the *Murphy* decision cited earlier—vacated the relevant part of the opinion. See *Murphy*, 270 F.3d at 958. The panel’s reasoning, of course, remains available to future panels.

707 F.3d at 401.

235. *Koretzoff*, 707 F.3d at 401 (citations omitted).

236. This would be much simpler for the court to determine than the proposal suggested by Gabriel Markoff, which would limit issue exhaustion to rulemakings “where participation had been sufficiently pluralistic,” Markoff, *supra* note 51, at 1086, which would require courts to “examine the substance of the comments themselves in order to determine whether competing viewpoints on the proposed rule had been offered.” *Id.* at 1086–87.

would be some risk that the rule might induce strategic behavior expanding that group: non-participation to get facial review without disclosing one's position to the agency."²³⁷ But "[i]t's not clear that such a strategy presents many advantages."²³⁸

One problem with Judge Williams' approach is that numerous courts (including the D.C. Circuit) have completely precluded certain petitioners from obtaining judicial review of rules where they found that that the petitioner had been aware of the rulemaking but had chosen not to participate.²³⁹ To reconcile this line of cases with Judge Williams' suggestion would require courts to engage in examination of the intentions or bad faith of such petitioners.

Professor Levin also blanches at the idea of giving preference to non-participants over participants:

To me, it is counterintuitive to give a person who diligently participated in a rulemaking proceeding fewer rights than a person who sat on the sidelines. The former would rightly regard this situation as unfair. We should seek to encourage potentially affected persons to file comments—thus, courts would be sending the wrong message if they were to adopt an exhaustion rule that made commenters worse off than non-commenters.²⁴⁰

He also elaborates on another type of "strategic behavior" that could be encouraged by such a differentiation:

The practical implications of the proposal are also troubling. Do we want to give a disgruntled commenter an incentive to recruit a non-commenter straw plaintiff to bring a judicial review proceeding to litigate contentions that the commenter is not permitted to litigate directly? If appeals by a commenter and a non-commenter are consolidated, should there be issues that only the latter is permitted to brief?²⁴¹

I agree with the concerns that led Judge Williams to propose making the doctrine inapplicable to parties who did not participate in the rulemaking, but agree with Professor Levin's view that a better goal is "to make the non-commenter *no worse off* than the person who commented—not to make him better off."²⁴² The guiding principles that close this Article seek to advance that goal.

I believe that the issue exhaustion doctrine, while perfectly appropriate as applied to adjudication raises problems in the rulemaking context if it is

237. 707 F.3d at 401.

238. *Id.*

239. *Gage v. Atomic Energy Comm'n*, 479 F.2d 1214 (D.C. Cir. 1973), is one of those cases. *See supra* text accompanying notes 68–75; *see also* Spencer, *supra* note 48, at 657 and cases cited in his article at n.197.

240. Letter from Ron Levin, *supra* note 65, at 5.

241. *Id.* at 5–6.

242. *Id.* at 6.

applied across the board. As Markoff has argued:

Rulemakings do not involve the rights of a few parties; the rules ultimately promulgated affect the physical and economic health and well-being of the entire United States and may have international effects as well. Thus, when a meritorious argument is procedurally barred, it is society at large who suffers for it—not only the individual petitioner. Further, unlike in adjudicatory proceedings, where the parties are contesting their specific interests, there is no guarantee that the parties that participate in rulemakings will be representative of the general interests at stake—a possibility supported by the empirical evidence of imbalanced participation.²⁴³

XIII. OSSIFICATION EFFECTS AND OTHER POLICY ARGUMENTS

As one who has been a consistent worrywart about increasing ossification of rulemaking,²⁴⁴ while also generally favoring broader access to judicial review, I should address whether issue exhaustion affects those two, sometimes conflicting, values.

As discussed above, several judges have suggested the doctrine potentially has a “force-feeding effect” of inducing people to comment on every possible issue they might potentially want to raise in court, which could make the agency’s rulemaking task (and the courts’ task on judicial review) that much harder.²⁴⁵ While I support the notice-and-comment process, I would not want commenters to feel they have to file “shotgun” comments in an effort to inoculate themselves from later issue-exhaustion defenses.

Professor Wagner, who has cautioned about information overload in agency proceedings,²⁴⁶ believes that issue exhaustion in rulemaking is a contributing factor:

The courts’ demand that parties exhaust their administrative remedies was originally conceived of as a way to save agency resources, both by avoiding “premature interruption” of the rulemaking process and by bringing the courts into the picture only as a last resort. But when viewed from the perspective of information, this requirement actually increases the burden on agencies. In order to preserve their claims, rational parties will react by erring on the side of providing too much rather than too little information. Indeed, the rule suggests not only that a party must file a comment before it can litigate but also that it must file that same, specific comment

243. Markoff, *supra* note 51, at 1086.

244. See e.g., Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO NORTHERN L. REV. 469 (2008).

245. See *Portland Cement Ass’n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011); *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 n.13 (9th Cir. 2007).

246. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1321–22 (2010) (“Rather than filtering information, the incentives tilt in the opposite direction and encourage participants to err on the side of providing too much rather than too little information. Evidence is then offered to show how this uncontrolled and excessive information is taking a toll on the basic objectives of administrative governance.”).

before raising it in court. If a party neglects to raise an argument during the comment period, however preliminarily, it is generally foreclosed from raising the issue later. Because the threat of litigation may be the only, or at least the best, way for stakeholders to get the agency's attention during the rulemaking process, they have strong incentives to lay the groundwork for future legal action by including every plausible argument in their comments.

Additionally, and more worrisome from the standpoint of information excess, the courts have held that more general comments from affected parties—even if lodged in writing and on time—are usually not material enough to matter legally. To preserve issues for litigation, affected parties are thus best-advised to provide comments that are specific, detailed, and well documented. This seemingly reasonable requirement for specificity again encourages interested parties to provide too much documentation, too many specifics, and too much detail, rather than too little.²⁴⁷

Another concern is that issue exhaustion seems to exacerbate the already existing tendency for commenters to submit comments at the last possible time in the comment period.²⁴⁸ This strategy apparently has taken root in NEPA proceedings already.²⁴⁹

On the other hand, as Professor Levin argues, the agencies (and, one would have to add, the Department of Justice) support the issue exhaustion doctrine and would prefer to be able to pass on issues rather than be confronted with them for the first time in court. As he pithily put it, “I think they would prefer the shotgun to the sandbag any day.”²⁵⁰

247. *Id.* at 1363–64 (footnotes omitted).

248. See STEVEN J. BALLA, ADMIN. CONFERENCE OF THE UNITED STATES, PUBLIC COMMENTING ON FEDERAL AGENCY REGULATIONS: RESEARCH ON CURRENT PRACTICES AND RECOMMENDATIONS TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 31–32 (2011) (finding that one third of comments in a sample of rulemakings were filed in the last three days of the comment period and “analytically informative” comments were even more likely to be filed at the end).

249. Conversation with Elizabeth Lewis, former Oceana law clerk, and follow-up e-mail to author (Mar. 17, 2015) (describing the commonly held view that in order to best position itself for potential issue-exhaustion battles in court it was strategically beneficial to submit factual comments in NEPA proceedings at the end of the comment period to avoid tipping off opposing participants about issues that might later be litigated). However, this raises the question of whether, in the absence of the issue-exhaustion doctrine, the strategy would be to submit such comments earlier—or not at all.

250. Letter from Ron Levin, *supra* note 65, at 4. The Supreme Court has expressed its concerns about “sandbagging” by lawyers appealing lower court losses. It first used the term in *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), to refer to actions “on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.” In *Puckett v. United States*, 556 U.S. 129, 134 (2009), the Court, citing *Wainwright*, referred to it in the context of “the contemporaneous-objection rule,” which the Court said “prevents a litigant from ‘sandbagging’ the court—remaining silent about his ob-

This Article cannot resolve that question, but I think the competing views argue for a middle ground approach. In some contexts, issue exhaustion makes sense and serves the administrative process and in others it may work too much unfairness or needless formality. The guiding principles at the end seek to help draw this line.

A related issue is that issue exhaustion may benefit well-resourced commenters at the expense of groups that cannot afford to monitor every rule-making that might affect them. Although some statutes and cases allow for extraordinary circumstances or reasonable grounds for failure to exhaust, these safety valves will likely not be of much use for the low-resourced commenter who simply cannot afford to participate.

While my concern for such participants was fueled by my reading of Judge Williams' concurrence in *Koretzoff*, he explained to me that that "lack of resources is only a part of it," and that he was "thinking of firms that have interests that are not well aligned with the weight of industry viewpoints, which is likely to be true in any industry with a heterogeneous distribution of firms."²⁵¹ Thus, he suggested that the concern in the Administrative Conference of the United States recommendation be "for persons or firms whose interests are not in close alignment with those persons or firms dominating the associations representing group viewpoints and who reasonably do not find it worthwhile to engage in continuous monitoring of the agency in question."²⁵²

In any event, the upshot is that it is likely that some unwary potential petitioners are going to be thwarted by the issue exhaustion doctrine, and the litigated cases are probably the tip of the iceberg. As Markoff speculates,

[T]he most important direct effect of issue exhaustion is not in those few dozen cases that are actually adjudicated and barred by the doctrine; it is in the hundreds of cases that are likely never filed because the parties know that they *would* be barred by the doctrine because they were unable to file comments earlier in the rulemaking process.²⁵³

Obviously there are even stronger fairness concerns in applying the doctrine to a court challenger that did not know about the rulemaking until it was over or did not even exist at the time. Perhaps a looser application of the doctrine when a rule is challenged in the enforcement context, as the

jection and belatedly raising the error only if the case does not conclude in his favor." *See also Stern v. Marshall*, 564 U.S. 462, 481–82 (2011) (applying doctrine to failure to raise an issue in the Bankruptcy Court).

251. Letter from Judge Stephen Williams to author (Apr. 27, 2015) (on file with author) (regarding the ACUS Committee on Judicial Review consideration of recommendations derived from this report).

