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ARTICLE

The Myth that Agency Adjudications Cannot Address Constitutional Claims

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Abstract. The 2023 decision in Axon Enterprise, Inc. v. FTC *is the latest of several recent Supreme Court rulings declining to require litigants asserting that agencies are unconstitutionally structured to present these claims to the agency before seeking relief in court. These decisions follow earlier rulings by the Court declining to require administrative exhaustion of other constitutional claims. Although they do not hold that constitutional claims need never be exhausted, these opinions deploy broad language implying a stark dichotomy between courts that can meaningfully address structural or other constitutional claims and agencies that cannot. Lower courts, commentators, and some agency officials have similarly disparaged constitutional adjudication by agencies.*

Building on a growing literature concerning executive branch engagement with the Constitution, this Article will challenge this perceived divide between agencies' and courts' ability to address constitutional claims. Even if agencies cannot "declare" statutes or official action unconstitutional as courts can, they routinely address constitutional issues and—perhaps counterintuitively—have various means to grant relief on structural and other constitutional claims. Thus, despite language in Axon *and other cases disparaging agency resolution of constitutional claims, courts should not mechanically excuse exhaustion of these claims. Instead, courts should apply a standard exhaustion analysis that considers the agency's ability and willingness to address constitutional claims, whether agency rules allow for timely relief on collateral legal claims, and the potential relevance of intertwined nonconstitutional or factual issues on which the agency can apply specialized knowledge or develop a record.*

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Introduction

In its 2023 decision in *Axon Enterprise, Inc. v. FTC*,[1] a unanimous Supreme Court declined to hold that Congress implicitly intended to require litigants opposing Federal Trade Commission ("FTC") and Securities and Exchange Commission ("SEC")[2] enforcement actions, who claimed these agencies' "structure or very existence" was unconstitutional, to seek relief from these agencies before suing in court.[3] At oral argument five months earlier, the writing may have been on the wall after Justice Alito pressed the government to explain what purpose was served by forcing the petitioner to exhaust a constitutional challenge to administrative law judges' ("ALJs") statutory protection from at-will removal[4] by raising it before the FTC.[5] The government responded that the Agency could make a record "useful to a reviewing court" by discussing the "advantages and disadvantages of removal protections for our ALJs," but conceded that "the agency couldn't declare the statute unconstitutional, so it couldn't provide relief on that ground at the end of the day."[6] This response matched the government's focus during briefing on the agencies' ability to grant relief on alternate *nonconstitutional* grounds.[7] The government did not argue that the Agencies could grant relief on the constitutional claims, for example, by exercising their statutory prerogatives to not use ALJs in administrative proceedings,[8] as the FTC previously held it could have done[9] had it determined that ALJ removal protections were unconstitutional,[10] or to proceed in court rather than administratively.[11] Nor did the government suggest that the Agencies

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1 143 S. Ct. 890 (2023).

2 The SEC was the petitioner in a related case. *Id.* at 898.

3 *Id.* at 897, 902.

4 The petitioner also challenged the FTC's exercise of both enforcement and adjudication powers. *Id.* at 899.

5 Transcript of Oral Argument at 65–66, *Axon*, 143 S. Ct. 890 (No. 21-86).

6 *Id.* at 66.

7 *See* Brief for the Federal Parties at 54, *Axon*, 143 S. Ct. 890 (Nos. 21-86, 21-1239) [hereinafter *Axon* Government Brief] ("[I]f the Commissions rule in favor of Axon and Cochran on statutory, regulatory, or factual grounds, their decisions will avoid the need for judicial resolution of any constitutional issue.").

8 5 U.S.C. § 556(b)(1)–(2) (permitting agency heads or members of multi-headed agencies to preside in lieu of an ALJ).

9 Axon Enter., Inc., 170 F.T.C. 454, 454–55, 455 n.2 (2020), 2020 WL 5406806, at *1 & n.2, *dismissed on other grounds*, 176 F.T.C. No. 9389 (Oct. 6, 2023), 2023 WL 6895829.

10 *Id.* at 456–60.

11 *See* 15 U.S.C. §§ 45(m)(1)(A), 53(a)–(b), 77t(b), 78u(d)(1), (3) (permitting the FTC and SEC to bring enforcement actions in federal district court).

might grant relief by exercising prosecutorial discretion to terminate the challenged proceedings altogether, as both Agencies ultimately did, citing nonconstitutional grounds.[12] The Court's subsequent ruling did not mince words in describing the supposed uselessness of administratively exhausting constitutional challenges to agency structure, stating that agencies are "generally ill suited to address structural constitutional challenges."[13]

Axon is the latest in a trio of Supreme Court rulings, along with *Carr v. Saul*[14] and *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[15] declining to require administrative exhaustion of structural constitutional claims, which follow earlier Supreme Court rulings declining to require exhaustion of other constitutional challenges.[16] Language in these rulings paints a seeming dichotomy between courts that can meaningfully address constitutional claims and agencies that cannot. *Axon* asserted that compelling litigants to participate in allegedly unconstitutional agency proceedings causes injury that reviewing courts cannot remedy after the fact.[17] The Court first described agencies as "ill suited to address structural constitutional challenges" in *Carr*,[18] which refused to preclude litigants from raising an unexhausted Appointments Clause challenge to Social Security Administration ("SSA") proceedings on subsequent judicial review.[19] And *Free Enterprise*, which refused to require a litigant to exhaust constitutional challenges to statutory appointment and removal provisions,[20] described such claims as falling "outside the [Agency's] competence and expertise."[21]

Such disparagement of constitutional adjudication by agencies echoes similar language in a quartet of cases from the 1970s in which the

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12 *See* Axon Enter., Inc., 176 F.T.C. No. 9389, at 2 (Oct. 6, 2023), 2023 WL 6895829, at *1 (citing, as grounds for dismissal, the need to redeploy limited agency resources in light of expected delays in resolving the merits due to having to litigate the constitutional issue in court); Pending Admin. Proc. at 2, Securities Act Release No. 11198, Exchange Act Release No. 97640, Investment Advisers Act Release No. 6323, Investment Company Act Release No. 34933, Accounting and Auditing Enforcement Release No. 4413, 2023 WL 3790795, at *2 (June 2, 2023) (citing a procedural irregularity and a need to preserve agency resources as grounds for dismissal).

13 Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 905 (2023) (internal quotation marks omitted) (quoting Carr v. Saul, 141 S. Ct. 1352, 1360 (2021)).

14 141 S. Ct. 1352 (2021).

15 561 U.S. 477 (2010).

16 *See infra* notes 22–29 and accompanying text.

17 *Axon*, 143 S. Ct. at 903–04.

18 *Carr*, 141 S. Ct. at 1360.

19 *Id.* at 1356.

20 *Free Enter.*, 561 U.S. at 490–91.

21 *Id.* at 491.

Court addressed exhaustion of constitutional claims related to public benefits programs, and reflects a common skepticism of administrative resolution of constitutional claims shared by many courts, scholars, and even some agency officials. In *Weinberger v. Salfi*[22] and *Mathews v. Diaz*,[23] the Court described adjudication of facial constitutional challenges to provisions of the Social Security and Medicare Acts as "beyond the [Agency's] competence."[24] *Mathews v. Eldridge*,[25] which concerned a due process challenge to agency rules for terminating disability benefits,[26] deemed it "unrealistic to expect that the [Agency] would consider substantial changes . . . at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context."[27] *Califano v. Sanders*[28] contrasted a merits challenge to a benefits eligibility decision with "[c]onstitutional questions [that] obviously are unsuited to resolution in administrative hearing[s] . . . ."[29] Lower courts have voiced similar doubts,[30] as have commentators.[31] Even some executive branch officials have expressed similar sentiments, as reflected by the government's litigating position in *Axon* and agency rulings declining to consider constitutional claims.[32]

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22 422 U.S. 749 (1975).

23 426 U.S. 67 (1976).

24 *Id.* at 76; *see Salfi*, 422 U.S. at 767.

25 424 U.S. 319 (1976).

26 *Id.* at 324–25.

27 *Id.* at 330.

28 430 U.S. 99 (1977).

29 *Id.* at 109.

30 *See, e.g.*, Cirko *ex rel.* Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 158 (3d Cir. 2020) (invoking "the well-worn maxim that constitutional questions . . . are 'outside the [agency's] competence and expertise'" (alteration in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 (2010))); Calcutt v. FDIC, 37 F.4th 293, 312–13 (6th Cir. 2022) (reasoning that because "the FDIC Board has no [constitutional] expertise" and "cannot edit its own organic statute," "[r]equiring issue exhaustion [of a constitutional challenge to the statute] would have been a pointless exercise"), *rev'd on other grounds*, 143 S. Ct. 1317 (2023). *But see* Yonatan Gelblum, *The Tenth Circuit's Nuanced Approach to Exhaustion of Constitutional Claims*, 102 DENV. L. REV. 393, 393 (explaining that the Tenth Circuit, unlike most other courts of appeals, is reluctant to presume that agencies cannot effectively address constitutional claims).

31 *E.g.*, Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 TEX. L. REV. 339, 404 (2022) ("[A]gencies have no power to rule on the constitutionality of . . . structural claims."); Peter A. Devlin, Note, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234, 1265 (2018) (referencing agencies' purported "lack of power to adjudicate constitutional issues").

32 *See, e.g.*, Kawasaki Kisen Kaisha, Ltd., No. 11-12, slip op. at 12 n.15, 2014 WL 7328475, at *6 n.15 (F.M.C. Nov. 20, 2014) (refusing to consider a Tonnage Clause objection to port fees because "[c]onstitutional considerations 'are more appropriately the province of the courts'" (quoting New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist., 28 F.M.C. 556, 563 (1986))); Stone, 57

The Court's rulings disparaging agency resolution of constitutional claims often did so in dicta or concerned cases with other compelling circumstances weighing against exhaustion, and did not actually hold that agencies can never resolve structural or other constitutional claims.[33] Nor did they overrule precedents requiring exhaustion of some constitutional claims, including facial challenges to statutes.[34] But by disparaging agencies' ability to consider constitutional claims, these decisions might imply that exhausting such claims is typically futile, which could support extending their holdings to other contexts. For example, futility exceptions may apply to statutes or regulations that, unlike the statute at issue in *Axon*, expressly require exhaustion before suing,[35] or differ from the scheme in *Carr* by expressly barring claims not raised before an agency on subsequent judicial review.[36] Not surprisingly, some courts have relied on language in these rulings to excuse exhaustion of constitutional claims in other contexts, such as when exhaustion was expressly required by agency rules that courts overrode by judicial fiat.[37]

This readiness to exempt constitutional claims from exhaustion mandates stands in tension with judicial recognition that administrative exhaustion has many potential benefits.[38] It threatens to increase the workload of federal district courts that are already burdened by recent exponential growth in cases.[39] And having to litigate constitutional claims in court before proceeding with administrative enforcement actions may substantially increase the costs to agencies of pursuing such actions, as the FTC recognized when it ultimately dismissed the *Axon* matter due to resource constraints, citing the likelihood of "years of additional [court]

E.C.A.B. 292, 296 (2005), 2005 WL 3740650, at *3 ("Appellant's argument that he was denied due process and a fair hearing because of bias by the claims examiner raises a constitutional question. . . . [Such] questions are unsuited to resolution in administrative hearing procedures."); *accord* Taucher v. Rainer, 237 F. Supp. 2d 7, 15 (D.D.C. 2002) (referencing a defendant agency's claimed "inability . . . to declare an act of Congress unconstitutional, from which it follows that an agency, like some sort of Flying Dutchman, is doomed to continue to apply an unconstitutional statute until a district court concludes that the statute is unconstitutional"), *rev'd in part on other grounds, vacated in part on other grounds sub nom.* Taucher v. Brown-Hruska, 396 F.3d 1168 (D.C. Cir. 2005).

33 *See infra* Section I.B.

34 *E.g.*, Elgin v. Dep't of the Treasury, 567 U.S. 1, 8 (2012); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215–16 (1994).

35 *See, e.g.*, Ross v. Blake, 578 U.S. 632, 642–45 (2016); Iraheta-Martinez v. Garland, 12 F.4th 942, 948 (9th Cir. 2021); Neely v. United States, 546 F.2d 1059, 1070 (3d Cir. 1976).

36 *E.g.*, Calcutt v. FDIC, 37 F.4th 293, 312 (6th Cir. 2022), *rev'd on other grounds*, 143 S. Ct. 1317 (2023).

37 *E.g.*, *id.*; *see also, e.g.*, K & R Contractors, LLC v. Keene, 86 F.4th 135, 145 (4th Cir. 2023).

38 *See infra* text accompanying notes 53–61.

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

litigation, further delaying the administrative adjudication that would reach the merits."[40]

The frequent disparagement of administrative adjudication of constitutional claims also contrasts with several recent trends in the legal literature. Recent decades have witnessed increased scholarly interest in a rich tradition of "administrative constitutionalism" by executive branch agencies engaging with the Constitution when taking official action.[41] Conclusory assertions that agency adjudicators cannot or need not address constitutional challenges also overlook a vigorous scholarly debate on whether the executive branch can or must engage in constitutional interpretation or decline to implement unconstitutional statutes.[42] And similarly categorical assertions about the superiority of court-awarded relief ignore a growing recognition by commentators (as well as disappointed litigants) that meaningful judicial redress for constitutional violations is often the exception rather than the norm.[43]

This Article considers the relatively unexplored implications of these developments and debates with respect to administrative exhaustion of constitutional claims, and questions the common assumption of a stark dichotomy between the ability of agencies and courts to address constitutional claims. Instead of a binary division between courts that can effectively address constitutional claims and agencies that cannot, this Article argues that any differences are usually ones of degree, and may sometimes favor initial agency adjudication, which counsels against mechanically extending the holdings in *Axon* and similar cases to excuse exhaustion of constitutional claims in other contexts.

Part I reviews statutory, regulatory, and judicial authorities governing administrative exhaustion, and factors that the jurisprudence has identified as counseling for or against requiring exhaustion of particular claims. It also reviews Supreme Court decisions on exhaustion of constitutional claims, which have never categorically exempted these claims from administrative exhaustion mandates, while declining to

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[40] Axon Enter., Inc., 176 F.T.C. No. 9389, at 2 (Oct. 6, 2023), 2023 WL 6895829, at *1.

[41] *See generally* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1904–10 (2013) (surveying literature).

[42] *See, e.g.*, Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1617–18 (2008) (exploring "various theories of Executive Disregard"); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1268 (1996).

[43] *See, e.g.*, Richard J. Pierce, Jr., *The Remedies for Constitutional Flaws Have Major Flaws*, 18 DUKE J. CONST. L. & PUB. POL'Y 105, 133 (2023); David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REGUL. 708, 728 (2020) ("In those rare cases where courts decide to reward a separation of powers claimant with a decision on the merits, they award no relief to the plaintiff.").

require exhaustion of these claims when other compelling circumstances counseled against doing so.

Part II challenges the assumption that agencies lack competence or authority to pass on constitutional questions in general and on facial challenges to statutes in particular. It argues that agencies can competently address constitutional controversies because they regularly engage with constitutional questions, encounter the constitutional issues likeliest to arise in their proceedings with comparable frequency to many generalist courts, and have access to the Department of Justice's ("DOJ's") recognized expertise in constitutional analysis. Agencies also have the necessary authority to address constitutional claims because, even if agencies cannot "declare" statutes or other official action unconstitutional in the same manner as courts, they can consider constitutional limits when deciding how and whether to execute the law. In addition, agencies may engage in "administrative avoidance" by exercising discretion in a manner that moots constitutional controversies, potentially without making any conclusive legal pronouncements. Part II also reviews constitutional, statutory, judicial, and historical authorities supporting a prerogative and possible duty on the part of agencies to avoid unconstitutional action, even if authorized or possibly required by statutes, which is similar to authority often attributed to the President.

Part III argues that agency resolution of constitutional claims is not categorically inferior to court adjudication. It explains how agencies may grant effective relief on constitutional claims by applying statutory or prosecutorial discretion or, potentially, by declining to give effect to laws they determine are unconstitutional. Because agencies may be especially well-suited to assess their own ability to grant such relief, courts that simply assume that exhaustion of constitutional claims is futile may short-circuit a process through which the agency could have identified ways to offer relief on these claims. Part III also explains why—notwithstanding judicial assertions about agencies' purported inability to issue court-like "declarations" of unconstitutionality, or alleged harm from participation in unconstitutional agency proceedings—judicial relief is not always superior to the relief an agency might grant. And it demonstrates how agency rules facilitating immediate resolution of threshold legal issues, and judicial precedents permitting collateral order appeals from interlocutory agency rulings, can adequately protect any cognizable "right not to stand trial" in allegedly unconstitutional agency processes when litigants must first seek relief from the agency. Part III further argues that many benefits attributed to administrative exhaustion can apply to constitutional claims. Agency consideration of these claims may prevent unconstitutional acts as well as abusive litigation tactics and piecemeal appeals, leverage the agency's specialized knowledge to resolve

nonconstitutional questions relevant to assessing if statutes or agency rules even raise a constitutional question in the first place or are severable, and develop a record for review.

Part IV argues that since agencies are not a categorically inferior forum for resolving constitutional claims in the first instance, courts should not mechanically extend the holdings of *Axon* and similar cases with compelling circumstances weighing against exhaustion of a constitutional claim to every situation in which litigants raise constitutional claims. Instead, courts should apply a standard administrative exhaustion analysis, which, unless statutes or regulations instruct otherwise, would assess how effectively the applicable administrative scheme can address the particular constitutional claim at issue. Courts should therefore consider whether an agency is willing and able to address constitutional claims and, in cases where a "right not to stand trial" is at issue, whether agency rules permit litigants to obtain prompt relief on threshold legal challenges. Courts should also consider whether constitutional claims are intertwined with statutory, regulatory, or factual issues on which the agency can apply specialized knowledge or develop a record for judicial review. The constitutional nature of a claim may therefore still be relevant to determining whether exhaustion is required, but should not itself be dispositive.

I. Exhaustion Mandates and Their Applicability to Constitutional Claims

This Part provides a general overview of administrative exhaustion as well as a review of Supreme Court jurisprudence concerning exhaustion of constitutional claims. It describes statutory, regulatory, and judicial exhaustion mandates, as well as judicial rationales for mandating exhaustion or excusing it in some instances. It also explains that despite disparaging agency resolution of constitutional claims, the Supreme Court has not held that agencies can never resolve these claims or that these claims need never be exhausted. Instead, the Court has declined to require exhaustion of particular constitutional claims before specific agencies when additional compelling circumstances weighed against requiring exhaustion.

A. *Administrative Exhaustion*

Administrative exhaustion mandates require litigants to raise their claims administratively before seeking relief in court. Courts enforce ex ante exhaustion of remedies mandates by dismissing suits filed without first giving a responsible agency the opportunity to resolve the underlying

controversy.[44] They enforce ex post issue exhaustion mandates on judicial review following an agency's decision by barring parties from objecting to the decision on grounds not raised before the agency.[45] This Section reviews the legal bases for these mandates, as well as judicial justifications for requiring exhaustion and for occasionally declining to do so.

The sources of exhaustion mandates may be statutory, regulatory, or judicial. Statutes may expressly require litigants to exhaust administrative remedies before suing,[46] as do some agency rules,[47] or may achieve similar results by barring court interference with pending agency proceedings.[48] Statutes or agency regulations may mandate issue exhaustion by barring arguments not raised before an agency on judicial review of its decision.[49] Absent such express mandates, courts may themselves impose "prudential" exhaustion requirements by refusing to hear suits filed without first seeking relief from the agency[50] or to consider arguments not raised before an agency when reviewing its decision.[51] Courts also read implicit exhaustion mandates into statutes creating comprehensive administrative review schemes for resolving certain controversies, treating such statutes as implicitly depriving district courts of jurisdiction over those cases.[52]

Courts justify exhaustion mandates based on benefits to agencies, courts, and litigants, and may occasionally excuse exhaustion if the

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44 Reiter v. Cooper, 507 U.S. 258, 269 (1993).

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

46 *See, e.g.*, I.R.C. § 7422(a) (barring suits to recover contested tax assessments "until a claim for refund or credit has been duly filed"); *see also* Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109, 114–18 (2018) (citing twenty-two additional examples of statutes requiring exhaustion).

47 *See, e.g.*, 21 C.F.R. § 10.45(b) (2024) ("A request that the [FDA] Commissioner take or refrain from taking any form of administrative action must first be the subject of a final administrative decision . . . before any legal action is filed in a court complaining of the action or failure to act."); *see also* Lubbers, *supra* note 46, at 118 n.24 (noting additional examples from other agencies); Darby v. Cisneros, 509 U.S. 137, 146–47 (1993) (explaining that agencies can mandate exhaustion by regulation).

48 *Compare, e.g.*, 12 U.S.C. § 1818(h)(2) (providing for judicial review of final agency decisions), *with id.* § 1818(i)(1) ("[E]xcept as otherwise provided in this section . . . no court shall have jurisdiction to affect . . . the issuance or enforcement of any [agency] notice or order under [this] section . . . .").