252. *Id.*

253. Markoff, *supra* note 51, at 1083.

Korettoff court suggested, would help here.²⁵⁴ There are few such reported cases. Indeed, Professor Levin noted²⁵⁵ that he had seen only two opinions in which issue exhaustion has been discussed in a rulemaking case that did not arise on direct review: *Murphy Exploration*, discussed above in connection with *Korettoff*, and *Dobbs v. Train*.²⁵⁶ But as he pointed out:

Neither of these was an enforcement case. In each, litigation was initiated by the challenger. The government pleaded the rule defensively, and the challenger responded by claiming the rule was invalid. And in each case it turned out that the challenger had not only known about the rule all along, but had actually participated in the rulemaking proceeding. Surprise, whether fair or unfair, wasn't involved at all.²⁵⁷

But more recently, one D.C. District Court Judge has read *Korettoff* to stand for the proposition that issue exhaustion is not applicable in an as-applied challenge to a rule. In *Health v. Burwell*,²⁵⁸ Judge Kollar-Kotelly determined that “[e]ven where a party has waived its opportunity to pursue facial review of a regulation by failing to comment during a rulemaking proceeding, such a party can raise its arguments when the agency applies the rule.”²⁵⁹

However, she added a qualification:

[W]hether comments have been presented to the agency matters in applying the arbitrary and capricious standard of review. In addition to other potential bases for determining that an agency action was arbitrary or capricious, discussed further below, this Court cannot “uphold agency action if it fails to consider significant and viable and obvious alternatives.” (quoting *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015)). Determining whether comments have been presented

254. *Korettoff v. Vilsack*, 707 F.3d 394, 400 n.2 (D.C. Cir. 2013). Parties subject to an agency enforcement action based on a rule may challenge the rule, although sometimes Congress seeks to bar such challenges if a party fails to meet a statutory deadline for a pre-enforcement review. But even where a deadline was missed, courts will allow certain types of challenges to be heard in an enforcement challenge. See e.g., *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) (allowing challenge to rule in criminal prosecution notwithstanding thirty-day limitation on judicial review imposed by the Clean Air Act); see also ACUS Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings*, 47 Fed. Reg. 58,208 (Dec. 30, 1982); Levin, *supra* note 46.

255. E-mail from Professor Levin to author and Stephanie Tatham, ACUS staff attorney 1 (Apr. 4, 2015) (on file with author).

256. 409 F. Supp. 432, 434–35 (N.D. Ga. 1975), *aff'd sub nom.* *Dobbs v. Costle*, 559 F.2d 94 (5th Cir. 1977).

257. E-mail from Professor Levin to author and Stephanie Tatham, ACUS staff attorney, *supra* note 255, at 1.

258. 126 F. Supp. 3d 28 (D.D.C. 2015), *aff'd in part, rev'd in part on other grounds, sub nom.* *Banner Health v. Price*, 867 F.3d 1323 (D.C. Cir. 2017).

259. *Id.* at 68 (citing *Korettoff*, 707 F.3d at 399).

to the agency regarding a specific challenge is thus part—but not all—of the calculus entailed in determining whether the agency has failed to consider “significant and viable and obvious alternatives.”²⁶⁰

But she went on to also allow unpresented *Chevron* claims to be raised, and the above qualification would not seem to apply to such legal issues: “Plaintiffs may raise these arguments here even if they were not presented in comments to the agency because this is a timely challenge to the regulations as applied in outlier payment determinations challenged in this action.”²⁶¹

One should also think about the effect of the doctrine on the courts. On the one hand, a strict application of it can keep cases or issues out of court entirely. In that sense, it may relieve the burden on courts—but that argument surely proves too much because it could be used to severely limit other access-to-review doctrines such as reviewability, standing, ripeness, and finality as well. Moreover, the doctrine clearly forces courts to make tough calls on whether the disputed issue had been adequately presented to or known by the agency. I found numerous cases where courts felt compelled to spend a lot of time and effort examining the record and making fine distinctions about whether challenger had raised the issue with sufficient specificity in the rulemaking.²⁶²

XIV. DOES THE TYPE OF CHALLENGE MATTER?

There are many different types of court challenges to rulemaking. Under the APA, petitioners for review can challenge agency rules as (1) uncon-

260. *Id.*

261. *Id.* at 72 (citing *Koretzoff*, 707 F.3d at 399). Note, however, that this case does not present a classic enforcement situation; rather it involved a payment dispute that drew into question the validity of controlling regulations. The fact that the Medicare reimbursement program provides an agency process for disputing these claims, with subsequent judicial review (or as Judge Kollar-Kotelly calls it “outlier payment determinations”) may distinguish this case from other enforcement contexts.

262. See *supra* text accompanying notes 126–133. Another example in the context of a challenge to an FCC license denial is found in *FiberTower Spectrum Holdings, L.L.C. v. FCC*, in which the challenger attempted to argue that one of the Commission’s reasons for denying the license—a failure to meet a construction requirement as a part of demonstrating “substantial service”—was “at odds with” the statutory goal of promoting “investment in new technologies.” 782 F.3d 692, 696–97 (D.C. Cir. 2015). The challenger had previously argued to the FCC that the construction requirement was an “ill-conceived policy with adverse consequences contrary to the public interest.” *Id.* at 696. The court said this was not enough to meet the issue exhaustion requirement, because the challenger had only suggested that the requirement was “contrary to the public interest,” not contrary to the statute. *Id.* at 697; see also *Karst Envtl. Educ. & Prot. v. FHA*, 559 F. App’x 421 (6th Cir. 2014), (discussing the same issue in the NEPA context).

stitutional, (2) ultra vires, (3) the product of a procedurally defective rulemaking, or (4) arbitrary and capricious. Such challenges can typically be made either pre-enforcement or as a defense to an enforcement action. The *Gellhorn and Byse* casebook usefully breaks down the possible types of rulemaking challenges into five:

(1) facial constitutional and statutory authority for the rule (which usually can be determined without any need for an administrative record); (2) procedural compliance in the rulemaking; (3) factual support for and judgment reasonability of the rulemaking; (4) as-applied constitutional and statutory authority for the rulemaking; (5) other issues unique to the particular enforcement context.²⁶³

It then concludes that challenges 4 and 5 would rarely, if ever, be ripe for review until the enforcement stage, at which point the rule would be challengeable in court unless there were available opportunities to do so in an agency adjudication.²⁶⁴ It concludes that type 1 would be “most unlikely to implicate exhaustion concerns,”²⁶⁵ leaving types 2 and 3, and asks rhetorically “isn’t it sensible to insist that *someone* in the rulemaking must prominently have raised them?”²⁶⁶

I would suggest that many procedural challenges need not be subject to the issue exhaustion doctrine, since the APA requirement that the challenger show “prejudicial error,”²⁶⁷ along with the presumption that agencies should know the procedural requirements in their own statutes and regulations, should provide sufficient bounds and grounds for such challenges. This is not to dispute that it is often beneficial for rulemaking participants to raise procedural issues in their comments so that agencies can address the problem. On the other hand, some procedural requirements found in the APA or other government-wide procedural statutes are or should be clearly held in mind by the agencies in all rulemakings. Moreover, some procedural challenges cannot logically be raised during the comments. For example, a “logical outgrowth” challenge,²⁶⁸ based on a lack of fair notice in the notice of proposed rulemaking that the agency was considering an issue that was later added in the final rule, could not by its nature have been raised until the final rule was issued.²⁶⁹

263. STRAUSS ET AL., *supra* note 5, at 1245.

264. *Id.* at 1245–46; *see supra* note 47. *But see supra* text accompanying notes 254–261.

265. STRAUSS ET AL., *supra* note 5, at 1245.

266. *Id.* at 1246.

267. 5 U.S.C. § 706(2) (2012).

268. *See, e.g.,* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (recognizing the logical outgrowth test and citing court of appeals cases that have applied it).

269. *But see* Util. Air Regulatory Grp. v. EPA, 744 F.3d 741 (D.C. Cir. 2014) (stating that under Clean Air Act’s rulemaking exhaustion provision, even a procedural challenge such as a logical outgrowth claim must first be presented to the EPA in petition for reconsid-

However, I agree that arbitrary and capricious challenges should perhaps be viewed differently. In such cases there may be a basis for concern that an overly permissive policy might defeat the twin purposes of the general exhaustion doctrine, namely to ensure that the agency has had the opportunity to bring its expertise to bear on the issue before it comes to court, and that courts are spared from having to hear issues that could have been resolved at the agency. On the other hand, we must also remember that rulemaking is a process designed for broad participation, including by those who are unrepresented by counsel, and who may frame their comments “in non-legal terms rather than precise legal formulations.”²⁷⁰

CONCLUSION

Since 2000 when Professor Funk wrote that “courts are hopelessly confused” on the subject of issue exhaustion in rulemaking, I do not think things have improved much. The Supreme Court has yet to opine on the appropriateness of issue exhaustion in rulemaking. The doctrine has garnered increasing acceptance in the D.C. Circuit and spotty acceptance in other circuits. But a close review of the cases shows that that many of them either involve the Clean Air Act, in which the doctrine is statutory, or involve either rulemakings of particular applicability or rulemakings conducted under quasi-adjudicative procedures, or are based on precedents that stem from the application of issue exhaustion in agency adjudications or in challenges to NEPA assessments. And the D.C. Circuit’s recent *Korettoff* case has raised the possibility of limiting the doctrine to pre-enforcement review cases—thus preserving the right for parties to raise previously unrepresented issues in a defense to rule-enforcement. In short, for the most part, the issue exhaustion doctrine is a prudential doctrine originally designed to apply to court challenges to agency adjudications, and it does not comfortably fit many challenges to agency rulemakings.

Courts still do not devote enough attention to the fact that most of the statutes and judicial precedents derive from remedy exhaustion statutes or at least statutes governing agency adjudication. Courts are inconsistent on the subject of whether the formal/informal distinction raised in *Sims* should be dispositive. They are also inconsistent on whether the type of legal chal-

eration). In this case, the challengers did present this issue in a petition for reconsideration in 2012. However, the agency had already signaled its opposition to this argument in court and had not ruled on the petition by May 2014. Meanwhile, the challenged rule had gone into effect after the court and agency denied stay requests. See Richard G. Stoll, *Protection of Judicial Review Watered Down in D.C. Circuit*, BLOOMBERG BNA: DAILY ENV’T REP. (May 16, 2014), <https://www.foley.com/protection-of-judicial-review-watered-down-in-dc-circuit-05-16-2014/>.

270. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002).

lenge to the rulemaking matters. Given all this, it is perhaps not surprising that it is possible to distill a fairly long list of ad hoc exceptions to application of the doctrine and that courts apply them rather inconsistently. And Congress has only twice waded into the area of issue exhaustion in rulemaking.

Congress does of course retain the power to require issue exhaustion, and there may be some rulemaking contexts where that would make sense, such as that presented by the Clean Air Act, where judicial review is concentrated in the D.C. Circuit and the parties are sophisticated repeat players, or by CERCLA, for the reasons mentioned above.²⁷¹ There may also be situations in the context of challenges to agency delay or inaction where the failure to file a petition for rulemaking would appropriately prevent consideration of the challenge on the basis of failure to exhaust administrative remedies.

But clearer lines need to be drawn—for the courts and for Congress to consider in individual statutes. The case for issue exhaustion is strongest in those types of rulemakings that are closest to adjudications. If the rulemaking statute is a formal or hybrid one, offering opportunities to request hearings, or if the rulemaking is one of particular applicability, issue exhaustion would normally be appropriate, unless the party had a good excuse for not participating in the hearing.

Issue exhaustion also makes more sense when the court challenge is based on factual disputes with the agency (or complaints that the agency should have chosen an alternative approach to the rule), couched as an arbitrary-and-capricious challenge. These are the types of arguments that can most beneficially be brought to the agency's attention first.

But constitutional or other purely legal arguments, or procedural challenges, would normally not benefit as much and might even be fruitless if not futile to bring to the agency's attention. Not only are these the type of questions that courts can decide without agency's help (some legal issues may be exceptions), but agencies should be intrinsically aware of their own jurisdiction, statutory authority, and applicable procedures anyway.

GUIDING PRINCIPLES²⁷²

Congress in enacting judicial review statutes, and the courts in interpreting such statutes and in making prudential decisions about what issues may be raised in challenges to rules, should consider the following principles:

1. The "issue exhaustion doctrine," which requires that issues raised

271. See *supra* text accompanying note 141.

272. These guiding principles were presented to the ACUS Committee on Judicial Review to consider in its deliberations.

in court challenges to agency action should first be raised with the agency, applies less squarely to rulemaking cases than it does to cases involving administrative adjudication. It also applies more comfortably to pre-enforcement review cases than to as-applied cases such as cases where rules are challenged in the context of an enforcement proceeding.

2. The issue exhaustion doctrine is most appropriately applied to certain types of rulemaking:
 - a. Where the doctrine is statutorily required;
 - b. To rulemakings of particular applicability;
 - c. To rulemakings that are conducted using procedures that include a right to a hearing, unless the litigating party had a good excuse for not participating in such hearings.
3. The issue exhaustion doctrine is most appropriately applied in rulemaking cases to certain types of issues and is less appropriately applied to others.
 - a. Most appropriately applied to challenges to:
 - i. Agency fact-finding, reasoning, choice of alternatives, and other similar issues that are incorporated in the arbitrary and capricious test;
 - ii. Agency failures to exercise their discretion.
 - b. May be appropriately applied to challenges to (depending on the circumstances):
 - i. Agency interpretations of their own statute;
 - ii. Agency failures to follow a statutory requirement found in a law that is not the APA or its own organic statute.
 - c. Ordinarily not appropriately applied to challenges to:
 - i. Agency violations of the Constitution;
 - ii. Agency actions that raise purely legal questions that would not be aided by the agency's view;
 - iii. Agency violations of basic procedural requirements contained in the APA, their own statutes, or their own regulations.
4. Even when the issue exhaustion doctrine is applicable in the rulemaking context, courts should allow parties who did not raise the issue in the comment process to raise it in court if:
 - a. Another commenter raised the issue sufficiently;
 - b. The agency raised the issue *sua sponte*;
 - c. Other circumstances make clear that the agency was aware of the issue;
 - d. The issue was so fundamental that the agency can be presumed to have been aware of it;

- e. They are challenging the rule in the context of an as-applied challenge, such as a defense to an enforcement action.
5. In addition, even when the issue exhaustion doctrine is applicable in the rulemaking context, courts should apply the standard exceptions to the exhaustion of remedies doctrine, such as:
 - a. Issues, that by their nature could not have been raised before the agency (e.g., a material change in circumstances or a serious impropriety in the administrative process);
 - b. Where the challenged action is patently in excess of the agency's authority;
 - c. Where it would have been futile to raise before the agency;
 - d. Where the agency has in fact considered the issue;
 - e. Where the obvious result would be a plain miscarriage of justice.²⁷³
 6. Reviewing courts should allow litigants challenging rules to have a full opportunity to demonstrate that they did in fact raise the issue first with the agency or that any of the above circumstances—indicating that application of the doctrine would be inappropriate—are present.

The Administrative Conference adopted *Statement # 19: Issue Exhaustion on Preenforcement Judicial Review of Administrative Rulemaking* on September 25, 2015,²⁷⁴ that incorporated many of these guiding principles. The Statement is attached as an appendix to this Article.