49 *E.g.*, 29 U.S.C. § 160(e) (barring judicial review of any "objection that has not been urged before the [National Labor Relations] Board."); 12 C.F.R. § 308.39(b) (2024) (requiring that parties must raise specific arguments to the ALJ and agency to preserve them); 20 C.F.R. § 802.211(a) (2024) (stating that administrative petition must "list[] the specific issues to be considered"); *Sims*, 530 U.S. at 108 (noting that courts reviewing agency decisions generally refuse to consider arguments not raised in accordance with agency rules requiring issue exhaustion).

50 Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247 (D.C. Cir. 2004).

51 *Sims*, 530 U.S. at 108–09.

52 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207–08 (1994).

advantages of immediate court proceedings outweigh these benefits. One justification for requiring exhaustion rests on a comity principle "grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies . . . ought to have primary responsibility for the programs that Congress has charged them to administer,"[53] which "appl[ies] with particular force" when agencies can apply discretion or expertise to an issue.[54] Exhaustion mandates also allow an agency "to correct its own mistakes . . . before it is haled into federal court,"[55] and discourage "deliberate flouting of administrative processes."[56] Exhaustion may also benefit courts.[57] It can prevent litigation altogether if claims are settled or remedied at the administrative level, or if a party losing before the agency foregoes court review.[58] And when court action follows, exhaustion can prevent piecemeal appeals, narrow or crystallize issues for judicial review, ensure cases are ripe for adjudication, and provide a record for review.[59] Courts have also suggested that exhaustion benefits litigants because agencies resolve claims "more quickly and economically" than courts[60] and because issue-exhaustion rules protect prevailing litigants from improper "sandbagging" by parties who lose before the agency and then seek a "second bite at the apple" on subsequent judicial review based on objections that they failed to raise before the agency.[61]

But if these advantages are attenuated, if pursuing administrative relief is futile, or if delayed judicial review would be ineffective, courts may elect not to require prudential exhaustion or may apply express or implied exceptions to statutes or regulations requiring exhaustion. Courts may decline to require prudential exhaustion of remedies "if the litigant's

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53 McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

54 *Id.*

55 *Id.*

56 *Id.* (internal quotation marks omitted) (quoting McKart v. United States, 395 U.S. 185, 195 (1969)).

57 *Id.*

58 *Id.*; *see also* Woodford v. Ngo, 548 U.S. 81, 89 (2006).

59 *McCarthy*, 503 U.S. at 145; Palladian Partners, Inc. v. United States, 783 F.3d 1243, 1255 (Fed. Cir. 2015); Forest Guardians v. U.S. Forest Serv., 641 F.3d 423, 431 (10th Cir. 2011); Connecticut v. Duncan, 612 F.3d 107, 114 (2d Cir. 2010); Midwestern Gas Transmission Co. v. FERC, 589 F.2d 603, 620 (D.C. Cir. 1978).

60 *Woodford*, 548 U.S. at 89.

61 Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs, 987 F.3d 581, 592–93 (6th Cir. 2021); *accord* Sims v. Apfel, 530 U.S. 103, 109 (2000). The beneficiary of such rules is often the agency *qua* litigant. *E.g.*, *Forest Guardians*, 641 F.3d at 431 n.6. But the beneficiary can also be a private party. *E.g.*, Big Horn Coal Co. v. Sadler, 924 F.3d 1317, 1325 (10th Cir. 2019) (holding that an employer waived its objection to an agency's award of benefits to a former employee by not raising it before the agency).

interests in immediate judicial review outweigh the government's interests . . . that the exhaustion doctrine is designed to further."[62] Balancing these interests requires an "intensely practical" assessment of "the claim presented and the characteristics of the particular administrative procedure."[63] Courts may thus decline to require prudential exhaustion when agencies lack authority, willingness, or institutional competence to adjudicate a claim,[64] or if a party's *merits* claim is that administrative remedies are inadequate.[65] They may also decline to require exhaustion when litigants face "an unreasonable or indefinite timeframe for [agency] action"[66] or irreparable harm from delayed judicial review.[67] Moreover, because courts require prudential issue exhaustion for the same reasons that they require litigants to raise arguments in adversarial trial court actions to preserve them for appeal,[68] they may decline to require prudential issue exhaustion when agencies utilize nonadversarial "inquisitorial" processes in which agency adjudicators, rather than litigants, bear primary responsibility for identifying and developing relevant issues.[69]

Courts may also apply express or implied exceptions to statutory or regulatory exhaustion mandates. Because courts presume Congress favors meaningful judicial review of agency action, they avoid construing ambiguous statutes as requiring exhaustion if delayed judicial review would be inadequate.[70] They may also identify or imply futility or similar exceptions to some express exhaustion mandates[71] and construe codified exceptions to such mandates for situations raising "extraordinary circumstances"[72] or in which litigants had "reasonable grounds"[73] not to exhaust as applying in circumstances similar to those excusing prudential

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62 *McCarthy*, 503 U.S. at 146 (internal quotation marks omitted) (quoting West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979)).

63 *Id.* (internal quotation marks omitted) (quoting Bowen v. City of New York, 479 U.S. 467, 484 (1986)).

64 *Id.* at 148.

65 *Id.*

66 *Id.* at 146–47.

67 *Id.* at 147.

68 Sims v. Apfel, 530 U.S. 103, 109–10 (2000).

69 *Id.* at 110–11.

70 McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

71 *E.g.*, Ross v. Blake, 578 U.S. 632, 642–44 (2016) (explaining that a statutory mandate to exhaust "available remedies" does not require exhaustion if officials refuse to provide relief); K & R Contractors, LLC v. Keene, 86 F.4th 135, 145 (4th Cir. 2023).

72 *E.g.*, 29 U.S.C. § 160(e).

73 *E.g.*, *id.* § 210(a).

exhaustion.[74] Moreover, in *Thunder Basin Coal Co. v. Reich*,[75] the Supreme Court held that when determining whether to infer implied congressional intent to require exhaustion of a particular claim through a comprehensive review scheme, courts must consider whether delayed judicial review would be inadequate, whether the claim is "wholly collateral" to the statutory review scheme, and whether it falls "outside the agency's expertise."[76]

B. *Exhaustion of Constitutional Claims*

Despite disparaging agency adjudication of constitutional claims in a number of rulings that declined to require litigants to exhaust particular constitutional claims before certain agencies,[77] the Supreme Court has not categorically exempted constitutional claims from exhaustion mandates.[78] It has required exhaustion of some constitutional claims or otherwise indicated that exhaustion mandates can apply to these claims. When the Court has declined to require exhaustion of constitutional claims, it has either rested its holding entirely on grounds other than the constitutional nature of the claim or cited this factor together with other compelling circumstances weighing against exhaustion.[79]

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[74] *E.g.*, Indep. Elec. Contractors of Hous., Inc. v. NLRB, 720 F.3d 543, 551–52 (5th Cir. 2013) (stating that "intolerably long" administrative process and futility constituted "extraordinary circumstances" for purposes of a codified exemption to a statutory exhaustion mandate); Commander Props., Inc. v. FAA, 11 F.3d 204, 205 n.2 (D.C. Cir. 1993) (stating that agency rules precluding consideration of a claim implicated a codified "reasonable grounds" exception to a statutory exhaustion mandate).

[75] 510 U.S. 200 (1994).

[76] *Id.* at 212.

[77] *See supra* notes 13–29 and accompanying text.

[78] *Cf.* Able v. United States, 88 F.3d 1280, 1288 (2d Cir. 1996) ("The Supreme Court has been inconsistent in its jurisprudence concerning the 'constitutionality' exception to the exhaustion requirement.").

[79] Separately from its jurisprudence on when exhaustion mandates apply to constitutional claims, the Court has held that reviewing courts have discretion to consider certain structural constitutional arguments that should have been pressed below in order to preserve them for subsequent review but had been waived or forfeited. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 878 (1991); Glidden Co. v. Zdanok, 370 U.S. 530, 535–37 (1962). Lower courts have relied on this jurisprudence to consider structural claims that were not raised as required by otherwise-applicable exhaustion mandates. *E.g.*, Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1326–27 (Fed. Cir. 2019) (applying discretion pursuant to *Freytag* to consider a structural claim not exhausted before the agency), *vacated and remanded on other grounds sub nom.* United States v. Arthrex, Inc. (*Arthrex II*), 141 S. Ct. 1970 (2021); Willy v. Admin. Rev. Bd., 423 F.3d 483, 490 n.20 (5th Cir. 2005) (same). In contrast, this Article addresses jurisprudence suggesting there can be no potential waiver or forfeiture of broad classes of constitutional claims in the first place because such claims need never be raised before an agency. *Cf.* Cirko *ex rel.* Circo v. Comm'r of Soc. Sec., 948 F.3d 148, 155 (3d Cir. 2020) ("[*Freytag*] excused

The Court has declined to categorically exempt constitutional claims from exhaustion and in some cases, it has required exhaustion of various constitutional claims, including facial challenges to statutes. *Thunder Basin*, which required exhaustion of a facial due process challenge to a statutory adjudication scheme despite the lack of an express statutory exhaustion mandate, held that although "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies,"[80] "*[t]his rule is not mandatory*."[81] In *Elgin v. Department of the Treasury*,[82] the Court, applying *Thunder Basin* to another administrative scheme that lacked an express exhaustion mandate, required federal employees raising facial challenges to civil service laws on equal protection grounds to first seek relief from the Merit Systems Protection Board ("MSPB").[83] It required exhaustion despite the MSPB's claimed inability to adjudicate such facial challenges,[84] noting that the agency could "identify the legal principles that govern the constitutional analysis" in order to develop a useful record for subsequent judicial review.[85] *United States v. Clintwood Elkhorn Mining Co.*[86] held that the Internal Revenue Code's express exhaustion mandate[87] applies to constitutional claims, including facial challenges to the tax laws.[88] And although *Diaz* and *Salfi* held that an agency had waived a statutory exhaustion mandate with respect to a constitutional claim,[89] *Salfi* also held that absent waiver, this mandate applied to constitutional claims,[90] and in subsequent cases the Court enforced this mandate against parties raising facial and other constitutional challenges when the agency had not

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the petitioner's failure to exhaust rather than holding that there was no exhaustion requirement in the first instance.").

80 *Thunder Basin*, 510 U.S. at 215 (alteration in original) (internal quotation marks omitted) (quoting Johnson v. Robison, 415 U.S. 361, 386 (1974)).

81 *Id.* (emphasis added).

82 567 U.S. 1 (2012).

83 *Id.* at 8.

84 *See id.* at 16 (noting that the MSPB had refused to adjudicate constitutional challenges to statutes on the grounds that "[i]t is well settled that administrative agencies are without authority to determine the constitutionality of statutes." (quoting Malone, 13 M.S.P.B. 81, 83 (1983))).

85 *Id.* at 20 n.9.

86 553 U.S. 1 (2008).

87 I.R.C. § 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary . . . .").

88 *Clintwood Elkhorn*, 553 U.S. at 9.

89 Mathews v. Diaz, 426 U.S. 67, 74–75 (1976); Weinberger v. Salfi, 422 U.S. 749, 766–67 (1975).

90 *Salfi*, 422 U.S. at 762.

waived exhaustion.[91] Several earlier decisions by the Court also required litigants to exhaust facial challenges to statutes, as well as other constitutional claims, before seeking relief in court.[92]

The Court's reasoning elsewhere also reflects the lack of a categorical rule exempting even structural constitutional claims or facial challenges to statutes from exhaustion mandates. Instead of holding that facial or other constitutional challenges need never be exhausted, *Carr* merely reasoned that "it is *sometimes* appropriate for courts to entertain constitutional challenges to statutes or other agency-wide policies even when those challenges were not raised in administrative proceedings."[93] *Ryder v. United States*[94] and *Lucia v. SEC*[95] held that litigants were entitled to relief on structural constitutional claims *because* they had raised them before a military court-martial and the SEC, respectively.[96] When the government cited these rulings to argue for an issue exhaustion mandate in *Carr*,[97] the Court did not overrule them or dismiss their analysis as dicta. Instead, it distinguished them based on differences in the administrative scheme at issue in *Carr*,[98] thus implying that in appropriate circumstances, exhaustion of structural constitutional claims is required. Accordingly, the Court has never categorically held that agencies cannot resolve constitutional claims or that such claims need never be exhausted.

Moreover, the Court has never relied solely on the constitutional nature of a claim as grounds for declining to require administrative exhaustion. Instead, it either excused exhaustion based entirely on other grounds or rested its holding at least partly on additional compelling factors that weighed against requiring exhaustion. In some cases, the

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91 Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 24 (2000) (distinguishing *Salfi*); Heckler v. Ringer, 466 U.S. 602, 618 & n.11 (1984) (distinguishing *Diaz*).

92 W.E.B. DuBois Clubs of Am. v. Clark, 389 U.S. 309, 310 n.3, 311–13 (1967) (per curiam) (requiring exhaustion before the Subversive Activities Control Board of a claim that provisions of the Internal Security Act of 1950 were unconstitutional "on their face and as applied" (internal quotation marks omitted)); Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 541, 553 (1954) (requiring exhaustion of a claim that regulations were "not authorized by statute or that, if purporting to be so authorized, the statute violates the Federal Constitution"); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 755–56 (1947) (requiring exhaustion of a claim that statutes were "unconstitutional on various grounds"); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (requiring exhaustion of a claim that, as applied, a statute exceeded congressional authority under the Commerce Clause).

93 Carr v. Saul, 141 S. Ct. 1352, 1360 (2021) (emphasis added).

94 515 U.S. 177 (1995).

95 585 U.S. 237 (2018).

96 *Id.* at 251; *Ryder*, 515 U.S. at 182–83.

97 141 S. Ct. at 1362.

98 *Id.* (distinguishing the administrative adjudication scheme at issue in *Carr* on the grounds that no express exhaustion requirement applied and that the Agency's proceedings were not adversarial).

Court simply excused exhaustion of a constitutional claim based on a standard exhaustion analysis that was not directly impacted by the constitutional nature of the claim. For example, *McNary v. Haitian Refugee Center, Inc.*[99] applied standard canons of construction in holding that a statutory exhaustion mandate did not bar facial challenges to agency rules, including constitutional challenges.[100] And *Salfi* and *Diaz*, despite stating in dicta that constitutional claims were "beyond [the Agency's] jurisdiction"[101] or "competence,"[102] merely held, based on the language of a statutory exhaustion mandate, that the Agency could waive the mandate's applicability and that it had done so in the cases before the Court.[103]

Even when the Court has declined to require exhaustion based partly on the constitutional nature of a claim, it has also relied on other compelling factors, consistent with earlier jurisprudence explaining "that the presence of constitutional questions, *coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay* . . . [is] sufficient to dispense with exhausting the administrative process."[104] For example, in *Free Enterprise* and *Axon*, the Court had to determine if a statute that did not address exhaustion implicitly required it, based in part on whether requiring exhaustion might preclude meaningful judicial review.[105] In this regard, the Court found it problematic that the administrative scheme at issue in *Free Enterprise* only permitted review of enforcement actions, thus requiring potential litigants wishing to challenge the respondent's authority to conduct pre-enforcement investigations to purposely engage in sanctionable conduct and risk hefty penalties just to obtain review.[106] And in *Axon*, the government asserted that the agency could not grant relief on an objection that its allegedly unconstitutional structure precluded it from adjudicating the merits of an enforcement claim,[107] but argued that the petitioner still had to litigate these merits before the

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99 498 U.S. 479 (1991).

100 *Id.* at 491–99 (applying textual canons and a presumption favoring meaningful judicial review).

101 Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

102 Mathews v. Diaz, 426 U.S. 67, 76 (1976).

103 *Id.* at 75–77; *Salfi*, 422 U.S. at 766–67. Similarly, the assertion in *Califano v. Sanders*, 430 U.S. 99 (1977), which concerned judicial review of a *nonconstitutional* claim, that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing[s]," *id.* at 109, was dicta.

104 Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 773 (1947) (emphasis added).

105 Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 900–01 (2023); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489 (2010).

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

107 *See supra* notes 1–12, 17 and accompanying text.

agency prior to seeking judicial relief on the constitutional claim.[108] The Court deemed such delayed relief inadequate since it would not undo the asserted "here-and-now" injury of having to litigate the merits before an unconstitutionally structured agency.[109] Similarly, *Carr* considered whether to impose an issue exhaustion mandate—not required by a statute or regulation—on litigants raising Appointments Clause claims[110] in informal proceedings that differed from adversarial court litigation where waiver typically applies, and gave no direct access to an official able to grant relief by making a valid appointment.[111] *Carr* described the constitutional issue as a factor that merely "tip[ped] the scales"[112] against requiring exhaustion when "[t]aken together" with the agency's nonadversarial process and the futility of seeking relief administratively.[113]

Similarly, in *Eldridge*, the Court read an implied exemption into a statutory exhaustion mandate applicable to a due process challenge to agency procedures for terminating benefits, because the procedural attack was "collateral" to the merits of the termination ruling and the plaintiff's "physical condition and dependency upon the disability benefits" made delayed judicial review inadequate.[114] Moreover, the petitioning agency in *Eldridge, Salfi*, and *Diaz* had repeatedly asserted that "constitutional claims are beyond [its] competence,"[115] so any attempt to obtain relief administratively may have been futile. Absent these additional factors weighing against exhaustion, it is far from certain that the Court would have excused exhaustion in these cases, and the Court has subsequently

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108 *Axon*, 143 S. Ct. at 905–06; *accord Axon* Government Brief, *supra* note 7, at 12–14 (contrasting the contested "non-final" agency decision to utilize ALJs alleged to be unconstitutionally protected from removal with a judicially reviewable "final order resolving the core issue" (internal quotation marks omitted) (quoting Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985))).

109 *Axon*, 143 S. Ct. at 903, 906 (internal quotation marks omitted) (quoting Seila L. LLC v. CPFB, 140 S. Ct. 2183, 2196 (2020)).

110 Carr v. Saul, 141 S. Ct. 1352, 1358 (2021).

111 *Id.* at 1359–60, 1361.

112 *Id.* at 1360.

113 *Id.* at 1362. Only one Justice asserted that exhaustion should not have been required due primarily to the constitutional nature of the claim. *Id.* at 1363 (Breyer, J., concurring in part and concurring in the judgment).

114 Mathews v. Eldridge, 424 U.S. 319, 330–32 (1976).

115 *See* Weinberger v. Salfi, 422 U.S. 749, 794 n.9 (1975) (Brennan, J., dissenting) (citing agency rulings); *see also id.* at 767 (majority opinion) ("[T]he only issue to be resolved is a matter of constitutional law concededly beyond [the Agency's] competence to decide . . . ."); *accord* Mathews v. Diaz, 426 U.S. 67, 76 (1976).

asserted that these cases' exhaustion holdings did not turn on the "constitutional character" of the claims at issue.[116]

II. Agencies Can Resolve Constitutional Controversies

Courts and commentators often imply that agencies cannot adjudicate constitutional claims because they purportedly lack expertise or authority to pass on constitutional issues in general and on the constitutionality of congressional enactments in particular. This Part challenges these assumptions. It argues that agencies have extensive experience and expertise in constitutional analysis, which may be comparable to that of many generalist courts when it comes to the constitutional issues most likely to arise in their proceedings. Additionally, agencies can draw on DOJ's recognized expertise in constitutional law. This Part also explains that despite assertions that agencies cannot "declare" statutes or other official action unconstitutional, an agency can address constitutional controversies by taking corrective action, either in response to its formal resolution of a constitutional question, or by engaging in "administrative avoidance" to moot a constitutional controversy without conclusively resolving the constitutional issue (and potentially without making any legal pronouncements). In addition, this Part reviews constitutional, statutory, judicial, and historical authorities indicating that agencies are authorized, and possibly required, to refrain from taking unconstitutional action, including action authorized and possibly even mandated by statute. And it explains why arguments by commentators for similar presidential authority or responsibility should also apply to administrative agencies.

A. *Agencies Have the Institutional Competence to Resolve Constitutional Controversies*

Court rulings declining to require exhaustion of constitutional claims often disparage agencies' institutional competence to address constitutional controversies. Thus, for example, courts have asserted that structural constitutional challenges "usually fall outside [agency] adjudicators' areas of technical expertise,"[117] and that "administrative agencies are without . . . expertise to pass upon the constitutionality of

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116 Smith v. Berryhill, 139 S. Ct. 1765, 1774 n.7 (2019) ("[T]he Court's subsequent [jurisprudence] demonstrates that [its] understanding of [the exhaustion provision at issue in *Eldridge* and *Salfi*] can extend to cases lacking *Eldridge*'s and *Salfi*'s constitutional character.").

117 *Carr*, 141 S. Ct. at 1360.

administrative or legislative action."[118] Commentators have made similar claims.[119] This assumption that Article II agencies lack Article III courts' competence to address constitutional questions, if true, would readily support excusing exhaustion of such claims on futility or similar grounds. After all, if only Article III judges can meaningfully consider constitutional claims, why force litigants to raise these claims before constitutionally clueless bureaucrats?[120]

However, these categorical assertions do not match reality. As Judge Frank Easterbrook noted when discussing presidential resolution of constitutional controversies, "if expertise is important it parades down the halls of the executive branch."[121] Agencies have routinely addressed constitutional questions since the Founding Era and are no strangers to constitutional analysis. An agency may encounter the constitutional issues most likely to arise in its proceedings with comparable frequency to many generalist courts. And even if an agency were to lack sufficient expertise on its own, it could seek expert advice from DOJ, whose constitutional pronouncements are viewed as highly persuasive by courts. Categorical assertions that agencies are unqualified to pass on constitutional questions therefore lack a factual basis.

1. Agencies Routinely Engage in Administrative Constitutionalism

As the burgeoning literature on administrative constitutionalism demonstrates, agencies regularly analyze and apply the Constitution. Executive branch agencies have engaged with the Constitution from the Washington administration to the modern era. Legal incentives to conform to constitutional norms and the nature of many agencies' missions necessarily compel agencies to routinely engage with various areas of constitutional law. Agencies therefore have expertise relevant to

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118 Spiegel, Inc. v. FTC, 540 F.2d 287, 294 (7th Cir. 1976) (citing cases).

119 *See, e.g.*, Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 45 (1985) ("[W]hen a statute is challenged on its face" "the agency can add little that will illuminate the controversy." "[I]ts factual expertise . . . is [un]likely to be helpful."); *see also* articles cited *supra* note 31. *But see* Robert C. Power, *Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 584 (1987) ("Agencies routinely resolve constitutional issues in their normal functions and . . . are no less competent to decide constitutional issues than are non-Article III judges.").

120 *See* Calcutt v. FDIC, 37 F.4th 293, 312–13 (6th Cir. 2022) ("[T]he FDIC Board has no [constitutional] expertise. . . . Requiring issue exhaustion in this situation would have been a pointless exercise."), *rev'd on other grounds*, 143 S. Ct. 1317 (2023); *cf.* McCarthy v. Madigan, 503 U.S. 140, 147–48 (1992) (reasoning that exhaustion may be waived if "an agency [is] unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute").

121 Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RSRV. L. REV. 905, 916 (1989).

assessing challenges not only to the constitutionality of executive branch action, but also to the constitutionality of statutes.

a. *Agencies' Extensive Engagement with the Constitution*

Agencies have a long history of engaging with constitutional questions. President Washington's Secretaries of State, Treasury, and War analyzed and opined on the scope of the executive branch's constitutional powers, such as presidential war powers,[122] and on the constitutionality of statutes, such as the act creating the First Bank of the United States.[123] In the first century of the Republic's existence, judicial review of agency action was the exception rather than the norm,[124] and most constitutional review was therefore conducted by agency officials exercising constitutional self-restraint.[125] Moreover, agencies sometimes took or avoided taking action based on assertions that statutes were unconstitutional. For example, after Congress overrode Andrew Jackson's veto of a law reauthorizing the Second Bank of the United States, Roger Taney, who had drafted the President's veto message claiming the bill was unconstitutional and was subsequently appointed Secretary of the Treasury,[126] withdrew the government's deposits from the Bank in an effort to destroy it.[127]

This tradition of administrative constitutionalism has continued into the twentieth and twenty-first centuries. For example, Professor Sophia Lee has documented how the Federal Communications Commission ("FCC") interpreted the state action doctrine when formulating regulatory policies requiring nondiscrimination by regulated entities in a manner that extended judicial precedents on this constitutional issue to new situations.[128] She found that in some cases, the FCC's actions were

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122 Letter from Alexander Hamilton to James McHenry (May 17, 1798), *in* 21 THE PAPERS OF ALEXANDER HAMILTON 461, 461–62 (Harold C. Syrett ed., 1974); Letter from Henry Knox to William Blount (Nov. 26, 1792), *in* 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 220, 220–21 (Clarence Edwin Carter ed., 1936).

123 Opinion of Alexander Hamilton on the Constitutionality of a National Bank (Feb. 23, 1791), *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 95, 95–112 (M. St. Clair Clark & D.A. Hall eds., 1832).

124 *See* Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1711–14 (2019).

125 *See id.* at 1714–16; Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1649–51 (2019).

126 ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR 81–82, 81 n.40 (1967).

127 *Id.* at 125.

128 Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 800–01, 823 (2010).

constitutionally motivated even when publicly justified on statutory grounds.[129] Countless other examples of agency engagement in constitutional analysis abound.[130] By way of illustration, rule-writers at the Department of Energy and the Environmental Protection Agency have considered whether their Agencies' regulations effected compensable regulatory takings[131] or provided adequate procedural due process.[132] In connection with a single rulemaking concerning tobacco sales to minors, the Food and Drug Administration ("FDA") considered these issues as well as separation of powers, nondelegation, First Amendment, equal protection, and substantive due process concerns.[133] Several agencies have also invoked the canon of constitutional avoidance when construing their organic acts.[134] And presidential guidance requires agencies to consider constitutional issues such as restraints relating to federalism and Fifth Amendment takings when taking official action.[135]

Agency adjudicators also routinely address constitutional issues. Because agency adjudications can affect property or liberty interests, agencies must often resolve disputes about due process or related constitutional rights.[136] And agency adjudicators have considered a wide

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129 *Id.* at 884–85.

130 *See, e.g.*, authorities cited *infra* notes 148–57.

131 Chronic Beryllium Disease Prevention Program, 88 Fed. Reg. 57365, 57639 (proposed Aug. 23, 2023) (to be codified at 10 C.F.R. pt. 850) ("DOE determined . . . that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment . . . .").

132 Guidelines for Development and Implementation of State Solid Waste Management Plans, 44 Fed. Reg. 28344, 28345 (May 15, 1979) (to be codified at 40 C.F.R. pt. 256) (disagreeing with an assertion in a rulemaking petition that the Constitution required a hearing prior to certain agency action).

133 Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396, 44416–17, 44469–74, 44537–38, 44550–55 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897) (determining that the agency's broad reading of a statute did not violate separation of powers or the nondelegation doctrine, explaining why advertising restrictions did not unconstitutionally burden speech, and finding that restrictions on the use of intellectual property and business activities were not a compensable taking, that the agency's action did not violate substantive due process or equal protection because it had a rational basis, and that the notice and comment process satisfied any procedural due process requirements).

134 Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1218 (2006).

135 Exec. Order No. 13,083, § 3(a)–(b), 63 Fed. Reg. 27651, 27652 (May 14, 1998) ("Agencies may limit the policymaking discretion of States and local governments only after determining that there is constitutional . . . authority for the action."); Exec. Order No. 12,630, § 3(a), 53 Fed. Reg. 8859, 8860 (Mar. 15, 1988) ("[Agencies] should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment . . . .").

136 *E.g.*, (Title Redacted By Agency), Docket No. 16-46 343 (Bd. Vet. App. Nov. 19, 2021), https://perma.cc/X886-4VZL, 2021 WL 6328590, at *5–6 (addressing claim that due process required a hearing before offsetting delinquent debts against benefits payments); Mr. Z Enter., Inc., 1

range of other constitutional issues.[137] For example, in a case that ultimately reached the Supreme Court, the SEC addressed an Appointments Clause challenge, deeming it "important that the Commission have an opportunity to address constitutional issues in the first instance" and noting that it had previously addressed Double Jeopardy and Seventh Amendment claims.[138] In a subsequent case, an SEC ALJ issued a lengthy ruling addressing Appointments Clause, Seventh Amendment, due process, and uncompensated takings arguments.[139]

b. *Agencies' Need to Routinely Address Constitutional Issues*

Agencies have multiple reasons for addressing constitutional issues. Judicial precedents and statutes incentivize agencies to consider constitutional constraints in order to mitigate legal hazards. Many statutes define agency authority in constitutional terms, requiring agencies to engage in constitutional analysis when construing or applying these statutes. And the nature of some agencies' mission causes them to routinely confront constitutional questions.

The courts and Congress have incentivized agency engagement with the Constitution. By denying deference to regulations that "raise serious constitutional problems,"[140] courts encourage agency rule-writers to consider constitutional limits. More broadly, because courts may set aside constitutionally flawed agency action,[141] agencies have a strong incentive to consider constitutional constraints on their actions. And the Equal Access to Justice Act penalizes agencies when qualifying litigants prevail

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O.C.A.H.O. 288, at 1869, 1887–88, 1897 n.7 (A.L.J. 1991) (addressing a Fifth Amendment objection to drawing an adverse inference from the exercise of the right to remain silent as well as a Sixth Amendment objection to admission of hearsay); Matsubun Gyogyo Co., 2 O.R.W. 466, 477–78, 1981 WL 37367, at *7 (N.O.A.A. A.L.J. 1981) (addressing a Fourth Amendment objection to consideration of evidence obtained from a warrantless regulatory search).

137 *See, e.g.*, cases cited *infra* notes 151–57.

138 Raymond J. Lucia Cos., Exchange Act Release No. 75837, Investment Advisers Act Release No. 4190, Investment Company Act Release No. 31806, 112 SEC Docket 1754, 1769 n.94 (Sept. 3, 2015), 2015 WL 5172953, at *21 n.94, *petition denied*, 832 F.3d 277 (D.C. Cir. 2016), *adhered to on reh'g en banc*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd and remanded sub nom.* Lucia v. SEC, 585 U.S. 237 (2018).

139 Anton & Chia LLP, Exchange Act Release No. 1407, at 5–10, 2021 WL 517421, at *3–7 (A.L.J. Feb. 8, 2021), *dismissed on other grounds sub nom.* Pending Admin. Proc., Securities Act Release No. 11198, 2023 WL 3790795 (June 2, 2023).

140 Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001).

141 5 U.S.C. § 706(2)(B); *see, e.g.*, *Lucia*, 585 U.S. at 251–52 (holding that failure to comply with the Appointments Clause when appointing an ALJ required vacatur of the Agency's adjudicatory decision).

on constitutional claims by making the losing agency pay attorney fees from its own budget if its position was not "substantially justified."[142]

In addition, statutes often expressly or implicitly define agency authority in constitutional terms, compelling agencies to engage in constitutional analysis when construing or applying their statutory mandates. For example, the statutory definition of income on which the Internal Revenue Service ("IRS") can assess taxes is construed as coextensive with the Sixteenth Amendment.[143] Likewise, Congress authorized the FDA to restrict tobacco advertising and promotion "to [the] full extent permitted by the first amendment to the Constitution."[144] And the Federal Energy Regulatory Commission's jurisdiction to regulate hydroelectric plants under the Federal Power Act is coextensive with Congress's Commerce Clause authority to regulate waterways.[145] When assessing their statutory authority, these Agencies necessarily engage in constitutional exegesis.[146]

Moreover, the nature of many agencies' mission necessarily implicates constitutional issues.[147] For example, the FCC must consider First Amendment issues when regulating broadcasters,[148] and the FTC, which "has a broad mandate to protect consumers from fraud and deception,"[149] claims expertise in "First Amendment commercial speech

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142 28 U.S.C. § 2412(d)(1), (d)(4); Initiative & Referendum Inst. v. USPS, 794 F.3d 21, 22 (D.C. Cir. 2015) (holding that a plaintiff who challenged the constitutionality of agency rules was a prevailing party under the EAJA).

143 Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 432–33, 432 nn.9 & 11 (1955).

144 21 U.S.C. § 387f(d)(1).

145 Swanton Vill., 70 F.E.R.C. ¶ 61,325, ¶ 61,993, 1995 WL 122416, at *3 (1995) (citing sections of the FPA).

146 *E.g.*, *id.* ¶¶ 61,995–61,996 (assessing whether regulation of a stream could impact interstate or foreign commerce); *see also, e.g.*, Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements, 81 Fed. Reg. 28974, 28984–87 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140, 1143) (considering objection that rules limiting distribution of free samples of tobacco products violate First Amendment protections for commercial speech); I.R.S. Chief Couns. Mem. 201504011, at 2, 5 (Jan. 23, 2015) (assessing the Sixteenth Amendment's implications for tax accounting by illegal marijuana businesses).

147 *See* Bernard W. Bell, *Interpreting and Enacting Statutes in the Constitution's Shadows: An Introduction*, 32 U. DAYTON L. REV. 307, 311 n.21 (2007) ("Some agencies have jurisdiction over issues which clearly implicate constitutional concerns, and thus Congress clearly contemplates that they may have to address constitutional principles.").

148 *E.g.*, Press Release, FCC, FCC Affirms First Amendment by Denying Petition Seeking to Suppress Coverage of White House Coronavirus Task Force News Conferences (Apr. 6, 2020), (available at https://perma.cc/3T2B-EWBV); Amend. of Section 73.658(k), 60 F.C.C.2d 641, 643 (1976) (rejecting rulemaking petition seeking regulation of broadcast television that "rais[ed] grave First Amendment questions").

149 *Protecting Consumers from Fraud and Deception*, FTC, https://perma.cc/53ZQ-76LC.

jurisprudence."[150] The Federal Maritime Commission ("FMC") has confronted various issues of first impression concerning state immunity under the Eleventh Amendment when adjudicating claims against public port authorities,[151] and addressed the Amendment's general applicability to agency proceedings in a case that ultimately reached the Supreme Court.[152] The IRS and customs authorities have considered whether Export Clause limits preclude them from levying excise taxes or duties on certain goods or services.[153] Agencies that regulate economic activity have addressed the impact of the Commerce Clause on their authority[154] or the validity of state laws[155] and have also adjudicated claims that governmental action effected regulatory takings subject to the Fifth Amendment's just compensation requirement.[156] And agencies adjudicating claims that may

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150 BUREAU OF CONSUMER PROT., BUREAU OF ECON. & THE OFF. OF POL'Y PLAN. OF THE FTC, COMMENTS ON ASSESSMENT OF CIVIL PENALTIES FOR MISUSE OF WORDS, LETTERS, SYMBOLS, AND EMBLEMS OF THE UNITED STATES MINT 3 (2005), https://perma.cc/FWY5-2MQ5.

151 *E.g.*, Ceres Marine Terminals, Inc., No. 94-01, slip op. at 24–29, 2004 WL 7323459, at *12–17 (F.M.C. Aug. 19, 2004) (synthesizing seemingly conflicting judicial precedents to distill a standard for determining if a port authority was an "arm of the state" for Eleventh Amendment purposes (internal quotation marks omitted) (quoting S.C. Mar. Servs., 29 S.R.R. 802, 805 n.7 (2002))); Odyssea Stevedoring of P.R., Inc., Nos. 02-08, 04-01, 04-06, slip op. at 6, 2004 WL 2678539, at *2–3 (F.M.C. Nov. 22, 2004) (ordering briefing on the then-open question of whether Puerto Rico enjoys Eleventh Amendment immunity), *subsequent proceedings,* Nos. 02-08, 04-01, 04-06, slip op. at 12 (F.M.C. Nov. 30, 2006) (holding the Puerto Rico Port Authority "is not an arm of the Commonwealth, and is therefore not entitled to [sovereign] immunity"), *rev'd and remanded sub nom.* P.R. Ports Auth. v. FMC, 531 F.3d 868 (D.C. Cir. 2008).

152 S.C. Mar. Servs., Inc., No. 99-21, at 5–11, 2000 WL 359791, at *2–5 (F.M.C. Mar. 23, 2000), *rev'd sub nom.* S.C. State Ports Auth. v. FMC, 243 F.3d 165, 173 (4th Cir. 2001), *aff'd*, 535 U.S. 743 (2002).

153 *E.g.*, I.R.S. Chief Couns. Mem. 200032002, at 3–5 (Aug. 11, 2000) (favoring a textualist reading over an originalist analysis in determining that the Export Clause bars the imposition of excise taxes on premiums for insuring goods being exported); U.S. Customs Serv. Priv. Ltr. Rul. 227654, at 13–14, 1997 WL 897195, at *10 (Dec. 2, 1997) (rejecting an Export Clause challenge to duties on fuel removed from foreign trade zone for purposes of powering a truck driving to Canada).

154 *E.g.*, Fittstone, Inc., 33 F.M.S.H.R.C. 2933 (A.L.J. 2011), 2933–34, 2011 WL 6148975, at *1 (deeming "plausible" but ultimately rejecting an argument that the holding in *United States v. Lopez*, 514 U.S. 549 (1995), requires that commercial activity must affect interstate commerce more than minimally in order to implicate the Commerce Clause); Reinhart, 59 Agric. Dec. 721, 735–36 (U.S.D.A. A.L.J. 2000) (rejecting an argument that *Lopez* implies that the Commerce Clause does not authorize Congress to regulate an industry with many participants who are primarily motivated by leisure rather than economic considerations), *aff'd*, 59 Agric. Dec. 721 (U.S.D.A. Jud. Officer 2000), *reconsideration denied*, 60 Agric. Dec. 241 (U.S.D.A. Jud. Officer 2001); Nev. Lifestyles Inc., 3 O.C.A.H.O. 463, at 684–86 (A.L.J. 1992) (rejecting a claim that the Commerce Clause could not authorize proceedings to enforce the immigration laws against an employer that utilized only intrastate suppliers).

155 *E.g.*, Bank of New Eng. Corp., 70 FED. RSRV. BULL. 374, 381–86 (1984) (assessing whether a state banking statute violated the Dormant Commerce Clause), *aff'd sub nom.* Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 740 F.2d 203 (2d Cir. 1984), *aff'd*, 472 U.S. 159 (1985).

156 *E.g.*, *N.Y. Indep. Sys. Operator, Inc*., 151 F.E.R.C. ¶ 61,075, 2015 WL 1953722, at *17–20 (2015) (holding that an electric grid management organization's proposal to require electric generators to

result in governmental outlays have considered Appropriations Clause limitations on the ability of agency contracts or representations by agency officials to bind the government.[157]

c. *Agencies' Experience Considering the Constitutionality of Statutes*

Although administrative constitutional analysis often focuses on agency action, agencies have also considered the constitutionality of statutes and related issues. A Government Accountability Office ("GAO") review of a sample of statutory provisions that a presidential signing statement asserted were unconstitutional found that the responsible agencies had avoided implementing only some provisions,[158] suggesting some constitutional analysis at the agency level. Agencies have also commented on the constitutionality of proposed or enacted legislation raising separation of powers concerns or implicating due process and other constitutional rights.[159] And a number of significant court cases

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permit other providers to use their transmission facilities in certain circumstances did not effect a regulatory taking); Mathews, No. 09-0666 BLA, slip op. at 5–6, 2010 WL 4035060, at *3–4 (D.O.L. Ben. Rev. Bd. Sept. 22, 2010) (holding that a retroactively applicable statute awarding benefits to decedent employees' survivors did not unconstitutionally effect an uncompensated regulatory taking from employers).

157 *E.g.*, Nat'l Treasury Emps. Union Chapter 90, 71 F.L.R.A. 527, 528–29 (2020) (vacating an arbitration award under a collective bargaining agreement because the Appropriations Clause rendered any contractual right to the payments invalid); Kostelnik, CBCA 3483-RELO (2013) (stating that the Appropriations Clause precluded agency officials' incorrect representations about employee benefits from binding the government).

158 Letter from Gary L. Kepplinger, Gen. Couns., U.S. Gov't Accountability Off., to Hon. Robert C. Byrd, Chairman, S. Comm. on Appropriations, at 11, 20 (June 18, 2007), available at https://perma.cc/FJ76-BEDX.

159 *E.g.*, Memorandum from Dep't of Vet. Aff. Gen. Couns. on Constitutionality of Retroactive Application of Proposed Legislation to Limit Time to Claim Insurance Proceeds ¶ 8 (May 2, 2000) (available at https://perma.cc/95FM-38EA) (explaining that legislation with retroactive effect allowing contingent beneficiaries of life insurance policies to claim policy proceeds when primary beneficiaries do not file timely claims would not violate the Fifth Amendment due process rights of primary beneficiaries); Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 20 (1992) [hereinafter *Diplomatic Passports*] (citing Memorandum from Jamison M. Selby, Deputy Legal Adviser, Dep't of State, to Timothy E. Flanigan, Acting Assistant Att'y Gen., Dep't of Just. Off. of Legal Couns. (Jan. 3, 1992)) (referencing the State Department's assertion that a statute limiting its ability to issue multiple passports to U.S. diplomats unconstitutionally interfered with presidential power); Constitutionality of Legislation Limiting the Use of Appropriated Funds During Service of Designated Executive Officer, 58 Interior Dec. 222, 222, 227 (1942) (asserting that a bill conditioning appropriations on removal of an executive branch officer violated separation of powers, due process, and the Bill of Attainder Clause); *see also, e.g.*, *supra* note 123 and accompanying text (referencing constitutional review by the first Secretary of the Treasury of the bill creating the First Bank of the United States).

interpreting the Constitution resulted from agency officials' disregard of statutes that the executive branch deemed to violate separation of powers provisions relating to appointments, limits on congressional power, and the President's foreign affairs powers.[160]

In addition, although some agencies resist adjudicating facial or other constitutional challenges to statutes,[161] others have entertained such challenges. For example, some agencies have recently addressed the merits of constitutional challenges to statutory ALJ removal protections.[162] Similarly, in 1887, the Department of the Interior rejected a railroad's contention that an act of Congress giving priority of title to certain homestead claimants over land grants to railroads violated the Contract Clause.[163] More recently, the Commodity Futures Trading Commission rejected an argument that Commodities Exchange Act provisions authorizing it to bar an individual from participating in the derivatives industry due to criminal misconduct, despite a subsequent presidential pardon, were unconstitutional because "Congress cannot limit the . . . presidential pardon [power]."[164]

In fact, several agencies or agency subcomponents that act as tribunals have viewed their statutory authority as expressly encompassing resolution of constitutional challenges to statutes and have therefore addressed such challenges. The Board of Tax Appeals, which was "an independent agency in the executive branch of the Government,"[165] affirmed the constitutionality of some tax statutes, while holding others

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160 *E.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 8 (2015) (concerning a refusal by the State Department to comply with a statute alleged to trench on presidential foreign affairs powers); United States v. Eaton, 169 U.S. 331, 343–45 (1898) (concerning a refusal by the Treasury to pay an acting consul, which the government justified on the grounds that "Congress was without power to vest in the President the [consul's] appointment"); Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 989 (3d Cir. 1986) (concerning a refusal by the Department of Defense to comply with a statute that it claimed improperly allowed a congressional agent to execute the law).