273. See *Wash. Ass'n for Television & Children (WATCH) v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983).

274. ADMIN. CONFERENCE OF THE UNITED STATES, STATEMENT # 19: ISSUE EXHAUSTION PREENFORCEMENT JUDICIAL REVIEW OF ADMINISTRATIVE RULEMAKING (2015), <https://www.acus.gov/recommendation/statement-19-issue-exhaustion-preenforcement-judicial-review-administrative>; see also 80 Fed. Reg. 60,611 (Oct. 7, 2015).

APPENDIX: ADMINISTRATIVE CONFERENCE STATEMENT # 19

Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking

Recommendation Number: Statement #19

Adopted on: September 25, 2015

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Committees: Judicial Review

The doctrine of issue exhaustion generally bars a litigant challenging agency action from raising issues in court that were not raised first with the agency. Although the doctrine originated in the context of agency adjudication, it has been extended to judicial review of challenges to agency rulemakings. Scholars have observed that issue exhaustion cases “conspicuously lack discussion of whether, when, why, or how [the issue] exhaustion doctrine developed in the context of adjudication should be applied to rulemaking.”¹ The Administrative Conference has studied the issue exhaustion doctrine in an effort to bring greater clarity to its application in the context of preenforcement review of agency rules. The Conference believes that this Statement may be useful by setting forth a series of factors that it invites courts to consider when examining issue exhaustion in that context.²

1. JEFFREY S. LUBBERS, FAIL TO COMMENT AT YOUR OWN RISK: DOES ISSUE EXHAUSTION HAVE A PLACE IN JUDICIAL REVIEW OF RULES? 11 (May 5, 2015) (Report to the Administrative Conference of the U.S.) [hereinafter LUBBERS REPORT] (citing PETER L. STRAUSS, ET AL, GELLHORN AND BYSE’S ADMINISTRATIVE LAW 1246 (10th ed. 2003)); see also *Koretov v. Vilsack*, 707 F.3d 394, 399 (D.C. Cir. 2013) (Williams, J., concurring) (joining a decision to preclude preenforcement review of new issues but writing separately “primarily to note that in the realm of judicial review of agency rules, much of the language of our opinions on ‘waiver’ has been a good deal broader than the actual pattern of our holdings”).

2. This Statement does not address the application of the doctrine in the context of a challenge to a rule in an agency enforcement action, where the passage of time and new entrants may complicate the inquiry. The Conference has previously identified issues that Congress should not ordinarily preclude courts from considering when rules are challenged in enforcement proceedings. See Admin. Conf. of the U.S., Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings* (Dec. 17, 1982), <http://www.acus.gov/82-7>.

Evolution of the Issue Exhaustion Doctrine

The requirement that parties exhaust their administrative remedies (“remedy exhaustion”) is a familiar feature of U.S. administrative law. This doctrine generally bars a party from appealing a final agency action to a court unless the party exhausts prescribed avenues for relief before the agency.³

The related but distinct concept of “issue exhaustion” prevents a party from raising issues in litigation that were not first raised before the agency, even if the petitioner participated in the administrative process.⁴ As with remedy exhaustion, the issue exhaustion doctrine initially arose in the context of agency adjudications.⁵

As the Supreme Court has recognized, “administrative issue-exhaustion requirements are largely creatures of statute.”⁶ In several judicial review provisions adopted during the 1930s, prior to the advent of the Administrative Procedure Act of 1946, Congress expressly required parties to raise all their objections to agency action before adjudicatory agencies. Since that time, Congress has included issue exhaustion provisions in many statutes governing review of agency orders.⁷ The typical statute contains an exception for “reasonable grounds” or “extraordinary circumstances” and permits the court to require an agency to take new evidence under certain conditions.⁸

Courts have also imposed issue exhaustion requirements in the adjudication context in the absence of an underlying statute or regulation requiring it. The Supreme Court early on characterized the “general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice” as one of “simple fairness,” emphasizing that issue exhaustion promotes orderly procedure and good administration

3. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938).

4. *See* *FiberTower Spectrum Holdings, L.L.C. v. FCC*, No. 14-1039, slip. op. at 9 (D.C. Cir. Apr. 3, 2015). Issue exhaustion statutes may not always be jurisdictional. *E.g.*, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602–03 (2014) (“A rule may be ‘mandatory,’ yet not ‘jurisdictional,’ we have explained. Section 7607(d)(7)(B), we hold, is of that character. It does not speak to a court’s authority, but only to a party’s procedural obligations.”) (citations omitted); *see also* *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1148 (D.C. Cir. 2005) (“as a general matter, a party’s presentation of issues during a rulemaking proceeding is not a *jurisdictional* matter”) (emphasis in original).

5. *See* LUBBERS REPORT, *supra* note 1, at 2–3.

6. *Sims v. Apfel*, 530 U.S. 103, 107 (2000) (plurality opinion).

7. *See* LUBBERS REPORT, *supra* note 1, at 4–6.