161 *See, e.g.*, Beaupre, 25 I.B.I.A. 133, 134 (1994), 1994 WL 39061, at *1 ("[The Agency] lacks the authority to declare a statute unconstitutional. . . . [A]ppellant must make her constitutional challenge in Federal court."); Bayly, 42 M.S.P.R. 524, 525–26 (1990) ("[The Agency] is without authority to determine the constitutionality of Federal statutes.").

162 *See, e.g.*, *infra* note 181 and accompanying text; Bennett Grp. Fin. Servs., LLC, Securities Act Release No. 10331, Exchange Act Release No. 80347, Investment Advisers Act No. 4676, Investment Company Act No. 32586, 116 SEC Docket 1814, 1818–19, 2017 WL 1176053, at *5 (Mar. 30, 2017); Optionsxpress, Inc., Securities Act Release No. 10125, Exchange Act Release No. 78621, 114 SEC Docket 4786, 4823–25, 2016 WL 4413227, at *50–52 (Aug. 18, 2016), *modified on other grounds*, 2016 WL 4761083 (Sept. 13, 2016).

163 Ala. & Chattanooga R.R. Co., 6 Pub. Lands Dec. 427, 431 (Interior Dep't 1887).

164 Hirschberg, No. 02-03, 2004 WL 1353738, at *1 (C.F.T.C. June 8, 2004).

165 Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 253, 338.

unconstitutional.[166] The Agriculture Board of Contract Appeals claimed authority to pass on a constitutional challenge to its organic act since it had many characteristics of a court and was obliged to consider attacks on its jurisdiction, noting that other boards of contract appeals had considered similar constitutional questions.[167] The Department of Labor's Benefits Review Board has similarly proceeded to consider facial challenges to statutes, reasoning that it was created to resolve disputes previously adjudicated by district courts, which can entertain such challenges.[168] And the Mine Safety and Health Review Commission agreed to entertain a challenge to its organic act, explaining that because Congress charged it with performing a role that a district court would otherwise perform, when applying this act, it could "decid[e] whether the law or a portion of it conforms to the Constitution" in the same way as a court.[169]

Elsewhere, agencies have assessed whether an allegedly unconstitutional statutory provision could be severed. For example, an ALJ at the Department of Agriculture held that a statute concerning funding for agricultural marketing, which was alleged to violate the First Amendment, could be severed, so any purported constitutional defect did not bar the agency from enforcing another provision of the same act.[170] The Surface Transportation Board held on similar grounds that a pending court challenge to the constitutionality of a statutory provision did not warrant staying proceedings brought under a different provision of the same act.[171]

Moreover, the expertise gained through agencies' constitutional analysis of their own actions should presumably enable them to assess as-

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166 *Compare, e.g.*, Meco Prod. Co. v Comm'r, No. 95519, 1940 WL 10034 (B.T.A. May 8, 1940) (upholding a statute against constitutional challenge), *and* Housman v. Comm'r, 38 B.T.A. 1007, 1013 (1938) (same), *aff'd*, 105 F.2d 973 (2d Cir. 1939), *with* Am. Sec. & Tr. Co. v. Comm'r, 24 B.T.A. 334, 357–58 (1931) (citing U.S. CONST. amend. V) (holding that a statute violated due process), *and* Indep. Life Ins. Co. of Am. v. Comm'r, 17 B.T.A. 757, 767–75 (1929) (citing U.S. CONST. art. I, § 9) (holding that a statute taxed property and therefore violated the Direct Tax Clause), *aff'd*, 67 F.2d 470 (6th Cir.1933), *rev'd sub nom.* Helvering v. Indep. Life Ins. Co., 292 U.S. 371 (1934).

167 Gregory Timber Res., 87-3 B.C.A. ¶ 20,086 (1987), 1987 WL 41246, *aff'd sub nom.* Gregory Timber Res., Inc. v. United States, 855 F.2d 841 (Fed. Cir. 1988).

168 Duck v. Fluid Crane & Constr. Co., No. 02-0335, 2002 WL 32069335, at *2 n.4 (D.O.L. Ben. Rev. Bd. Oct. 22, 2002); Herrington v. Savannah Mach. & Shipyard Co., 17 Ben. Rev. Bd. Serv. (MB) 194 (1985), 1985 WL 55381, at *2.

169 Richardson, 3 F.M.S.H.R.C. 8, 19 (1981), 1981 WL 141537, at *8.

170 Gerawan Farming, Inc., 65 Agric. Dec. 1, 9 (U.S.D.A. A.L.J. 2006), 2006 WL 6161753, at *6, *rev'd in part, dismissed in part, and modified in part*, No. 02–0008, 2008 WL 2213514 (U.S.D.A. Jud. Officer May 9, 2008).

171 Section 213 Investigation of Canadian Nat'l Ry. Co., No. NOR 42134, slip op. at 8, 2014 WL 7236883, at *6 (S.T.B. Dec. 18, 2014).

applied or facial challenges to statutes. For example, if agency enforcement attorneys know enough constitutional law to avoid coercing confessions by torture, they would presumably understand that statutes authorizing or requiring such action would violate the Fifth and Eighth Amendments. Thus, the Supreme Court has indicated that the need to conform agency action to the Constitution can equip agencies to assess constitutional challenges to statutes, dismissing concerns that an agency that previously addressed constitutional challenges to its actions would be "befuddled" if required to prepare a record for review of a facial challenge to a statute.[172] The common categorical claim that agencies lack competence to address constitutional issues therefore lacks an empirical basis.

2. Agencies Have Extensive Experience Addressing the Constitutional Issues that Are Relevant to Their Adjudications

Courts often assume that agencies have specialized knowledge of statutes they implement but "know[] . . . nothing special about" constitutional issues that might arise in administrative adjudications.[173] However, the Supreme Court has recognized that agencies may develop expertise in addressing laws they do not administer but that are often relevant to their proceedings.[174] It follows that agencies may have expertise in constitutional issues relevant to their proceedings, especially because unlike generalist district courts,[175] which adjudicate many more constitutional issues, agencies' constitutional experience is necessarily related to those issues that arise in their proceedings. Such issues that agencies have adjudicated include controversies related to their statutory missions, such as Export Clause challenges to customs duties and Fifth Amendment takings challenges to benefits awards under the labor laws;[176] due process and related procedural arguments concerning how agencies conduct adjudications;[177] as well as separation of powers controversies concerning how agencies are structured, such as challenges to removal

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172 Elgin v. Dep't of the Treasury, 567 U.S. 1, 16, 19 n.9 (2012).

173 *See* Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 905 (2023).

174 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 214–15 (1994) (reasoning that an agency that previously addressed a defense to its enforcement proceedings based on a statute it did not administer could apply "agency expertise" when addressing the same defense in a subsequent proceeding (internal quotation marks omitted) (quoting Whitney Nat'l Bank v. Bank of New Orleans & Tr. Co., 379 U.S. 411, 420 (1965))).

175 The relevant comparison is to district courts, which generally have "original jurisdiction of all civil actions arising under" federal law when exhaustion is not required. 28 U.S.C. § 1331.

176 *See* sources cited *supra* notes 153, 156.

177 *See, e.g.*, cases cited *supra* note 136.

protections[178] or to an agency's exercise of both adjudicatory and enforcement powers.[179] Although district courts likely encounter a greater volume of constitutional controversies, because litigation over agency action represents only a portion of these disputes, a significant fraction of these controversies may concern matters such as justiciability or criminal procedure that might not typically arise in agency proceedings. In contrast, an agency may encounter constitutional questions less often, but those constitutional issues that it addresses necessarily relate to its structure, administrative processes, or activities.

Consider, for example, the experience of the FTC, which was the respondent in *Axon*. The petitioner's district court complaint challenging the removal protections enjoyed by FTC ALJs invoked *Free Enterprise*'s merits holding that two layers of for-cause removal protection for some inferior officers, who can be removed only for specified grounds by officers who are also removable only for cause, were unconstitutional.[180] A KeyCite search indicates that as of the date the plaintiff sued, the FTC had addressed the issue of *Free Enterprise*'s applicability to ALJ removal protections in three prior agency proceedings.[181] Although three adjudications may not seem impressive, the same search indicates that the U.S. District Court for the District of Arizona, where the *Axon* petitioner mounted its collateral attack on the FTC proceeding against it, had not issued *any* opinion applying *Free Enterprise*'s removal holding in the same timeframe.[182] A similar search of opinions by the U.S. District Court for the District of Columbia, "a principal venue for cases involving the

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178 *See, e.g.*, cases cited *supra* note 162, *infra* note 181.

179 *E.g.*, ITT World Comms. Inc., 85 F.C.C.2d 561, 570–71 (1981), 1981 WL 158593, at *8–9 (rejecting a due process challenge to an agency's potential exercise of both investigatory and adjudicatory functions), *terminated on other grounds*, No. 80-633, 1986 WL 292547 (F.C.C. Jan. 17, 1986).

180 Complaint for Declaratory and Injunctive Relief at 18–19, Axon Enter., Inc. v. FTC, 452 F. Supp. 3d 882 (D. Ariz. 2020) (No. CV-20-00014) (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 495 (2010)).

181 Otto Bock HealthCare N. Am., Inc., 168 F.T.C. 324, 389–90 (2019), 2019 WL 5957363, at *50, *petition dismissed voluntarily*, No. 19-1265 (D.C. Cir. Dec. 14, 2020); 1-800 Contacts, Inc., 166 F.T.C. 274, 332–33 (2018), 2018 WL 6078349, at *54, *rev'd on other grounds*, 1 F.4th 102 (2d Cir. 2021); LabMD, Inc., 160 F.T.C. 1373, 1375–76, 1376 n.11 (2015), 2015 WL 13879762, at *2–3, *3 n.11, *final decision entered*, No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016), *rev'd on other grounds*, 894 F.3d 1221 (11th Cir. 2018). The FTC subsequently ruled on the *Axon* petitioner's own objection to ALJ removal protections. *See* Axon Enter., Inc., 170 F.T.C. 454, 460 (2020), 2020 WL 5406806, at *6–7, *dismissed on other grounds*, 176 F.T.C. No. 9389, 2023 WL 6895829 (F.T.C. Oct. 6, 2023).

182 The only opinion issued by the U.S. District Court for the District of Arizona citing *Free Enterprise* during this period addressed remedies in a prisoner suit rather than removal protections for agency officials. *See* Tiedemann v. Mitchell, No. CV 17-00597, 2018 WL 10128038, at *3 (D. Ariz. July 26, 2018), *aff'd in part, vacated in part, and remanded*, 778 F. App'x 461 (9th Cir. 2019).

separation of powers"[183] where the *Free Enterprise* litigation originated,[184] yields one opinion tangentially referencing *Free Enterprise*'s removal holding in a very different context.[185] The common assertion that agencies lack sufficient expertise to address constitutional issues thus overlooks the very real possibility that an agency may have substantial experience, comparable to that of many courts, in addressing precisely those constitutional issues most likely to arise in its proceedings.

3. Agencies Can Draw on DOJ's Constitutional Expertise

Even if an agency were to encounter constitutional issues with which it is unfamiliar, it could draw on a unique executive branch resource: DOJ and its Office of Legal Counsel ("OLC"). When the First Congress created the office of the Attorney General, it required its holder to "give his advice and opinion upon questions of law . . . when requested by the heads of any of the departments."[186] The Attorney General is still charged with this responsibility,[187] which is currently delegated to OLC.[188] From the earliest days of the Republic, such advice has addressed constitutional issues,[189] as acknowledged by a provision in DOJ's 1870 organic act barring the Attorney General from delegating responsibility for advising on "construction of the Constitution of the United States" to subordinates.[190]

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183 JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT, at xvii (2001).

184 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., No. 06-0217, 2007 WL 891675 (D.D.C. Mar. 21, 2007), *aff'd*, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part, and remanded*, 561 U.S. 477 (2010).

185 English v. Trump, 279 F. Supp. 3d 307, 327–28 (D.D.C. 2018), *appeal dismissed voluntarily*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018). *English* concerned an acting *agency head*'s claim to nearly absolute protection from *direct* removal by the President, *id.*, rather than involving ALJs or other officers subordinate to and removable for cause by agency heads who were themselves removable for cause by the President. The U.S. District Court for the District of Columbia had also cited *Free Enterprise* in dozens of other cases, but only with respect to issues other than the constitutionality of removal protections. *E.g.*, Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., 390 F. Supp. 3d 72, 82 (D.D.C. 2019) (applying *Free Enterprise*'s exhaustion analysis), *aff'd*, 811 F. App'x 667 (D.C. Cir. 2020).

186 Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

187 28 U.S.C. § 512.

188 28 C.F.R. § 0.25(a) (2024).

189 *E.g.*, Libellous Publications, 1 Op. Att'ys Gen. 71, 73–74 (1797) (addressing the scope of the Supreme Court's original jurisdiction); Patents for Lands in Vincennes, 1 Op. Att'ys Gen. 44, 44 (1794) ("[N]othing in the constitution . . . invests the President with authority to issue patents to these settlers.").

190 Act of June 22, 1870, ch. 150, § 4, 16 Stat. 162 (establishing the Department of Justice).

DOJ routinely addresses agency requests for advice on constitutional issues, including separation of powers concerns and the constitutionality of legislation,[191] conducting analyses comparable to those conducted by courts, which often cite to its opinions. Like courts, DOJ will survey and consider relevant Founding Era and other historical sources in addition to constitutional text and judicial precedents,[192] and conduct severability analyses if it deems statutory provisions unconstitutional.[193] Based on its review, DOJ may advise agencies to refrain from taking certain action or giving effect to statutes that it deems unconstitutional.[194] Courts treat DOJ's constitutional analysis as persuasive authority[195] and as evidence of the "longstanding 'practice of the government'" relevant to interpreting ambiguous constitutional provisions.[196] Agencies' ability to seek this advice when addressing novel constitutional questions not encountered in their own routine engagement with the Constitution further belies any claim that they lack the necessary institutional competence to address such issues.

B. *Agencies Have the Authority and Responsibility to Resolve Constitutional Controversies*

This Section challenges the assumption often expressed by courts and commentators that agencies have no obligation or authority to consider

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191 *E.g.*, *Diplomatic Passports*, supra note 159, at 20–21 (concurring with State Department concerns that a statute barring issuance of duplicate passports to U.S. diplomats unconstitutionally interfered with presidential foreign affairs powers); Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 43 Op. Att'ys Gen. 231, 231–32 (1980) [hereinafter *Constitutionality of Congress's Disapproval*] (advising the Secretary of Education that a statute allowing Congress to veto Department of Education regulations was unconstitutional).

192 *See generally, e.g.*, Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007) (considering textual, originalist, judicial, and historical authorities in determining what positions are "Offices" subject to the Appointments Clause).

193 *See* Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations, 20 Op. O.L.C. 232, 234–39 (1996); *Diplomatic Passports*, supra note 159, at 18.

194 *Constitutionality of Congress's Disapproval*, supra note 191, at 232 (advising that the Secretary of Education could "implement . . . regulations . . . in spite of Congress' disapproval" of these rules pursuant to a legislative veto provision that DOJ determined to be unconstitutional).

195 *See, e.g.*, Trump v. United States, 144 S. Ct. 2312, 2336, 2343 (2024) (treating OLC opinions concerning the responsibilities of the Vice President and the applicability of general laws to the President as persuasive authority); Burnap v. United States, 252 U.S. 512, 515–16 (1920) (relying on Attorney General opinions to assess what positions are constitutional "Offices").

196 *See* NLRB v. Noel Canning, 573 U.S. 513, 525, 528–30, 539–41, 543–45 (2014) (reviewing dozens of Attorney General opinions to determine historical practice under the Recess Appointments Clause).

constitutional challenges in general[197] and, in particular, lack authority to consider facial constitutional challenges to statutes, often described as an inability to "declare a statute unconstitutional."[198] It explains that as a semantic matter, such assertions about agencies' purported inability to "declare" statutes or other official action unconstitutional mistakenly focus on differences in the *nature* of authority exercised by courts, which generally act by *declaring* the legal rights and obligations of other actors, and by agencies, which directly *implement* laws. But these differences do not prevent agencies from considering constitutional constraints on their own actions when *implementing* the law. Moreover, constitutional, statutory, judicial, and historical authorities indicate that agencies can and should conform their actions to the Constitution, usually by exercising statutory or prosecutorial discretion, but possibly also in rare cases when doing so may require them to disregard unconstitutional statutes. Although commentary arguing for such executive branch authority typically focuses on the President, this reasoning should also apply to agency officers.

1. Agencies' Ability to Resolve Constitutional Issues Without Issuing Court-Like "Declarations" of Unconstitutionality

The assertion that agencies cannot address the constitutionality of statutes largely rests on a framing of the issue as whether agencies can "declare" statutes unconstitutional.[199] Some authorities have similarly asserted that agencies cannot "declare" even agency action unconstitutional.[200] Framing resolution of constitutional controversies in this manner as solely involving the issuance of legal "declarations" has the

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197 *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 330 (1976) ("It is unrealistic to expect that the Secretary would consider substantial changes in [agency rules] at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge."); Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364, 366–67 (9th Cir. 1996) ("[C]hallenges to the constitutionality of a statute or a regulation promulgated by an agency are beyond the power or the jurisdiction of an agency."); *see also* articles cited *supra* note 31.

198 Elgin v. Dep't of the Treasury, 567 U.S. 1, 17 (2012).

199 *Id.*

200 *See* Bonnichsen v. United States, 969 F. Supp. 628, 650 (D. Or. 1997) (referencing "the traditional doctrine—that an agency has no authority to declare a statute *or regulation* unconstitutional" (emphasis added)); *accord* Howard v. FAA, 17 F.3d 1213, 1218 (9th Cir. 1994) ("Challenges to the constitutionality of an agency regulation . . . lie outside the cognizance of that agency."); Fuentes-Campos, 21 I. & N. Dec. 905, 912 (Bd. of Immigr. Appeals 1997), 1997 WL 269368, at *8 ("It is well settled that we lack jurisdiction to rule on the constitutionality of . . . the regulations we administer."). *But see* Graceba Total Commc'ns, Inc. v. FCC, 115 F.3d 1038, 1040–41 (D.C. Cir. 1997) (asserting that although an agency cannot consider constitutional challenges to statutes, it may consider a constitutional objection to its regulations).

effect of implying that it is the exclusive domain of courts, whose "province and duty . . . [is] to say what the law is."[201] Courts must "declare" or "say" what the law is (i.e., *communicate* what the law requires) because they resolve "Cases" or "Controversies" between *other* actors.[202] Courts therefore "declare" to these actors what the law requires in the course of resolving disputes. These pronouncements may set precedents for future cases, and "may not lawfully be revised, overturned or refused faith and credit by another Department of Government."[203] In contrast, *agencies themselves* implement and must comply with the law, including the Constitution. Pursuant to the principle of judicial supremacy, they may have their actions set aside by courts and must comply with court orders and binding judicial interpretations of the Constitution and other legal authorities.[204]

Therefore, when courts adjudicate the rights and duties of agencies or other parties, they can declare agency action or acts of Congress that agencies implement to be unconstitutional in a way that agencies cannot. But agencies can still *assess* what the Constitution requires and then act (or decline to act) accordingly.[205] Agency adjudicators often do so expressly, but agencies may also engage in what might be termed "administrative avoidance" by exercising discretion in a manner that eliminates an alleged constitutional problem without formally ruling on, and sometimes without even acknowledging, the constitutional controversy, and without necessarily making any formal legal pronouncement. Such constitutional self-policing by agencies, which differs from formal judicial declarations of the law, allows agencies to ensure that their actions comport with the Constitution, and does not violate the principle of judicial supremacy.

a. *Agencies May Address Constitutional Issues Expressly or Through "Administrative Avoidance" When Executing Laws*

Even when agencies formally construe the law when acting in a so-called quasi-judicial capacity, they are deemed to merely be executing the

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201 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

202 U.S. CONST. art III, § 2, cl. 1.

203 Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948); *accord* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.† (1792) ("[No] Executive officer . . . [may] sit as a court of errors on the judicial acts or opinions of this court.").

204 *Chi. & S. Air Lines*, 333 U.S. at 113 ("[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render.").

205 United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution . . . .").

law,[206] and can conceivably consider constitutional constraints when deciding how they will do so. For example, an SEC ALJ refused to impose a penalty in the amount sought by agency enforcement counsel because he found that doing so would have violated the Excessive Fines clause of the Eighth Amendment.[207] The Mine Safety and Health Review Commission reversed an ALJ's grant of relief against a party joined after the conclusion of trial because it found that granting relief based on evidence adduced at trial would have violated the party's due process rights.[208] The FTC held that it may consider separation of powers arguments for disqualifying agency adjudicators.[209] And the FMC has considered Eleventh Amendment constraints on its exercise of jurisdiction over public port authorities.[210]

In addition, unlike courts, whose "'obligation' to hear and decide a case is 'virtually unflagging,'"[211] agencies can engage in what can be termed "administrative avoidance" by exercising their discretion about how to execute the law in order to take corrective action that a declaration of unconstitutionality might require, but without formally addressing the constitutional issue or even making any legal pronouncement. By exercising discretion in this manner, agencies can sidestep legal controversies—and mitigate legal hazards[212]—by taking or refraining from taking actions in ways that can moot or prevent a constitutional dispute. In the process, the agency might not expressly hold that a statute or agency action is unconstitutional or even acknowledge the existence of a constitutional controversy. This procedural mechanism is arguably broader in scope than the constitutional avoidance engaged in by courts, which is only possible when a court can resolve a controversy by adopting a plausible construction of an ambiguous statute that avoids raising a

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206 City of Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013) (stating that although agency "activities take 'legislative' and 'judicial' forms . . . they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" (citing U.S. CONST. art II, § 1, cl. 1)).

207 F.X.C. Invs. Corp., Investment Advisers Act Release No. 218, 79 SEC Docket 276, 289–90, 2002 WL 31741561, at *21 (A.L.J. Dec. 9, 2002), *final decision entered*, Investment Advisers Act Release No. 2097, 2003 WL 21278143 (Jan. 9, 2003).

208 Jones, 8 F.M.S.H.R.C. 1045, 1051–52 (1986), 1986 WL 221564, at *3–5.

209 Axon Enter., Inc., 170 F.T.C. 454, 454–55, 455 n.2 (2020), 2020 WL 5406806, at *1 & n.2, *dismissed on other grounds*, 176 F.T.C. No. 9389, 2023 WL 6895829 (F.T.C. Oct. 6, 2023).

210 *See* authorities cited *supra* note 151.

211 Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

212 *Cf.* United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) (reasoning that administrative exhaustion can "put [an agency] on notice of the accumulating risk of wholesale reversals being incurred by its persistence" in maintaining a challenged policy).

serious constitutional question.[213] Unlike courts applying the canon of constitutional avoidance, agencies can simply tailor their actions to moot a constitutional controversy without making *any* legal pronouncement, and therefore do not need to identify statutory grounds for any remedial action they may take.[214]

Agencies have utilized this type of "administrative avoidance" to resolve constitutional controversies that parties had or might have raised in administrative proceedings, without actually ruling on the constitutional issue and, at times, without even acknowledging the existence of a constitutional controversy or making any type of legal ruling. For example, the Sixth Circuit held that the Treasury Department mooted a state's Spending Clause and Tenth Amendment challenge to a statute by issuing regulations construing the law in a manner that avoided raising a constitutional issue.[215] The agency's action therefore resolved the constitutional controversy, although the agency cited only policy grounds for its construction of the statute.[216]

Similarly, a few months after the Supreme Court's *Axon* ruling, the SEC elected "to dismiss, as a matter of discretion" the SEC proceeding at issue in *Axon*, together with forty-one other pending enforcement proceedings in which enforcement staff were inadvertently given access to adjudicatory staff records as a result of what the SEC had termed a "control deficiency."[217] Although the incident had been cited in support of constitutional attacks on these adjudications,[218] the SEC dismissed the

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213 *See* Jennings v. Rodriguez, 583 U.S. 281, 296–97 (2018) (explaining that a lower court erred by construing a statute in an "implausible" manner to avoid a constitutional issue).

214 The scholarship has sometimes used the term "[a]dministrative avoidance," but only to reference agency engagement in judicial-type avoidance of constitutional controversies by construing statutes in a manner that avoids a constitutional issue. *E.g.*, Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 507–08 (2005). This Article uses the term more broadly to encompass any exercise of administrative discretion that may moot a constitutional controversy, even without a formal adjudicatory pronouncement on a statutory or other legal question.

215 Ohio v. Yellen, 53 F.4th 983, 991–92, 991 nn.4–5 (6th Cir. 2022).

216 *Id.* at 985; *see* Coronavirus State and Fiscal Recovery Funds, 86 Fed. Reg. 26786, 26807–08 (May 17, 2021) (to be codified at 31 C.F.R. pt. 35).

217 Pending Admin. Proc., Securities Act Release No. 11198, Exchange Act Release No. 97640, Investment Advisers Act Release No. 6323, Investment Company Act Release No. 34933, Accounting and Auditing Enforcement Release No. 4413, 2023 WL 3790795, at *2 (June 2, 2023).

218 *See, e.g.*, Brief of the Cato Institute as Amicus Curiae in Support of Respondents at 14, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22-859) (noting that "[t]his breach would have been avoided had the judicial and executive functions been independent of each other, as our Constitution requires"); Brief of Atlantic Legal Foundation as Amicus Curiae in Support of Respondents at 11–13, *Jarkesy*, 144 S. Ct. 2117 (No. 22-859) (citing the information-sharing issue as exemplary of a due process problem inherent in administrative adjudications); *accord* Margaret A. Little, *The SEC's Bleak House of Cards: Some Reflections on* Jarkesy v. SEC *and Judicial Doctrine*, 27 TEX. REV. L. & POL. 565, 599 (2023) (asserting

actions without addressing whether dismissal was legally required or even suggesting that the incident might have had constitutional or other legal ramifications.[219] And several years before the Supreme Court held for the first time in *Lucia v. SEC* that an agency's ALJs had to be appointed in accordance with the Appointments Clause,[220] the FTC took steps to correct a potential Appointments Clause violation despite *rejecting* an administratively raised argument that a presiding ALJ should have been appointed in accordance with the Clause.[221] Although it refused to *adjudicate* the constitutional claim in the party's favor, the Commission, which as a "Head[] of Department[]" could make valid appointments under the Clause,[222] stated that "purely as a matter of discretion [it] has ratified [the ALJ's] appointment" in order to "put[] to rest any possible claim that this administrative proceeding violates the Appointments Clause."[223]

b. *Agency Resolution of Constitutional Issues Does Not Usurp Judicial Power*

An agency's choice to take corrective action in response to a constitutional challenge, either by exercising discretion to engage in "administrative avoidance" that moots the controversy without a formal ruling, or by expressly ruling that it cannot constitutionally implement a statute or administrative policy either in general or in a particular context, does not improperly trench on the courts' power to "say what the law is." Instead, such action allows the agency to engage in self-policing to ensure it complies with the Constitution without first awaiting a court's determination that it has failed to comply. Such a decision by an agency on how it will act, even if motivated by constitutional considerations, is not equivalent to a judicial "declaration" to *other actors* that a statute or other official act is unconstitutional.[224]

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that the "[disclosure] incident crystalizes the constitutional infirmity of the SEC's in-house tribunals: when the prosecutor and 'judge' work for the same boss, there can be no due process").

219 *Pending Admin. Proc.*, 2023 WL 3790795, at *2.

220 Lucia v. SEC, 585 U.S. 237, 241 (2018).

221 LabMD, Inc., 160 F.T.C. 1373, 1374–75 (2015), 2015 WL 13879762, at *1–2, *final decision entered*, No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016), *rev'd on other grounds*, 894 F.3d 1221 (11th Cir. 2018).

222 U.S. CONST. art. II, § 2, cl. 2; *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 512–13 (2010) (determining that a multimember agency is a "Hea[d]" of a "Departmen[t]" for purposes of the Appointments Clause (alterations in original)).

223 *LabMD*, 160 F.T.C. at 1375, 2015 WL 13879762, at *2.

224 *See* Mar. Admin., Dep't of Transp., No. P1-90, 1991 WL 383090, at *13–14 (F.M.C. Sept. 20, 1991) (refusing to give effect to a statute on constitutional grounds but adding that "the Commission is not declaring that [the statute] is 'unconstitutional.'" "We have no power to do so." (citing

This type of constitutional analysis by agencies allows them to monitor and adjust their actions to ensure compliance with the Constitution, without being ordered to do so by the courts, even in the absence of controlling judicial precedents. For example, it is "not controversial in practice" for the executive branch to "refuse to enforce a law that is 'like' one held invalid by the courts."[225] If agencies could not decline to enforce such laws absent express judicial rulings on each statute, the resulting litigation would likely overwhelm courts and force massive expenditure of resources by litigants.[226] But confirming that a statute falls within the scope of a court ruling invalidating a different statute, or ascertaining the exact breadth of a ruling invalidating a statute administered by the agency, necessarily requires some independent analysis and judgment by agency officials.[227]

There is no obvious reason why agencies cannot perform this and other constitutional analyses to ensure that their actions comply with the law, including any constitutional strictures that render the statutes they implement invalid either in specific contexts or *in toto*. Such action does not contravene the principle of judicial supremacy, as long as agencies follow binding judicial precedents and respect any subsequent court

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Weinberger v. Salfi, 422 U.S. 749, 765 (1975))); *accord* David S. Welkowitz, *Trademark Trial and Appeal Board, Meet the Constitution*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 509, 524 (2017) ("Although it took a Supreme Court decision [in *Zivotofsky v. Kerry*, 576 U.S. 1 (2015)] to actually declare [a] statute unconstitutional, this did not prevent the State Department from acting on its own determination" by "refus[ing] to apply a clearly applicable statute." (emphasis omitted)).

225 Easterbrook, *supra* note 121, at 913; *see, e.g.*, I.R.S. Gen. Couns. Mem. 38,504 (Sept. 19, 1980), 1980 WL 131617, at *1 (recommending that absent Supreme Court review of appellate rulings invalidating a Social Security Act provision similar to an Internal Revenue Code provision, the IRS should announce "that it accepts the decisions *** and that [the tax provision] is unconstitutional").

226 For example, at the time the Supreme Court held that a legislative veto provision in the Immigration and Nationality Act violated the Constitution in *INS v. Chadha*, 462 U.S. 919 (1983), over two hundred other statutes contained legislative veto provisions. William West & Joseph Cooper, *The Congressional Veto and Administrative Rulemaking*, 98 POL. SCI. Q. 285, 286 (1983).

227 *Compare, e.g.*, *Mar. Admin.*, 1991 WL 383090, at *18–24 (asserting that *Chadha*'s holding invalidates a provision in a different statute), *with id.* at *27 (dissenting opinion) (criticizing the majority's "absurd reach to synthesize constitutional bogeymen"). *See also, e.g.*, Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to Hon. John Boehner, Speaker, U.S. House of Reps. 1 (Sept. 4, 2013) (available at https://perma.cc/EUY2-JFN2) (reporting that the executive branch will not enforce provisions of the Defense of Marriage Act because "[a]lthough the Supreme Court did not directly address the constitutionality of the . . . provisions in [*United States v. Windsor*, 133 S. Ct. 2675 (2013)], the reasoning of the opinion strongly supports the conclusion that those provisions are unconstitutional under the Fifth Amendment"); Benefits—Nonpayment of Benefits Because of Deportation, SSR 68-45, 1968 WL 3917, at *2–3 (Jan. 1, 1968) (relying on Supreme Court and DOJ precedents concerning the effect of court rulings declaring a statute unconstitutional to conclude that a Supreme Court ruling that a statute expatriating certain U.S. citizens was unconstitutional nullified a worker's deportation for purposes of a different statute concerning Social Security benefits based on the earnings of deported workers).

rulings setting aside their actions.[228] Thus, as a D.C. Circuit opinion authored by then-Judge Brett Kavanaugh asserted, the executive branch may decline to implement statutes that it determines are unconstitutional "unless and until a final Court order dictates otherwise."[229] As explained below, multiple authorities indicate that agencies can and possibly must engage in such self-policing. And when they do, agencies may be able to provide effective relief to parties raising constitutional claims even without "declaring" statutes or other official action unconstitutional.

2. Agencies' Authority and Duty to Address Constitutional Issues

Despite expecting agencies to comply with the Constitution[230] and holding that unconstitutional laws are a legal nullity,[231] courts often disregard these principles in the context of administrative adjudications. For example, *Eldridge* asserted that even when an agency's own rules are alleged to be unconstitutional, "[i]t is unrealistic to expect that the [Agency] would consider substantial changes at the behest of a single [litigant] raising a constitutional challenge in an adjudicatory context" and the "[Agency] would not be required even to consider such a challenge."[232] And *Salfi* stated in dicta that it "is beyond [an agency's] jurisdiction" to consider "the constitutionality of a statut[e]."[233] However, constitutional, statutory, judicial, and historical authorities indicate that agencies can and must follow the Constitution, even if doing so requires avoiding certain constructions or applications of statutes or, in rare cases where an agency lacks prosecutorial or statutory discretion to engage in such avoidance, entirely refusing to give effect to unconstitutional laws.

a. *Constitutional Text*

The Constitution indicates that executive branch officers have a primary responsibility to comply with its strictures that may trump any authority they might otherwise have to implement unconstitutional

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228 *Cf.* United States v. Nixon, 418 U.S. 683, 703–04 (1974) (explaining that "each branch of the Government must initially interpret the Constitution" but that the Supreme Court is the "ultimate interpreter of the Constitution" (internal quotation marks omitted) (quoting Baker v. Carr, 369 U.S. 186, 211 (1962))).

229 *In re* Aiken Cnty., 725 F.3d 255, 259 (D.C. Cir. 2013).

230 *See, e.g.*, *supra* notes 140–41 and accompanying text.

231 *E.g.*, Collins v. Yellen, 141 S. Ct. 1761, 1788–89 (2021) ("[A]n unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment) . . . .").

232 Mathews v. Eldridge, 424 U.S. 319, 330 (1976).

233 Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

statutes. It directly mandates that "executive . . . Officers . . . shall be bound by Oath or Affirmation, to support this Constitution."[234] In contrast, these officers' duty to execute statutes is *indirect* and not subject to an oath,[235] flowing derivatively from their role as agents of the President,[236] who is the only official directly charged with "tak[ing] care that the Laws be faithfully executed."[237] These textual differences suggest that the more important duty for "executive Officers," including agency heads, is to uphold the Constitution rather than to execute unconstitutional laws.

b. *Statutory Authorities*

Congress itself typically gives agencies broad discretion and some impetus to refrain from taking unconstitutional action, including implementing unconstitutional laws. It is common for statutes to grant agencies discretion with respect to implementation, thereby empowering agencies to avoid exercising statutory authority that they deem unconstitutional. To cite an example implicated by *Axon*, if an agency determines the two levels of statutory removal protection enjoyed by ALJs are (or may be) unconstitutional[238]—absent contrary provisions in its organic act—it can decide not to utilize ALJs in adjudications because the Administrative Procedure Act ("APA") also permits agency heads or members of multi-headed agencies to preside over hearings.[239] Thus, there is often no clear line between facial and as-applied challenges to

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234 U.S. CONST. art. IV, cl. 3; *cf. Aiken Cnty.*, 725 F.3d at 261 (opinion of Kavanaugh, J.) (asserting that the presidential Oath of Office Clause gives the President authority to assess the constitutionality of a statute).

235 *See* Gary Lawson, *Rebel Without a Clause: The Irrelevance of Article VI to Constitutional Supremacy*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 37 (2011) ("Government officials are not constitutionally mandated to swear equivalent oaths to uphold laws, treaties, judicial decisions, or other legal instruments.").

236 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) ("[T]he Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed., 1939))); *Ex parte* Grossman, 267 U.S. 87, 120 (1925) (appointed officers are "agents with which [the President] is to take care that the laws be faithfully executed").

237 U.S. CONST. art II, § 3.

238 *See supra* note 180 and accompanying text.

239 5 U.S.C. § 556(a), (b)(1)–(2). For example, in one fourteen-month period, an FTC Commissioner presided over three agency proceedings. Inova Health Sys. Found., No. 9326, slip op. at 3–4, 4 n.2, 2008 WL 2307161, at *2 & n.2 (F.T.C. Comm'r May 29, 2008) (discussing participation as presiding officer in multiple cases), *dismissed on other grounds*, No. 9326, 2008 WL 2556051 (F.T.C. June 17, 2008). More recently, the SEC has refrained from utilizing ALJs in the wake of constitutional challenges to its administrative adjudications. *See infra* notes 317–20 and accompanying text.

statutes,[240] and the latter category concerns matters that agencies can address by exercising statutory discretion.[241]

Moreover, Congress often expressly gives agencies discretion *not* to implement statutes, which can conceivably allow agencies to decline implementation on constitutional grounds. For example, the Internal Revenue Code authorizes the IRS to enter into agreements and compromises concerning taxpayers' liabilities without prohibiting it from doing so based on doubts about the constitutionality of a statute.[242] The America Invents Act likewise gives the U.S. Patent and Trademark Office ("USPTO") absolute discretion to determine whether or not to act on a request to institute inter partes review proceedings that consider whether previously issued patents do not meet the statutory criteria for patentability.[243] In litigation, the government has asserted that due to this provision, "if the [Agency] determined that the retroactive application of IPRs to pre-AIA patents was an unconstitutional taking, [it] could exercise its discretion to decline to institute the IPR."[244] Multiple statutes also permit agencies to "compromise, modify, or remit" statutory penalties,[245] or require them to consider "such . . . matters as justice may require" when fixing the amount of a penalty.[246] Such discretion may permit consideration of constitutional strictures like the prohibition on

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240 Elgin v. Dep't of the Treasury, 567 U.S. 1, 15 (2012) (citing Citizens United v. FEC, 558 U.S. 310, 331 (2010)).

241 *Cf., e.g.*, Island Creek Coal Co. v. Bryan, 937 F.3d 738, 753 (6th Cir. 2019) ("[T]he [constitutional] claim here concerns how the Department of Labor *applied* its statutory appointment power."); Nat'l Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B., 28 F.3d 376, 392 (3d Cir. 1994), *as amended* (Aug. 29, 1994) ("[I]f and when the [Agency] seeks to use [12 U.S.C.] § 1821(d)(13)(D) unconstitutionally . . . the courts should deem application of § 1821(d)(13)(D) unconstitutional *as applied* in that case . . . ."); *accord* Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 24 (2000) (explaining that "[p]roceeding through the agency . . . provides the agency the opportunity to reconsider its policies, interpretations, and regulations [implementing the Medicare Act] in light of [constitutional] challenges" to this guidance); Schreiber v. Cuccinelli, 981 F.3d 766, 784–85 (10th Cir. 2020) (noting that even an agency that refuses to consider facial challenges to a statute might be able to grant relief on a due process claim by changing how it *interprets* a statute).

242 I.R.C. §§ 7121(a), 7122(a). The IRS makes extensive use of this authority; for example, in 2023, it agreed to compromise on unpaid taxes otherwise due under the Internal Revenue Code a total of 12,711 times, implicating $214.5 million in outstanding taxes. IRS, PUB. NO. 55-B, INTERNAL REVENUE SERVICE DATA BOOK, 2023, at 59 (2024).

243 Leahy-Smith America Invents Act, Pub. L. No. 112-29, sec. 7(a), § 6, 125 Stat. 284, 313 (2011) (codified at 35 U.S.C. §§ 311(b), 314(d)); Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 266 (2016).

244 Celgene Corp. v. Peter, 931 F.3d 1342, 1357 n.11 (Fed. Cir. 2019).

245 *E.g.*, 7 U.S.C. § 3805(e); 12 U.S.C. § 1818(i)(2)(F); 46 U.S.C. § 41109(a)(2).

246 *E.g.*, 12 U.S.C. § 1818(i)(2)(G); 15 U.S.C. § 5408(b)(2); 33 U.S.C. § 3852(d).

"excessive fines,"[247] as at least one agency adjudicator has held.[248] More broadly, the APA's carve-out for matters "committed to agency discretion"[249] preserves agencies' prosecutorial discretion to decline to enforce laws for almost any reason,[250] presumably including constitutional reasons.[251] Such statutory provisions allowing agencies to exercise discretion make it much less likely that an agency would have to directly confront true facial challenges to statutes, where the only relief it could grant would require disobeying a statutory imperative.