8. *E.g.*, 15 U.S.C. § 77i(a); 29 U.S.C. § 160(e); 42 U.S.C. § 1320a-8(d)(1).

by offering the agency an opportunity to act on objections to its proceedings.⁹ But questions about the common law application of the doctrine were later raised in *Sims v. Apfel*, where the Court held that a judicial issue exhaustion requirement was inappropriate on review of the Social Security Administration's informal, non-adversarial adjudicatory benefit determinations, reasoning that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding."¹⁰

Although the issue exhaustion doctrine originated in the adjudication context, it has been extended to preenforcement review of agency rulemakings. Two statutes have been identified by the Conference as explicitly requiring issue exhaustion for review of agency rules—the Clean Air Act and the Securities Exchange Act of 1934.¹¹ Both statutes were amended to incorporate issue exhaustion provisions in the 1970s, when Congress enacted numerous regulatory statutes with significant rulemaking provisions.¹²

The doctrine has also been extended to the rulemaking context through common law. Despite *Sims*' focus in the adjudication context on the extent to which the underlying administrative proceeding resembled adversarial litigation for purposes of determining whether the doctrine applied, appellate courts have increasingly applied the doctrine in the absence of a statute requiring it when reviewing preenforcement challenges to agency rules enacted via notice-and-comment proceedings.¹³ And at least two appellate courts have applied the doctrine to review of administrative rulemaking af-

9. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (reviewing an adjudicative order issued by the Interstate Commerce Commission after an adversarial hearing); *see also* *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).

10. *Sims v. Apfel*, 530 U.S. 103, 108–12 (2000) (plurality opinion).

11. 42 U.S.C. § 7607(d)(7)(B); 15 U.S.C. § 78y(c)(1). However, provisions governing some agencies' "orders" have been held to apply to judicial review of rules. *See* *Citizens Awareness Network v. U.S.*, 391 F.3d 338, 345–47 (1st Cir. 2004); *see also* *Inv. Co. Inst. v. Bd. of Govs.*, 551 F.2d 1270, 1276–77 (D.C. Cir. 1977); *American Public Gas Ass'n v. Fed. Power Comm'n*, 546 F.2d 983, 986–88 (D.C. Cir. 1976).

12. LUBBERS REPORT, *supra* note 1, at 4, 11, 13.

13. *E.g.*, *Koretov v. Vilsack*, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring) ("[g]enerally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking"); *City of Portland, Or. v. EPA*, 507 F.3d 706, 710 (D.C. Cir. 2007); *Military Toxics Project v. EPA*, 146 F.3d 948, 956–57 (D.C. Cir. 1998); *see also* LUBBERS REPORT, *supra* note 1, at 27–30 (describing application of the doctrine as well as varied precedent in appellate courts other than the U.S. Court of Appeals for the D.C. Circuit). No cases were identified that applied the issue exhaustion doctrine in the context of new issues raised during enforcement challenges to rules.

ter specifically considering *Sims*,¹⁴ although *Sims* was recently cited by the Ninth Circuit as militating against issue exhaustion in an informal rulemaking issued without notice-and-comment procedures.¹⁵

Relying on their equitable authority, courts have also fashioned exceptions to the issue exhaustion doctrine.¹⁶ The Conference commissioned a consultant's report to identify and articulate the scope of these exceptions in federal appellate case law, as well as to examine the general arguments for or against the doctrine in the rulemaking context.¹⁷ Without endorsing every conclusion expressed therein, the Conference believes that the report of its consultant can provide guidance to courts considering the application of the doctrine as it pertains to preenforcement review of administrative rulemaking.

Factors for Courts to Consider in Applying the Issue Exhaustion Doctrine

The Administrative Conference believes that stakeholders, agencies, and courts benefit when issues are raised during rulemaking proceedings with sufficient specificity to give the agency notice and a fair opportunity to address them prior to judicial review.¹⁸ Many of the justifications for applying the doctrine in judicial review of agency adjudicatory decisions apply squarely to review of rulemakings. The doctrine promotes active public participation, creates orderly processes for resolution of important legal and policy issues raised in agency proceedings, ensures fully informed decisionmaking by administrative agencies, provides a robust record for judicial

14. *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1148–49 (D.C. Cir. 2005); *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004).

15. *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1080 (9th Cir. 2013) (describing a Surface Transportation Board (STB) exemption proceeding as a rulemaking but applying the *Sims* rationale to it because the STB's procedures were informal and public comments were not sought).

16. *E.g.*, *Washington Ass'n for Television and Children (WATCH) v. FCC*, 712 F.2d 677, 681–82 (D.C. Cir. 1983) (“[Our] cases assume that § 405 contains implied exceptions without explaining why. We understand these cases, however, as implicitly interpreting § 405 to codify the judicially-created doctrine of exhaustion of administrative remedies, which permits courts some discretion to waive exhaustion.”) (footnotes omitted).

17. *See generally* LUBBERS REPORT, *supra* note 1.

18. *Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998); *see also* *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015) (holding on review of an agency adjudicatory decision that “the question in determining whether an issue was preserved, however, is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it”).

review, and lends certainty and finality to agency decisionmaking. Issue exhaustion also avoids the potential for significant disruption to extensive work by the agency, which can result if an issue is raised only during judicial review, after the rule has been developed. Application of the doctrine spares courts from hearing objections that could have been cured at the administrative level and reduces the need for agencies to create post-hoc rationalizations.¹⁹

On the other hand, the Conference also recognizes some practical and doctrinal concerns with uncritically applying issue exhaustion principles developed in the context of formal adversarial agency adjudications to the context of preenforcement rulemaking review.²⁰ Overbroad application of the doctrine to rulemaking proceedings could serve as a barrier to judicial review for persons or firms who reasonably did not engage in continuous monitoring of the agency in question.²¹ Issue exhaustion requirements may also contribute to the burdens of participating in a rulemaking proceeding, by exerting pressure on commenters to raise at the administrative level every issue that they might conceivably invoke on judicial review.²² Also, an overbroad exhaustion requirement may result in unnecessary uncertainty and inefficiencies by leaving unaddressed fundamental legal questions — such as a rule’s constitutionality or validity under a substantive federal statute. These and other concerns have led some observers to question the value of the doctrine as applied to rulemaking, or at least to call for limitations on its scope.