In addition, some statutes acknowledge, incentivize, or potentially even require agency efforts to comply with the Constitution, including nonenforcement of unconstitutional statutes. For example, Congress specifically provides for agencies to report any "formal or informal policy to refrain . . . from enforcing, applying, or administering any provision of any Federal statute . . . on the grounds that such provision is unconstitutional."[252] And the Equal Access to Justice Act—which has been held to apply to litigation over a statute's constitutionality—penalizes agencies that take unconstitutional action, including implementing unconstitutional statutes, by providing for fee shifting funded out of agency budgets in certain instances when the government loses the resulting litigation.[253] Statutes that transfer adjudicative responsibility from district courts to agencies or create agencies that act solely as tribunals may also imply a congressional intent for these agencies to consider all legal issues that a court might adjudicate, including facial constitutional challenges to statutes.[254] More broadly, APA adjudicative

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247 U.S. CONST. amend. VIII.

248 F.X.C. Invs. Corp., Investment Advisers Act Release No. 218, 79 SEC Docket 276, 290, 2002 WL 31741561, at *21 (A.L.J. Dec. 9, 2002) ("I conclude that [penalties sought by agency counsel are] constitutionally excessive under the Excessive Fines Clause of the Eighth Amendment. That is a matter that justice requires me to consider." (footnote omitted)), *final decision entered*, Investment Advisers Act Release No. 2097, 2003 WL 21278143 (Jan. 9, 2003).

249 5 U.S.C. § 701(a)(2).

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

251 *See infra* notes 330–41 and accompanying text.

252 28 U.S.C. § 530D(a)(1)(A)(i), (e).

253 *Id.* § 2412(d)(1), (d)(4); Taucher v. Brown-Hruska, 396 F.3d 1168, 1174–75 (D.C. Cir. 2005) (awarding fees under the EAJA against an agency that implemented a statute subsequently held to be unconstitutional).

254 Island Creek Coal Co. v. Bryan, 937 F.3d 738, 753 (6th Cir. 2019) (stating in dicta that an agency adjudicating disputes previously handled by courts may be an appropriate venue for resolving facial challenges to statutes); *accord* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) (reasoning that it may be especially appropriate for agencies "established exclusively to adjudicate . . . disputes" to adjudicate facial challenges to statutes).

provisions requiring agencies to "determine" requests for "disqualification of a presiding . . . employee"[255] and to address "all the material issues of . . . law . . . presented on the record"[256] may imply a duty to pass on constitutional challenges raised in agency proceedings, including those directed at the proceeding itself.[257]

c. *Judicial Precedents*

Some Supreme Court and federal appellate court rulings have implied or even expressly endorsed a power or duty in the executive branch, including agencies, to avoid unconstitutional applications of statutes or to decline to implement unconstitutional statutes altogether, including when agencies act in an adjudicatory capacity. The Supreme Court has noted that "[i]n the performance of assigned constitutional duties, each branch of the Government must . . . interpret the Constitution."[258] It has also indicated that agencies' ability to decline to enforce laws by exercising prosecutorial discretion, which has historically been invoked on constitutional grounds,[259] has constitutional underpinnings.[260] Such reasoning suggests that agencies may forego enforcing unconstitutional statutes even without express statutory authority to decline enforcement. Moreover, although the Court has not directly addressed the implication of the oath of office for federal officers tasked with implementing unconstitutional statutes, it has held that this oath bars state officials from enforcing unconstitutional state laws.[261] And it has held that when promulgating regulations, agencies lack authority to construe ambiguous

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255 5 U.S.C. § 556(b).

256 *Id.* § 557(c)(3)(A).

257 *Cf.* Axon Enter., Inc., 170 F.T.C. 454, 455 (2020), 2020 WL 5406806, at *1 ("Nothing in [agency rules governing requests to disqualify ALJs] precludes disqualification based on constitutional infirmity."), *dismissed on other grounds*, 176 F.T.C. No. 9389, 2023 WL 6895829 (F.T.C. Oct. 6, 2023); C. Stuart Greer, *Expanding the Judicial Power of the Administrative Law Judge to Establish Efficiency and Fairness in Administrative Adjudication*, 27 U. RICH. L. REV. 103, 122 & n.94 (1992) ("[Section 557(c)(3)(A)] does not expressly prohibit an administrative agency from addressing the constitutionality of statutes."); LePere, 2 O.R.W. 618, 623 (N.O.A.A. A.L.J. 1982), 1982 WL 42978, at *5 (citing § 557(c)(3) as a basis for considering a constitutional objection to a warrantless search by agency enforcement personnel).

258 United States v. Nixon, 418 U.S. 683, 703 (1974).

259 *See infra* text accompanying notes 332–35.

260 Heckler v. Chaney, 470 U.S. 821, 832 (1985); *see also* Rebecca Krauss, Note, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 9 (2009) ("[F]ederal case law has concluded that judges are constitutionally prohibited from interfering with prosecutorial decisions.").

261 Cooper v. Aaron, 358 U.S. 1, 16–18 (1958).

statutes in a constitutionally dubious manner,[262] implying that agencies must at least consider whether some applications of a statute are unconstitutional.

The Court has also refrained from expressing disapproval of executive branch decisions to disregard statutes on constitutional grounds. *Myers v. United States*,[263] which upheld the President's removal of a postmaster in defiance of a statute the Court declared unconstitutional,[264] affirmed on these merits grounds a lower-court judgment that had fully (and, according to the Court, erroneously) dismissed a suit for backpay on timeliness grounds.[265] If the executive branch's disregard of the statute were invalid absent judicial sanction, the Court would have presumably ordered backpay through the date of its ruling instead of affirming the dismissal *in toto*. And when litigation resulted from executive branch noncompliance with statutes on constitutional grounds, the Court has not criticized the noncompliance, regardless of whether it ultimately ruled that the statute was unconstitutional[266] or upheld the statute over the executive branch's objection.[267]

The federal courts of appeals have also issued rulings indicating that agency officials may have discretion or a duty to avoid unconstitutional action, potentially even when it is authorized by statute. Some courts have indicated that mandamus may issue to enjoin agency officers from enforcing unconstitutional statutes,[268] thus implying that these officers are subject to a "clear duty" to not enforce these statutes.[269] The Tenth Circuit, adopting the reasoning of a concurring opinion by Justice Thomas, asserted that the executive branch may decline to give effect to an unconstitutional statute, explaining that "the President always had the legal power to [act] in a manner consistent with the Constitution" since, as the Court's majority opinion in the same case explained, "an

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262 Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

263 272 U.S. 52 (1926).

264 *Id.* at 107–08.

265 *Id.* at 107.

266 *E.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 31–32 (2015) (asserting that Congress acted "improper[ly]" by enacting an unconstitutional statute but not criticizing the responsible agency's refusal to comply with the statute prior to its invalidation by the courts).

267 *E.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).

268 *See* Richardson v. United States, 465 F.2d 844, 850–51 (3d Cir. 1972) (en banc), *rev'd on other grounds*, 418 U.S. 166 (1974); Nat'l Ass'n of Gov't Emps. v. White, 418 F.2d 1126, 1129 (D.C. Cir. 1969); *accord* Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 690 (1949) (holding that courts may enjoin official action taken pursuant to an unconstitutional statute).

269 *In re* Nat'l Nurses United, 47 F.4th 746, 750, 752 (D.C. Cir. 2022) ("[M]andamus is reserved only for transparent violations of a clear duty to act.").

unconstitutional provision is never really part of the body of governing law."[270] An earlier D.C. Circuit panel opinion authored by then-Judge Kavanaugh expressly deemed such reasoning applicable to administrative agencies, asserting that "settled, bedrock principles of constitutional law" permit a "President [who] has a constitutional objection to a statutory mandate or prohibition [to] decline to follow the law unless and until a final Court order dictates otherwise."[271] It added that "[t]hose basic constitutional principles apply to the President *and subordinate executive agencies*."[272]

Some judicial opinions have also specifically indicated that agencies can or should consider constitutional issues when acting in an adjudicatory capacity. For example, in *Thunder Basin*, the Supreme Court refused to adopt a "mandatory" rule barring agencies from "[a]djudicati[ng] . . . the constitutionality of congressional enactments."[273] In a later case, the Court noted that an agency may "reconsider its policies, interpretations and regulations [construing its organic act] in light of" constitutional challenges to such guidance raised in administrative proceedings.[274] Similarly, the Federal Circuit held that when an agency adjudicates liability under a statute it administers, it may resolve a claim that a defense to liability under an unrelated statute is unavailable because the other statute is unconstitutional, since rejecting the defense on constitutional grounds "does not require the agency to question its own statutory authority or to disregard any instructions Congress has given it."[275] Furthermore, the Sixth Circuit suggested in dicta that a claim by the Department of Labor's Benefits Review Board to have "authority to decide . . . the constitutional validity of statutes" "should be unsurprising" because "[t]he executive branch has just as much of an obligation to comply with the Constitution when enforcing the law as the judicial

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270 Leachco, Inc. v. Consumer Prod. Safety Comm'n, 103 F.4th 748, 757 (10th Cir. 2024) (internal quotation marks omitted) (first quoting Collins v. Yellen, 141 S. Ct. 1761, 1793 (2021) (Thomas, J., concurring), and then quoting *id.* at 1788–89 (majority opinion)).

271 *In re* Aiken Cnty., 725 F.3d 255, 259 (D.C. Cir. 2013).

272 *Id.* (emphasis added).

273 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) (first alteration in original) (internal quotation marks omitted) (quoting Johnson v. Robison, 415 U.S. 361, 368 (1974)).

274 Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 24 (2000).

275 Riggins v. Off. of Senate Fair Emp. Pracs., 61 F.3d 1563, 1569–70 (Fed. Cir. 1995). Although *Riggins* involved a legislative branch entity adjudicating claims by congressional employees, rather than an executive branch agency, its analysis applied the general jurisprudence governing adjudications by administrative agencies, *id.* at 1569, and it only treated the legislative branch's involvement as an additional factor that merely "fortified" its conclusion, *id.* at 1570–71.

branch does when interpreting it."[276] Elsewhere, it indicated "that administrative agencies may [not] look the other way when it comes to as-applied constitutional challenges and constitutional-avoidance arguments," reasoning that an agency has an "ongoing duty to conform its behavior with our highest law" that is "re-enforced by the oath each executive officer must take to 'to [sic] support this Constitution.'"[277] Based on similar reasoning, the D.C. Circuit criticized the FCC's refusal to consider a First Amendment challenge to how it applied the Communications Act of 1947 because, the Agency claimed, "Congress and the courts are more appropriate venues for reacting to the constitutional questions."[278] The court strongly disagreed, reasoning that

> Federal officials . . . take a specific oath to support and defend [the Constitution]. To enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath, but, in any event, the Commission must discharge its constitutional obligations by explicitly considering [the] claim .... [F]ailure to do so [is] the very paradigm of arbitrary and capricious administrative action.[279]

d. *Historical Practice*

Longstanding historical practice also indicates that agency officials may consider the constitutionality of both agency action and legislation when taking official action. As previously discussed, agencies have engaged with the Constitution since the Founding Era with regard to their own actions,[280] and in some instances have taken or avoided taking official action based on a finding that a statute was unconstitutional.[281] Attorneys General and their subordinates have also advised agency officials not to rely on certain statutory authorities or comply with some statutes on constitutional grounds.[282] And several important constitutional court cases stemmed from a refusal by the President or agencies to implement

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276 Island Creek Coal Co. v. Bryan, 937 F.3d 738, 753 (6th Cir. 2019) (internal quotation marks omitted) (quoting Duck v. Fluid Crane & Constr. Co, No. 02-0335, 2002 WL 32069335, at *2 n.4 (D.O.L. Ben. Rev. Bd. Oct. 22, 2002)).

277 Jones Bros. v. Sec'y of Lab., 898 F.3d 669, 674–75 (6th Cir. 2018) (quoting U.S. CONST. art. VI).

278 Meredith Corp. v. FCC, 809 F.2d 863, 868 (D.C. Cir. 1987).

279 *Id.* at 874 (citing U.S. CONST. art. IV, cl. 3).

280 *See, e.g.*, *supra* notes 124–25, 128–35, 147–54 and accompanying text.

281 *See, e.g.*, *supra* text accompanying notes 126–27, 158, 160, 165–66; *see also infra* text accompanying notes 342–46.

282 *E.g.*, Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att'ys Gen. 209, 212–13, 214 (1865) (advising that a statute requiring tax assessors to appoint officers violated the Appointments Clause and that assessors should refrain from making such appointments); *see also Constitutionality of Congress's Disapproval*, *supra* note 191 (contemporary OLC opinion advising agency to disregard unconstitutional statute).

or comply with legislation deemed unconstitutional, such as President Wilson's refusal to comply with an act requiring Senate approval to remove officers and the State Department's refusal to comply with a statute purporting to compel executive branch recognition of a foreign state's territorial claim.[283] Therefore, agency consideration of constitutional constraints on both administrative and legislative power when acting or refusing to act is hardly unprecedented.

3. Agencies' Shared Responsibility with the President for Upholding the Constitution

Although recent decades have witnessed extensive debate over executive branch authority or responsibility to interpret the Constitution or to disregard unconstitutional statutes, almost all such commentary focuses on the President.[284] But arguments for such presidential authority or responsibility should also apply to the President's subordinates, including the officers who head administrative agencies. Their status as unelected appointees holding offices created by Congress, rather than an elected office created by the Constitution, does not compel a different result.

Both textualist and functionalist principles imply this result. The Constitution's text directly requires agency heads to take an oath to uphold the Constitution[285] as required of the President.[286] But the Constitution requires only the *President* to "take Care that the Laws be faithfully executed."[287] Agency officials' duty to execute statutes thus derives from the President's own duty to do so.[288] It therefore follows that if the President is not obligated or permitted to execute unconstitutional statutes, neither are they. From a functionalist perspective, because these officers are the President's agents,[289] if the President can or must decline to enforce unconstitutional laws, the same is true for these officers and

283 Zivotofsky v. Kerry, 576 U.S. 1, 7–8 (2015); Myers v. United States, 272 U.S. 52, 107–08 (1926).

284 *E.g.*, Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199 (1994); Lawson & Moore, *supra* note 42, at 1268 ("It is emphatically the province and duty of the President to say what the law is, including the law embodied in the Federal Constitution.").

285 U.S. CONST. art. VI, cl. 3.

286 *Id.* art. II, § 1, cl. 8.

287 *Id.* art. II, § 3.

288 *See supra* notes 235–37 and accompanying text.

289 *See* cases cited *supra* note 236.

the agencies they run,[290] as at least one federal court of appeals has implied.[291]

Although it might be argued that only a democratically elected President may refuse to implement laws enacted by a democratically elected Congress,[292] agency action is subjected to democratic accountability by virtue of the President's appointment and removal powers.[293] Thus, for example, opinions by Attorneys General, whom the President can appoint and remove, are attributed to the President,[294] and similar attribution should apply to other agency heads' constitutional decisions.[295] In addition, democratic accountability is a dubious metric for assessing authority to pass on the constitutionality of congressional enactments in the first place, given that the least controversial claim to such power belongs to the judiciary, which self-identifies as the least democratically accountable branch.[296]

It might also be argued that because the offices of agency officials, unlike the presidency, are "established by Law,"[297] "an administrative agency's power . . . is limited to the authority delegated by Congress."[298] It might therefore be argued that absent congressional authorization,

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290 *Cf.* RESTATEMENT (THIRD) OF AGENCY § 3.04 cmt. b (AM. L. INST. 2006) (noting that an agent's power is "coextensive with the principal's capacity to do the act in person").

291 *See supra* note 272 and accompanying text.

292 *Cf.* Joseph Landau, *Presidential Constitutionalism and Civil Rights*, 55 WM. & MARY L. REV. 1719, 1724–25 (2014) ("[T]he President—the only democratically elected official accountable to the entire U.S. populace—can bring a unique authority to the interpretation of . . . the Constitution . . . .").

293 United States v. Arthrex, Inc. (*Arthrex II*), 141 S. Ct. 1970, 1982–83 (2021); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010).

294 *E.g.*, Harold J. Krent, *Creating Precedents Through Words and Deeds*, 32 CONST. COMMENT. 513, 520 (2017) (reviewing HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION (2015)) ("Many presidential statements on the meaning of the Constitution can be found in writings of . . . the Attorney General. . . . [G]iven that presidents select and remove Attorney Generals [sic], the Opinions converge with those of the presidents themselves.").

295 Disagreement over an agency's resolution of constitutional questions could potentially constitute cause to remove even independent agency heads not removable at will, ensuring democratic accountability for the agency's action. *Cf.* Anyel, 58 M.S.P.R. 261, 264–65, 269, (1993) (stating that failure to follow administrative legal precedents constituted "cause" for disciplining ALJ). Thus, for example, refusal to follow DOJ guidance, to the extent it is considered binding on agencies, *Casa De Md. v. DHS*, 924 F.3d 684, 692 n.1 (4th Cir. 2019) ("OLC opinions . . . 'are generally viewed as providing binding interpretive guidance for executive agencies.'" (quoting United States v. Arizona, 641 F.3d 339, 385 n.16 (9th Cir. 2011))), might constitute cause for removal.

296 *E.g.*, City of Arlington v. FCC, 569 U.S. 290, 305 (2013) (comparing "unelected federal bureaucrats" to "unelected (and even less politically accountable) federal judges").

297 U.S. CONST. art. II, § 2, cl. 2.

298 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

agencies cannot pass on the constitutionality of statutes[299] and potentially other constitutional questions. However, even setting aside the possibility that Congress may have provided such authorization in the APA or other statutes,[300] these arguments overlook limitations that the Constitution imposes on the offices that Congress creates, including the requirement that their occupants "shall be bound . . . to support this Constitution."[301] Just as Congress cannot evade other constitutional provisions when establishing offices,[302] it cannot legislate around this oath or other provisions that render statutes unconstitutional and therefore preclude them from having legal effect.[303] Agencies' status as creatures of legislation should therefore not diminish their authority or duty to address constitutional issues.

III. Agency Resolution of Constitutional Claims Is Not Categorically Inferior

This Part challenges the common assumption that agency resolution of constitutional claims is generally inferior to court adjudication. It describes how agencies may grant meaningful relief on constitutional claims by exercising statutory or prosecutorial discretion or, potentially, by declining to give effect to laws they determine to be unconstitutional. Further, it explains why agencies may be especially well-suited, relative to courts, to determine whether they can grant such relief in the first place. It also explores doctrinal and practical limitations on court-awarded relief that often render it no better than—and in some cases inferior to—the relief agencies might grant on constitutional claims. In addition, this Part explains why agency rules that allow for immediate relief on threshold legal issues may adequately protect any asserted "right not to stand trial" in an allegedly unconstitutional administrative proceeding. Lastly, this Part demonstrates how many benefits of exhaustion—such as early

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299 Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1683 (1977) ("There does appear at first glance to be something anomalous about permitting a creature of the legislature to countermand its broad statutory mandate and override the legislative judgment and command."); *accord* Jones Bros. v. Sec'y of Lab., 898 F.3d 669, 673 (6th Cir. 2018) ("An administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing.").

300 *See supra* Section II.B.2.b.

301 U.S. CONST. art. VI, cl. 3.

302 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 500 (2010); Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam), *superseded in part by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003).

303 *See supra* note 231 and accompanying text.

correction of errors, prevention of piecemeal appeals and improper "sandbagging," application of an agency's specialized knowledge, and development of a record for judicial review—may apply when litigants first present constitutional claims to agencies.

A. *Agencies Can Grant Meaningful Relief on Constitutional Claims*

Courts often assert that agencies cannot award adequate relief on constitutional claims, primarily because agencies cannot "declare" statutes or other official acts unconstitutional[304] or because delayed judicial review might not remedy the injury of having to participate in constitutionally flawed agency proceedings.[305] As explained in Section II.B.1, *supra*, the focus on court-like declarations of unconstitutionality overlooks an agency's ability to *decide for itself* whether to take or avoid taking action based on the same constitutional principles. By *deciding* to exercise authority in certain ways or not exercise it at all, agencies can provide relief similar to the relief granted by court orders *requiring* them to do so.[306] In fact, courts that refuse to require exhaustion of constitutional claims based on categorical assertions of futility may short-circuit a process that might allow an agency to apply its familiarity with its own statutory powers and administrative processes to assess whether it can potentially provide adequate relief to litigants raising constitutional claims. Such relief is not categorically inferior to court-awarded relief, particularly given doctrinal and practical constraints on judicial remedies. Moreover, even claims that an agency's structure or other aspects of the administrative process itself are constitutionally flawed can be adequately addressed under rules adopted by many agencies that allow for immediate consideration of, and redress on, threshold legal objections to agency proceedings.

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304 *E.g.*, Calcutt v. FDIC, 37 F.4th 293, 313 (6th Cir. 2022) (explaining that exhaustion "would have been a pointless exercise" even if the agency had vacated a penalty challenged on the basis of allegedly unconstitutional removal protections "because the removal restrictions would persist"), *rev'd on other grounds*, 143 S. Ct. 1317 (2023); *accord* Patsy v. Fla. Int'l Univ., 634 F.2d 900, 907 (5th Cir. 1981) ("[I]t was beyond the authority of the administrative agency to declare a . . . statute or regulation unconstitutional and thus the administrative remedies were clearly inadequate."), *rev'd on other grounds and remanded sub nom.* Patsy v. Bd. of Regents of the State of Fla., 457 U.S. 496 (1982).

305 *E.g.*, Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 904 (2023); Mathews v. Eldridge, 424 U.S. 319, 325, 331 (1976).

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

1. Agencies Can Remedy Constitutional Violations

Many statutory schemes grant agencies leeway to apply the law in a manner that avoids alleged constitutional violations. Even in the absence of such express grants, agencies have prosecutorial discretion to decline to enforce statutes, presumably including statutes to which litigants object on constitutional grounds. In less common situations where agencies truly lack such flexibility, they may still be able to grant appropriate relief by not giving effect to an unconstitutional statute.

a. *Statutory Mechanisms for Granting Administrative Relief on Constitutional Grounds*

Statutes often grant agencies broad discretion, allowing them to address structural or purportedly facial challenges to statutes as as-applied challenges by changing whether and how they exercise statutory discretion.[307] For example, although Appointments Clause challenges are often considered "structural," in case of a flaw in an inferior officer's appointment, a "head of department" whom Congress has authorized to (re)appoint the officer "ha[s] the power to fix this problem" in response to objections raised administratively[308] as long as agency procedural rules do not impair the ability to exercise this authority in the adjudicatory context.[309] Thus, nearly three years before the Supreme Court held in *Lucia* that an agency's ALJs had to be appointed in accordance with the Clause,[310] the FTC responded to an administrative litigant's argument that the presiding ALJ should have been appointed in accordance with the Clause, without awaiting judicial resolution of the issue, by ratifying the ALJ's appointment in order to "put[] to rest any possible claim that this administrative proceeding violates the Appointments Clause."[311] And following *Lucia*'s holding that the remedy for a hearing conducted by an improperly appointed ALJ is remand to a different, properly appointed ALJ,[312] DOJ advised agencies to reassign cases to properly appointed ALJs

307 *See supra* notes 239–48 and accompanying text.

308 Island Creek Coal Co. v. Bryan, 937 F.3d 738, 752 (6th Cir. 2019).

309 *Cf.* Carr v. Saul, 141 S. Ct. 1352, 1361 (2021) (explaining that exhaustion of Appointments Clause challenges was futile because agency rules did not permit appeal to the head of department).

310 Lucia v. SEC, 585 U.S. 237, 251 (2018).

311 LabMD, Inc., 160 F.T.C. 1373, 1375 (2015), 2015 WL 13879762, at *2, *final decision entered*, No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016), *rev'd on other grounds*, 894 F.3d 1221 (11th Cir. 2018).

312 *Lucia*, 585 U.S. at 251–52.

in response to timely objections at the administrative stage,[313] thereby providing the same remedy that a court would have ordered. Similarly, the APA permits agency heads or members of multi-headed agencies to conduct hearings in lieu of ALJs,[314] allowing agencies to address what may at first appear to be purely facial challenges to ALJs' two layers of statutory removal protections[315] by reassigning proceedings to officers directly removable by the President.[316] For example, after the Fifth Circuit held that SEC ALJs are unconstitutionally shielded from removal,[317] the SEC preemptively began routinely assigning new administrative cases to itself rather than to ALJs,[318] even in matters that were not subject to review in that circuit[319] while it sought Supreme Court review of the Fifth Circuit's ruling.[320]

Many statutes also give agencies that exercise enforcement authority discretion to choose whether to proceed administratively or in court.[321] If

313 Memorandum from Solic. Gen., U.S. Dep't of Just., to Agency Gen. Counss., Guidance on Admin. L. Judges after *Lucia v. SEC* (S. Ct.) 7–8 (July 2018) (available at https://perma.cc/39KX-EAWH).

314 5 U.S.C. § 556(b)(1)–(2).

315 *See supra* note 180 and accompanying text.

316 The resulting burden on agency heads would not necessarily be excessive because APA provisions limiting an agency's discretion to delegate adjudicatory responsibilities to non-ALJs only apply when a matter proceeds to the "taking of evidence," 5 U.S.C. § 556(b), which appears to occur in only a very small minority of all administrative proceedings, *see* KEELYN GALLAGHER & ADI DYNAR, RE-ESTABLISH JUSTICE: CREATING A RIGHT TO REMOVE FOR THE ACCUSED 3–4 (2024) (noting that only fifty-three out of 1,983 enforcement actions brought by fifteen agencies in 2022 proceeded to a full hearing that year, while seven percent were dismissed and more than eighty percent settled), available at https://perma.cc/7NJ4-VXN3. Agencies thus have substantial flexibility to avoid utilizing ALJs for many proceedings altogether, and for pre-trial proceedings in other matters, by simply relying on administrative delegations to other staff, which do not raise the same constitutional concerns as removal restrictions applicable to officers assigned specific duties by statute, even when delegees enjoy similar removal protections. *See* Yonatan Gelblum, *Distinguishing Administrative Delegations from Constitutional Offices*, HARV. J.L. & PUB. POL'Y PER CURIAM 7–10 (Summer 2024), https://perma.cc/38SU-Z5T6.

317 Jarkesy v. SEC, 34 F.4th 446, 463 (5th Cir. 2022), *aff'd on other grounds*, 144 S. Ct. 2117 (2024).

318 Andrew J. Ceresney et al., *Supreme Court Punches SEC APs Right in the Seventh Amendment*, PROGRAM ON CORP. COMPLIANCE & ENF'T AT N.Y.U. SCH. OF L. (July 3, 2024), https://perma.cc/4WEY-3JWB. *Compare, e.g.*, John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 9396, Exchange Act Release No. 69208, Investment Company Act Release No. 30435, Investment Advisers Act Release No. 3571, 105 SEC Docket 4051, 4058–59, 2013 WL 1180836, at *14 (Mar. 22, 2013) (assigning the *Jarkesy* matter to an ALJ), *with, e.g.*, Viener, Exchange Act Release No. 95884, No. 3-21139, slip op. at 9, 2022 WL 4445472, at *8 (S.E.C. Sept. 22, 2022) (assigning a proceeding to the Commission following the Fifth Circuit's ruling in *Jarkesy*), *dismissed*, No. 3-21139, 2024 WL 4332569 (Sept. 27, 2024).

319 *Viener*, 2022 WL 4445472, at *1 (noting that the respondent was a New Jersey resident).

320 *See* Petition for a Writ of Certiorari, SEC v. Jarkesy, 143 S. Ct. 2117 (2024) (No. 22-859).

321 *Compare, e.g.*, 12 U.S.C. § 5563(a), *and* 15 U.S.C. § 78u–2(a) (giving the Consumer Finance Protection Bureau and SEC authority to administratively order remedial relief), *with* 12 U.S.C. § 5564(a), *and* 15 U.S.C. § 78u(d)(1), (3) (authorizing these agencies to seek similar relief in court).

these agencies find merit in constitutional challenges to their administrative proceedings, such as the *Axon* petitioner's challenges to ALJ removal protections and the combination of prosecutorial and adjudicative actions in one agency,[322] they can provide relief by abandoning these proceedings and refiling in court. They can also take such action even without deciding the constitutional question, simply because they wish to mitigate legal hazards.[323] Thus, for example, the SEC started routinely bringing most of its enforcement actions in court rather than administratively once its administrative adjudications became the subject of increased constitutional scrutiny.[324] In fact, commentators have recently proposed that agencies adopt rules making such relief automatic if a party requests it, in order to address structural constitutional objections to their proceedings.[325]

In addition, as previously noted, many statutes expressly give agencies discretion to elect not to enforce their provisions.[326] For example, had the *Clintwood Elkhorn* respondent timely filed an administrative tax refund claim based on its Export Clause challenge to an excise tax,[327] and had the IRS determined that the applicable statute was unconstitutional, the Agency could have agreed to issue a refund pursuant to open-ended resolution and compromise authority granted to it by the Internal Revenue Code.[328] In fact, Treasury regulations specifically provide that "doubt as to liability" can be grounds for compromising tax liabilities without excluding doubt resulting from constitutional considerations.[329]

b. *Use of Prosecutorial Discretion to Grant Administrative Relief on Constitutional Grounds*

Even absent express statutory authorization not to apply a statute, agencies acting in an enforcement posture, as was the case in *Axon*, may be able to exercise prosecutorial discretion to decline enforcement on constitutional grounds. Agencies generally have broad discretion to not

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322 Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 897 (2023).

323 *See supra* notes 211–23 and accompanying text.

324 *See* Ceresney et al., *supra* note 318 ("[T]he SEC has already been bringing nearly all of its new enforcement actions—whether sounding in fraud, negligence, or strict liability—in district court since the Supreme Court's *Lucia* decision, which addressed but declined to resolve the constitutional questions regarding the agency's use of ALJs.").

325 Walker & Zaring, *supra* note 39, at 5, 13–14; GALLAGHER & DYNAR, *supra* note 316, at 3.

326 *See supra* notes 242–48 and accompanying text.

327 United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 4 (2008).

328 I.R.C. §§ 7121(a), 7122(a) (2006).

329 Treas. Reg. § 301.7122-1(b)(1) (2024).

enforce laws for almost any reason,[330] and routinely choose not to fully enforce laws, often on a large scale, for various reasons.[331] Significantly, the executive branch has historically considered doubts about a statute's constitutionality to be grounds for exercising its discretion not to enforce the law.[332] For example, Thomas Jefferson instructed federal prosecutors not to enforce the Sedition Act, which he considered repugnant to the First Amendment.[333] More recently, DOJ voluntarily dismissed charges—*after* a conviction was affirmed[334]—in the face of a sharply worded dissenting opinion asserting that application of the Federal Rules of Evidence to exclude exculpatory hearsay by witnesses deported by the government violated the Sixth Amendment.[335]

Prosecutorial discretion thus provides an additional mechanism for agencies to address constitutional claims. If respondents in agency enforcement proceedings raise constitutional objections, including facial objections to the statutory enforcement scheme, an agency that agrees can ordinarily exercise this discretion and dismiss the proceeding. For example, not long after losing in *Axon*, the SEC voluntarily dismissed *all* its enforcement proceedings "as a matter of discretion" after discovering a procedural irregularity.[336] The FTC similarly dismissed the proceeding at issue in *Axon*, following the Supreme Court's ruling, on the grounds that constitutional litigation in the courts was expected to last years and therefore its "limited agency resources" would be better used elsewhere.[337] No legal impediment would have prevented these agencies from taking

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330 Heckler v. Chaney, 470 U.S. 821, 831 (1985).

331 *See, e.g.*, Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 74 (2015) ("The IRS inevitably must make nonenforcement decisions on a daily basis because it is tasked with administering many more tax laws against many more taxpayers than its resources allow."); Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1–2 (June 15, 2012) (available at https://perma.cc/MU9Q-67BV) (adopting what became known as the "Deferred Action for Childhood Arrivals" policy of nonenforcement of the immigration laws against a large class of undocumented aliens who were brought to the United States before age sixteen).

332 Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. & Robert J. Delahunty, Special Couns., to John Bellinger, III, Senior Assoc. Couns. to the President and Legal Adviser to the Nat'l Sec. Council 20 n.28 (Nov. 15, 2001) (available at https://perma.cc/9BM7-GH24).

333 Prakash, *supra* note 42, at 1617.

334 Henry Weinstein, *Appeal Lost, Yet Freedom Won*, L.A. TIMES (Apr. 23, 2003, 12:00 AM), https://perma.cc/37UB-MY7M.

335 United States v. Ramirez-Lopez, 315 F.3d 1143, 1159–76 (9th Cir.) (Kozinski, J., dissenting), *opinion withdrawn and appeal dismissed*, 327 F.3d 829 (9th Cir. 2003).

336 Pending Admin. Proc., Securities Act Release No. 11198, Exchange Act Release No. 97640, Investment Advisers Act Release No. 6323, Investment Company Act Release No. 34933, Accounting and Auditing Enforcement Release No. 4413, 2023 WL 3790795, at *2 (June 2, 2023).

337 Axon Enter., Inc., 176 F.T.C. No. 9389, at 2 (Oct. 6, 2023), 2023 WL 6895829, at *1.

the same actions had they determined they could not constitutionally maintain these proceedings. In fact, after the Supreme Court held last year that the SEC cannot bring administrative penalty proceedings concerning securities fraud partly because they are analogous to common law fraud actions falling within the ambit of the Seventh Amendment,[338] the SEC dismissed, without comment, multiple other administrative actions concerning other alleged misconduct not directly addressed by the Court's ruling.[339]

Other agencies have exercised similar discretion to not enforce statutes while expressly citing constitutional grounds for doing so. For example, the IRS entirely stopped enforcing an excise tax statute because it had been held unconstitutional in a district court ruling, although the ruling only directly applied to seven taxpayers.[340] And the FDA has indicated that it exercises "enforcement discretion" with respect to certain marketing claims that Congress charged it with regulating in order to avoid First Amendment violations.[341] By exercising prosecutorial discretion in this way, agencies can remedy (or prevent) alleged constitutional harms.

c. *Refusal to Give Effect to Statutes on Constitutional Grounds*

Given the broad statutory and prosecutorial discretion available to agencies, it is likely to be the exception—rather than the rule—that a constitutional challenge raised before an agency cannot be addressed by exercising such discretion. But in exceptional cases where it cannot, for the reasons given in Section II.B.2, *supra*, the agency may be able to simply decline to implement a statute it determines is unconstitutional. For example, the FMC declined to exercise jurisdiction—granted to it by statute—to adjudicate challenges to other agencies' rules on the grounds that the statute violated the separation of powers.[342] The Commission explained that it acted pursuant to the principle that "the exercise of jurisdiction by any governmental body . . . is subject to limitations reflecting principles of . . . constitutional law," while taking pains to

338 SEC v. Jarkesy, 144 S. Ct. 2117, 2130–31 (2024).

339 *See generally* Amanda Iacone, *SEC Drops Auditor Misconduct Cases After In-House Judges Ruling*, BLOOMBERG TAX (Sept. 24, 2024, 4:45 AM), https://perma.cc/NV2S-REGW.

340 United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 5 (2008) (citing IRS Notice 2000-28, 2000-1 C.B. 1116, 1116–17); Ranger Fuel Corp. v. United States, 33 F. Supp. 2d 466, 469 (E.D. Va. 1998).

341 Draft Guidance for Industry: Factors that Distinguish Liquid Dietary Supplements, 74 Fed. Reg. 63759 (F.D.A. Dec. 4, 2009) (notice); Guidance for Industry and FDA: Interim Procedures for Qualified Health Claims, 68 Fed. Reg. 41387 (F.D.A July 11, 2003) (notice).

342 Mar. Admin., Dep't of Transp., No. P1–90, 1991 WL 383090, at *15 (F.M.C. Sept. 20, 1991).

emphasize that it was "not declaring [the statute] 'unconstitutional.'"[343] Similarly, when the IRS acquiesced to a district court ruling invalidating an excise tax statute,[344] it not only exercised prosecutorial discretion by declining to enforce the provision against all taxpayers, but also agreed to treat voluntary payments made pursuant to the statute as overpayments of tax subject to refund with interest.[345] Thus, without purporting to declare the statute unconstitutional, the IRS declined to give the statute any effect despite having only been judicially ordered not to apply the statute to seven taxpayers in a single district court ruling, which would not have been binding in other cases even before the same judge.[346]

2. Agencies May Have a Relative Advantage in Assessing Whether They Can Grant Relief on Constitutional Claims

When courts excuse exhaustion of constitutional claims based on categorical assumptions about an agency's purported inability to grant relief, they may short-circuit a process that might have allowed the agency to apply institutional expertise to identify ways in which it could effectively address a constitutional claim. Agencies may be especially well-situated to make such assessments of whether statutes they routinely apply, or their own procedural rules, grant them discretion to avoid unconstitutional acts[347] or if prosecutorial discretion can allow them to avoid enforcing a statute in a manner that would moot constitutional concerns.[348] Such agency expertise at identifying potential remedies may be particularly helpful when litigants purport to raise facial challenges to statutes, given that the distinction between facial and as-applied challenges "is hazy at best and incoherent at worst."[349] Thus, as one court explained:

> Before delving into any constitutional quandary, we usually give the Executive a chance to confirm that the relevant statutes and regulations apply to the petitioner in the way that he claims. Without doing so, the courts would have no idea how things would shake

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343 *Id.* at *14–15 (internal quotation marks omitted) (quoting FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1315 (D.C. Cir. 1980)).

344 *See* authorities cited *supra* note 340.

345 *See generally* I.R.S. Notice 2000-28, 2000-1 C.B. 1116 (announcing procedures for claiming a refund for the excise tax at issue following the district court ruling, without distinguishing between voluntary and involuntary payments).

346 *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011).

347 *See supra* notes 239–48 and accompanying text.

348 *See* discussion *supra* Section III.A.1.b.

349 Elgin v. Dep't of the Treasury, 567 U.S. 1, 15 (2012).

> out. The agency might interpret those authorities differently. It might drop the enforcement action as a matter of informed discretion. Or it might deny relief.[350]

When courts instead decline to require exhaustion of constitutional claims based on presumptions that the agency could not provide relief, they may thereby deprive the agency of an opportunity to apply its expertise to the very question of whether it can effectively redress the claim.[351] Courts that mechanically refuse to subject broad classes of constitutional claims to exhaustion mandates may therefore prematurely forego the benefits of exhaustion in cases where the agency might have determined it can prevent or correct the alleged constitutional violation at an early stage and thereby avoid constitutional harm and unnecessary litigation.

3. Court-Awarded Relief Is Not Categorically Superior

When declining to require exhaustion of constitutional claims, courts often assert that the relief agencies might grant, such as dismissal of enforcement proceedings, is inferior to judicial relief, such as a declaratory judgment holding that a statute is unconstitutional.[352] Commentators have made similar claims.[353] Such assertions disregard doctrinal limits on the courts' ability and willingness to consider and grant relief on constitutional questions, as well as practical limits on the relative precedential value or other impact of many lower court decisions compared to the potential impact of an agency ruling.

Claims that agency-granted relief on constitutional claims is inferior often appear to implicitly or expressly rest on the potentially more limited impact of an agency's constitutional exegesis compared to judicial declarations of "what the law is." Such agency precedents potentially "control" only in those controversies falling within the agency's jurisdiction. In contrast, although district court rulings are not binding

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350 Jones Bros. v. Sec'y of Lab., 898 F.3d 669, 676 (6th Cir. 2018).

351 *Id.*; *see also* Schreiber v. Cuccinelli, 981 F.3d 766, 784 (10th Cir. 2020) (stating that an agency claiming to lack authority to consider facial challenges to statutes might have decided that it can address a constitutional challenge to its statutory *interpretation* if a litigant had exhausted the issue); *accord* Connecticut v. Duncan, 612 F.3d 107, 114 (2d Cir. 2010) (noting that exhaustion may allow the agency to identify an alternative course of action that moots a constitutional controversy).

352 *E.g.*, Calcutt v. FDIC, 37 F.4th 293, 313 (6th Cir. 2022) (administratively raising a challenge to penalty proceedings based on allegedly unconstitutional removal protections "would have been a pointless exercise" even if the agency vacated the penalty "because the removal restrictions would persist"), *rev'd on other grounds*, 143 S. Ct. 1317 (2023).

353 *E.g.*, Adam M. Katz, Note, *Eventual Judicial Review*, 118 COLUM. L. REV. 1139, 1162 (2018) ("[G]iven the incentive for parties to settle prior to reaching a trial, administrative or otherwise, [requiring exhaustion] of constitutional challenges constrains the ability of Article III courts to develop administrative and constitutional law.").

precedent,[354] they may have a broader impact. These opinions may be persuasive authority in subsequent cases, including cases involving different agencies. Conversely, the typical disparagement of constitutional adjudication by agencies makes it unlikely that an agency's constitutional analysis would be similarly cited. And although the losing side in district court can file an appeal that might result in binding precedent, in the common scenario where an agency resolves a dispute solely between itself and another party—and does so in a way that moots the controversy—Article III standing requirements preclude appellate review that might turn the agency's rationale into binding precedent.[355] Courts have also historically issued nationwide injunctions barring implementation of statutes or other official action "*not only against the plaintiff, but also against anyone*,"[356] which, unlike an agency's voluntary decision to exercise self-restraint, could apply to multiple agencies and may be modified only by another court order.

However, various judicial doctrines tend to reduce the likelihood that courts will resolve a constitutional controversy by providing this type of broad declaratory or injunctive relief that an agency cannot. Courts avoid issuing constitutional rulings if they can grant relief on statutory grounds,[357] which agencies routinely do. And due to the judicial preference for severing unconstitutional statutory provisions,[358] courts may avoid resolving constitutional questions by determining that deciding the issue would not provide any relief to the challenger.[359] Justiciability and prudential considerations also tend to limit courts' readiness and ability

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354 Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011).

355 *E.g.*, Buck v. Sec'y of Health and Hum. Servs., 923 F.2d 1200, 1203 (6th Cir. 1991) ("[W]here, as here, the Secretary issues a decision that is fully favorable to the claimant, the claimant cannot seek judicial review.").