The Conference has compiled a list of factors—some of which may be

19. The argument for judicial application of the doctrine may be especially strong where the challenged issue concerns the factual basis of a rule, the agency’s evaluation of alternatives, or the agency’s failure to exercise its discretion in a particular manner. Judicial evaluation of the reasonableness of an agency’s action in such cases under an arbitrary and capricious standard of review may depend heavily on the administrative record and on the agency’s analysis of those issues. See *generally* *Gage v. Atomic Energy Comm’n*, 479 F.2d 1214, 1217–19 (D.C. Cir. 1973).

20. See William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 17 (2000) (“[u]nfortunately, some courts have ignored the specific statutory origin for [issue exhaustion] and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute”).

21. The impact of such barriers can fall most heavily on persons or entities whose interests are not in close alignment with the interests that have been advanced most forcefully by other participants in a given proceeding. See *Koretov v. Vilsack*, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring).

22. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1363–64 (2010); LUBBERS REPORT, *supra* note 1, at 38–40.

dispositive in particular cases—that it invites courts to consider when deciding whether to preclude a litigant from raising issues for the first time during preenforcement review of an agency rule. The list should be understood as a checklist of potentially relevant factors, not a fixed doctrinal formula, and as inapplicable where a statute directs otherwise. Specifically, the list includes consideration of whether:

- The issue was raised by a participant in the rulemaking other than the litigant.²³
- The issue was addressed by the agency on its own initiative in the rulemaking.²⁴
- The agency failed to address an issue that was so fundamental to the rulemaking proceeding or to the rule’s basis and purpose that the agency had an affirmative responsibility to address it.²⁵
- The issue involves an objection that the rule violates the U.S. Constitution.²⁶
- It would have been futile to raise the issue during the rulemaking proceeding because the agency clearly indicated that it would not entertain comments on or objections regarding that issue.²⁷
- The issue could not reasonably be expected to have been raised

23. See *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (“In general, we will not invoke the waiver rule in our review of a notice-and-comment proceeding if an agency has had an opportunity to consider the issue. This is true even if the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party.”).

24. *Id.*

25. See *NRDC v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014) (“EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule . . .”) (internal quotation marks omitted). This factor may include issues arising under the applicable substantive statute or the APA.

26. *Cf.*, *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d* *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (invoking “extraordinary circumstances” exception in statutory provision requiring issue exhaustion to address constitutional issue not raised with the NLRB because the issue went to the very power of the agency to act and implicated fundamental separation of powers concerns). It is worth emphasizing that regardless of whether the issue exhaustion doctrine would apply, participants in a rulemaking should raise constitutional issues during the rulemaking proceeding to give the agency an opportunity to adjust its rule to eliminate the constitutional objection or at least to explain in the administrative record why its rule does not raise constitutional concerns.

27. See *Comite De Apoyo A Los Trabajadores Agricolas v. Solis*, No. 09-240, 2010 WL 3431761, at *18 (E.D. Pa. Aug. 31, 2010); *cf.* *WATCH v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983) (remarking that “[a] reviewing court . . . may in some cases consider arguments that it would have been futile to raise before the agency,” but cautioning that “[f]utility should not lightly be presumed”).

during the rulemaking proceeding because of the procedures used by the agency.²⁸

- The basis for the objection did not exist at a time when rulemaking participants could raise it in a timely comment.²⁹

If an issue exhaustion question arises in litigation, litigants should be given an opportunity to demonstrate that some participant adequately raised the issue during the rulemaking or that circumstances exist to justify not requiring issue exhaustion. And if a court declines to apply issue exhaustion principles to preclude review of new issues, the agency should be given an opportunity to respond to new objections on the merits.³⁰ Where application of the issue exhaustion doctrine forecloses judicial review, the Administrative Procedure Act, 5 U.S.C. § 553(e), can provide a procedural mechanism for the public to raise new issues that were not presented to the agency during a rulemaking proceeding: the right to petition agencies for amendment or repeal of rules.

Citation: 80 Fed. Reg. 60,611, 60,611 (Oct. 7, 2015).

28. *See* *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073 (9th Cir. 2013) (declining to apply issue exhaustion because the agency's procedures were informal and "never provided direct notice of or requested public comment" on challenged issue).

29. *Cf.* *C/SX Transp., Inc., v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–81 (D.C. Cir. 2009) (declining to apply issue exhaustion to a litigant's argument that the final rule was not a logical outgrowth of the noticed rule).

30. Courts have a variety of options for soliciting the agency's views that should vary depending on the circumstances. These options include permitting the agency to brief the issue or supplement the administrative record, or ordering a remand for the limited purpose of soliciting the agency's views.