356 Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 (2017).

357 *E.g.*, N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 582 (1979) ("Before deciding the constitutional question . . . courts [must] consider whether . . . statutory grounds might be dispositive."). *But see* Trump v. Casa, Inc., No. 24A884, 2025 WL 1132004, at *1 (U.S. Apr. 17, 2025) (setting oral argument to consider a challenge to the courts' ability to issue nationwide injunctions).

358 United States v. Arthrex, Inc. (*Arthrex II*), 141 S. Ct. 1970, 1986 (2021).

359 *E.g.*, Ohio v. Yellen, 53 F.4th 983, 994 (6th Cir. 2022) (holding that where a plaintiff did not attempt "the uphill battle" of establishing that a statutory provision it claimed was unconstitutional was not severable, it lacked standing to litigate the issue because the only provisions of the statute that actually impacted the plaintiff would not be affected by a judicial finding of unconstitutionality); Budri v. Admin. Rev. Bd., U.S. Dep't of Lab., 858 F. App'x 117, 123 (5th Cir. 2021) (refusing to consider the merits of an objection to agency action based on allegedly unconstitutional removal protections based in part on an assertion that the only possible remedy would be severance).

to grant facial relief rather than as-applied relief comparable to what an agency itself could grant,[360] or may preclude judicial relief altogether.[361]

Consequently, there is no legal entitlement to broad judicial relief on a constitutional claim if a cognizable injury can be otherwise redressed, which undermines the assertion that agencies' purported inability to issue court-like constitutional pronouncements renders administrative remedies inferior. As Judge Easterbrook explained when addressing arguments that presidential refusal to enforce unconstitutional statutes improperly precludes judicial resolution of constitutional questions: "Constitutional decisions are byproducts of real cases, not the *raison d'être* of the judicial system. . . . If the political branches arrange their affairs so as to eliminate occasions for litigation, neither the courts nor the people have a complaint."[362] The type of practical as-applied relief that agencies can grant may therefore be no less effective at remedying alleged constitutional harms than the relief a court would likely grant.

But even if the potential precedential value or breadth of court rulings mattered, it is unclear that agency adjudication would always be inferior. Although agency rulings are less likely to lead to judicial precedents impacting future court cases and other agencies,[363] agencies typically have nationwide jurisdiction[364] and must provide "reasoned explanation[s]" for departing from their precedents.[365] In this respect, their precedents may provide greater certainty in future agency proceedings than district court rulings that do not bind even the same judge.[366] In addition, because agencies are not subject to Article III constraints such as standing, they may be able to grant relief in response to constitutional claims by litigants who cannot seek relief in court because their claims are not justiciable.[367]

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360 *E.g.*, Sabri v. United States, 541 U.S. 600, 608–09 (2004) (stating that "facial challenges are best when infrequent" because they "call for relaxing familiar requirements of standing"); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 477–78 (1995) (facial invalidation is disfavored "when a narrower remedy will fully protect the litigants").

361 *E.g.*, California v. Texas, 141 S. Ct. 2104, 2115 (2021) (refusing to declare a statutory provision that did not directly impact the parties before the Court unconstitutional because judicial "[r]emedies . . . ordinarily 'operate with respect to specific parties'" and "[i]n the absence of any specific party, they do not simply operate 'on legal rules in the abstract.'" (quoting Murphy v. NCAA, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring))).

362 Easterbrook, *supra* note 121, at 927 (footnote omitted).

363 *See supra* notes 354–56 and accompanying text.

364 Loc. 926, Int'l Union of Operating Eng'rs v. Jones, 460 U.S. 669, 681 (1983).

365 Honeywell Int'l, Inc. v. Nuclear Regul. Comm'n, 628 F.3d 568, 579 (D.C. Cir. 2010) (quoting Hatch v. FERC, 654 F.2d 825, 834 (D.C. Cir. 1981)).

366 Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011).

367 Fund Democracy, LLC v. SEC, 278 F.3d 21, 27 (D.C. Cir. 2002) ("Because agencies are not constrained by Article III, they may permit persons to intervene in the agency proceedings who would not have standing to seek judicial review of the agency action."); Wilcox Elec., Inc. v. FAA, 119 F.3d 724,

Moreover, when constitutional challenges implicate third-party rights, judicial declarations of unconstitutionality, even by appellate courts, may be of limited benefit vis-à-vis the immediate remedial action an agency can take, because they cannot ordinarily bind nonparties. For example, the challenge to ALJ removal protections in *Axon* potentially implicated ALJ tenure rights, since courts typically remedy an unconstitutional removal protection by severing it.[368] But if the district court hearing this challenge had severed the statutory removal protections for the FTC's ALJs, the ruling would have been close to meaningless even if affirmed on appeal. Specifically, if the FTC were to subsequently discharge an ALJ, any challenge to the dismissal would be heard by the MSPB[369] and reviewed in the Federal Circuit,[370] which would not be bound by a district court or regional circuit court ruling. In contrast, had the FTC considered the constitutional claim meritorious, or simply wanted to reduce the associated legal hazards, it could have chosen to conduct proceedings without the use of ALJs, as the APA allows it to do.[371] By doing so, the FTC would have immediately and conclusively spared the *Axon* petitioner from what the petitioner had described as the "constitutional injury" of being "subject[ed] to an . . . enforcement proceeding by an unaccountable ALJ."[372]

4. Administrative Collateral Review Mechanisms Can Protect a "Right Not to Stand Trial"

A closer question arises from *Axon*'s analogy of structural constitutional claims to invocations of immunity doctrines implying a "'right[] not to stand trial' or face other legal processes,"[373] which support immediate appeal under the collateral order doctrine from interlocutory district court orders "treated as 'final'" on practical grounds.[374] Thus, for example, a state claiming a district court wrongly denied dismissal based on Eleventh Amendment immunity need not litigate through to a merits

727 (8th Cir. 1997) ("Agencies, of course, are not Article III creatures, and Congress can confer standing to participate in agency proceedings on anyone it wishes.").

368 Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2208 (2020).

369 5 U.S.C. § 7521(a) (giving the MSPB authority to adjudicate ALJ removals); 5 C.F.R. § 1201.142 (2024) (allowing ALJs to initiate MSPB proceedings to challenge removal); Elgin v. Dep't of the Treasury, 567 U.S. 1, 11–12 (2012) (holding that district courts lack jurisdiction over federal employee removal disputes subject to the MSPB's jurisdiction).

370 28 U.S.C. § 1295(a)(9).

371 5 U.S.C. § 556(b)(1)–(2).

372 Brief for Petitioner at 36, Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023) (No. 21–86).

373 *Axon*, 143 S. Ct. at 904 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

374 Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994).

ruling before seeking appellate review.[375] It has a cognizable right not to proceed further in district court before appealing because "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals," and this right would be "effectively lost" if the state could not immediately appeal a refusal to dismiss.[376] *Axon* similarly reasoned that litigating the merits before an agency alleged to lack constitutional authority to decide a controversy creates a "here-and-now" injury that delayed judicial review cannot fully remedy, implying a "right[] 'not to stand trial'" that would be "effectively lost" if a litigant could seek judicial redress only *after* litigating the merits before the agency.[377]

This Section argues that, notwithstanding *Axon*'s reference to the collateral order doctrine, *Axon* does not categorically excuse exhaustion of structural and other constitutional claims asserting a "right not to stand trial" before an agency. Language in *Axon* itself casts doubt on whether the Court viewed its discussion as a holding recognizing an absolute right to immediate relief for structural constitutional claims. But even if there were such a right, it could be protected through procedural rules at many agencies, allowing for prompt resolution of threshold legal questions, together with the general practice by appellate courts of considering collateral order appeals from agency adjudications. Such a procedure may preserve many benefits of exhaustion without unduly impairing any "right not to stand trial." The *Axon* Court did not confront, address, or reject this possibility because the government did not raise this argument and instead implied that no such procedure was available.

Preliminarily, it is unclear that *Axon* intended its reference to a "right not to stand trial" to be a holding that immediate review must be available for structural challenges to an administrative adjudication scheme, as it is for Eleventh Amendment claims and other recognized grounds for immediate appeal. *Axon* described this reasoning as merely a "nearer analogy" to such claims rather than deeming the case before it an identical situation, and added that "[n]othing we say today portends newfound enthusiasm for interlocutory review."[378] This language suggests that the Court did not intend to extend its existing collateral order jurisprudence, under which rejection of claims that adjudicators should be disqualified, a tribunal lacks jurisdiction, or a suit was brought in an improper forum

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375 P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 141 (1993).

376 *Id.* at 144–46 (internal quotation marks omitted) (first quoting *In re* Ayers, 123 U.S. 443, 505 (1887); and then quoting *Mitchell*, 472 U.S. at 526).

377 *Axon*, 143 S. Ct. at 904 (internal quotation marks omitted) (quoting *Mitchell*, 472 U.S. at 526).

378 *Id.*

are not immediately appealable.[379] Moreover, the Court previously held that some structural violations, including removal restrictions like those in *Axon* alleged to be unconstitutional, do not necessarily deprive an agency of authority.[380] They thus would presumably not support a claim to an absolute "right not to stand trial" before the agency. In fact, the Court had previously rejected an argument that exhaustion of a claim that Congress could not have constitutionally authorized an enforcement proceeding should not be required based on assertions that "the mere holding of the prescribed administrative hearing would result in irreparable damage."[381] It is possible, given *Axon*'s qualifications concerning its collateral order analysis and this existing jurisprudence, that *Axon* simply intended for this consideration to bear some weight in what it characterized as a type of balancing test,[382] rather than recognizing an absolute "right not to stand trial" in an unconstitutionally structured administrative process.

But even if *Axon* somehow recognized such a right, this right can still be vindicated when litigants must first seek relief administratively. It is only necessary that the agency provide a means for conclusively resolving and granting relief on such collateral threshold questions before proceeding with merits litigation. Specifically, agency rules must permit dispositive motions practice, expressly authorize stays pending resolution of dispositive motions (or give presiding officers sufficient discretion over scheduling to permit them to postpone merits proceedings until resolution of these motions), and must either provide for initial consideration of collateral legal issues by an agency official able to immediately grant relief, or a procedure for interlocutory appeals to such an official.[383] Many agencies that regularly conduct adjudications have adopted such rules, including the Department of Housing and Urban

379 Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 500 (1989); Van Cauwenberghe v. Biard, 486 U.S. 517, 521–22 (1988); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378 (1981); Catlin v. United States, 324 U.S. 229, 236 (1945).

380 Collins v. Yellen, 141 S. Ct. 1761, 1787 (2021).

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

382 *Axon*, 143 S. Ct. at 900 (explaining that the *Thunder Basin* factors help to determine if exhaustion is required even when they "point in different directions"); *id.* at 911 (Gorsuch, J., concurring in judgment) (describing the *Thunder Basin* test as a "multi-factor balancing test").

383 This official is often the agency head. For example, heads of department are the only agency officials potentially able to cure constitutionally defective inferior officer appointments by making a new appointment, U.S. CONST. art. II, § 2, cl. 2, and the APA only permits agency heads to preside over evidentiary hearings in lieu of ALJs enjoying multiple layers of removal protection, 5 U.S.C. § 556(b)(1)–(2).

Development, the Department of Education, the Federal Deposit Insurance Corporation, and the FCC[384] to name just four.

A litigant asserting a "right not to stand trial" before an agency with such rules can move for a ruling on the issue and a stay of proceedings pending a decision and, if an initial adjudicator denies relief in a proceeding with multiple levels of administrative review, request internal interlocutory review. In *Eldridge*, the Supreme Court indicated that the collateral order doctrine can apply to agency rulings that are final in a "practical" sense,[385] and all circuits have permitted appeals of interlocutory agency rulings under the doctrine.[386] So if an agency denies interlocutory review or a stay pending review of a constitutional challenge asserting a "right not to stand trial" before the agency, or conclusively rules against the litigant on the claim, thus requiring it to proceed on the merits, the litigant could potentially obtain an immediate judicial ruling on the constitutional claim.[387] For example, the Puerto Rico Ports Authority was able to benefit from motion to dismiss, summary judgment, and stay

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384 12 C.F.R. §§ 308.13, 308.28(a)–(b), (d), 308.29(b) (2024) (FDIC); 24 C.F.R. §§ 26.2(c)(4)–(7), 26.11(d), 26.16(f)–(g), 26.23(b), 26.27 (2024) (HUD); 34 C.F.R. §§ 668.88(e)–(f), 668.99(a), (f) (2024) (Department of Education); 47 C.F.R. §§ 1.45(d), 1.102(b)(3), 1.251, 1.301 (2024) (FCC).

385 Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976) (internal quotation marks omitted) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

386 Rhode Island v. EPA, 378 F.3d 19, 25 (1st Cir. 2004) ("[E]very circuit to have considered the question to date has determined . . . that the collateral order doctrine applies to judicial review of administrative determinations." (first citing Osage Tribal Council v. U.S. Dep't of Lab., 187 F.3d 1174, 1179 (10th Cir. 1999); then citing Meredith v. Fed. Mine Safety & Health Rev. Comm'n, 177 F.3d 1042, 1050–51 (D.C. Cir. 1999); then citing Carolina Power & Light Co. v. U.S. Dep't of Lab., 43 F.3d 912, 916 (4th Cir. 1995); then citing Jim Walter Res., Inc. v. Fed. Mine Safety & Health Rev. Comm'n, 920 F.2d 738, 744 (11th Cir. 1990) (per curiam); then citing Donovan v. Occupational Safety & Health Rev. Comm'n, 713 F.2d 918, 922–23 (2d Cir. 1983); then citing Donovan v. Oil, Chem. & Atomic Workers Int'l Union, 718 F.2d 1341, 1344–45 (5th Cir. 1983); and then citing Marshall v. Occupational Safety & Health Rev. Comm'n, 635 F.2d 544, 548 (6th Cir. 1980)); Donovan v. Allied Indus. Workers of Am., 760 F.2d 783, 785 & n.5 (7th Cir. 1985) (citing, inter alia, Donovan v. Int'l Union, Allied Indus. Workers, 722 F.2d 1415 (8th Cir. 1983)); Marshall v. Oil, Chem. & Atomic Workers Int'l Union, 647 F.2d 383 (3d Cir. 1981)); *see also* Hale v. Norton, 476 F.3d 694, 698 (9th Cir. 2007) (holding by additional circuit that the "doctrine applies to administrative determinations"); King-Roberts v. USPS, No. 98–3370, 1999 WL 618121, at *2 (Fed. Cir. Aug. 13, 1999) (same).

387 The Supreme Court has also indicated that the All Writs Act permits a court of appeals with jurisdiction to review an agency's final decisions to issue appropriate injunctions during the pendency of agency proceedings to maintain the status quo. FTC v. Dean Foods Co., 384 U.S. 597, 603–04 (1966). Therefore, in appropriate circumstances, a litigant might also be able to obtain a court order imposing an immediate stay on agency proceedings or requiring that these proceedings be expedited where an agency refuses to consider a constitutional claim implying a "right not to stand trial" before proceeding on the merits. *Cf.* Maxon Marine, Inc. v. Dir., Off. of Workers' Comp. Programs, 39 F.3d 144, 147 (7th Cir. 1994) (noting that where a litigant asserted that the agency had engaged in "prejudicial . . . administrative foot-dragging" and an ALJ had issued a ruling denying a request for expedited proceedings for which no further review within the agency was immediately available, a court of appeals might have been able to exercise jurisdiction and grant relief under the All Writs Act).

proceedings authorized by agency rules to obtain a ruling on a threshold Eleventh Amendment objection to three FMC proceedings prior to litigating the merits,[388] and after the FMC rejected its Eleventh Amendment argument, the Authority successfully appealed to the D.C. Circuit under the collateral order doctrine.[389]

Such a procedure would effectively protect any asserted "right not to stand trial," notwithstanding the need to first object administratively to the agency's exercise of authority. By analogy, the collateral order doctrine requires that a district court first refuse to dismiss in a "conclusive" order,[390] and thus does not entitle litigants to avoid initially seeking dismissal from the very tribunal alleged to lack authority.

By potentially allowing for immediate consideration of a constitutional claim by both the agency and a court before other issues are resolved, this process may attenuate one benefit of exhaustion, which is the avoidance of piecemeal litigation.[391] However, other benefits of exhaustion may still apply. As explained in greater detail in Section III.B, *infra*, exhaustion also prevents improper "sandbagging" by litigants who object to an agency ruling on judicial review based on grounds that they failed to raise before the agency, and allows an agency to take early corrective action, apply its expertise to intertwined statutory or regulatory issues, or develop a record for judicial review. These benefits would still apply even if litigants could obtain immediate court review of an agency's interlocutory ruling on a constitutional claim.

Axon does not foreclose the possibility that an administrative process can adequately protect any "right not to stand trial" in this manner, because the government did not make this argument in *Axon* and the *Axon* Court therefore did not address it. Although the FTC and SEC had adopted rules that authorize summary adjudication, stays, and interlocutory review by agency heads,[392] the government's brief did not reference these rules when describing these Agencies' administrative processes.[393] Instead, the only administrative relief the government indicated was available would have required litigating the *merits* before these Agencies, which the government claimed could not provide relief on the constitutional claims, thereby forcing litigants to wait until judicial

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388 Odyssea Stevedoring of P.R., Inc., Nos. 02-08, 04-01, 04-06, 2006 FMC LEXIS 7, at *2–4 (Nov. 30, 2006), *rev'd and remanded sub nom.* P.R. Ports Auth. v. FMC, 531 F.3d 868 (D.C. Cir. 2008).

389 *P.R. Ports Auth.*, 531 F.3d at 870; *see also* Petitioner's Brief at 2, *P.R. Ports Auth.*, 531 F.3d 868 (No. 06-1407) (asserting jurisdiction pursuant to the collateral order doctrine).

390 Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 278 (1988).

391 McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

392 16 C.F.R. §§ 3.22(a)–(b), 3.23(b), 3.24 (2022) (FTC); 17 C.F.R. §§ 201.250(a), 201.400, 201.401 (2022) (SEC).

393 *Axon* Government Brief, *supra* note 7, at 4.

review of the agency's merits ruling before seeking relief on the constitutional claims.[394] In contrast, in *Thunder Basin*, the Court treated the availability of expedited review before the agency as a factor favoring the application of an implicit exhaustion mandate to a facial due process challenge to the statute establishing the administrative adjudication scheme.[395] *Axon* therefore does not preclude the possibility that even structural constitutional claims implicating a "right not to stand trial" might be adequately addressed through administrative adjudication schemes that allow for immediate relief on such claims prior to any merits litigation.

B. *The Benefits of Exhaustion Can Apply to Constitutional Claims*

Because agencies can resolve constitutional controversies[396] and offer meaningful relief on constitutional claims[397]—and are thus not a categorically inferior forum for resolving such claims—many of the justifications for exhaustion mandates can apply to these claims. In particular, exhaustion may allow agencies to take corrective action that avoids constitutional violations altogether, resolves controversies without court involvement, and prevents piecemeal litigation and improper "sandbagging" by litigants. Administrative exhaustion can also allow agencies to apply specialized knowledge to address statutory or regulatory issues intertwined with constitutional questions, and to create a helpful record for judicial review.

1. Resolving Controversies at an Early Stage

Courts recognize that exhaustion benefits agencies and courts by allowing agencies to take corrective action or otherwise resolve or narrow disputes before they reach the courts.[398] As explained in Section III.A.1, *supra*, when litigants raise constitutional claims administratively, agencies have an opportunity to utilize various procedural avenues for taking remedial action, and may do so based either on a formal constitutional ruling or by simply taking action to moot the issue and avoid its associated legal hazards.[399] By doing so, they may avoid constitutional violations in the first place or moot constitutional controversies at an early stage,

394 *See supra* notes 107–09 and accompanying text.

395 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 218 (1994).

396 *See supra* Part II.

397 *See supra* Section III.A.

398 *See supra* notes 55–59 and accompanying text.

399 *See supra* notes 206–23 and accompanying text.

thereby preventing or minimizing injury from any constitutional violation and avoiding the need to expend judicial and other resources on court litigation.

2. Avoiding Piecemeal Litigation and Improper "Sandbagging"

In the common scenario where litigants raise both constitutional and nonconstitutional claims or defenses,[400] exhaustion mandates can help to prevent inefficient piecemeal litigation and improper "sandbagging" by litigants who seek relief on new grounds in court after losing before the agency.[401] Administrative, judicial, and party resources may be conserved if the constitutional claims are brought in the same administrative forum that will adjudicate the nonconstitutional issues. If parties could instead bring constitutional claims in court rather than raising them before the agency that will decide the merits, the court may ultimately determine that a nonconstitutional issue that the agency could have resolved moots the constitutional claim, particularly given the judicial preference for avoiding unnecessary constitutional adjudication.[402] As the Supreme Court explained when it required exhaustion of a challenge to wartime price control laws on both constitutional and statutory grounds,

> the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the [Agency's] final performance of its function. When that has been done, it is possible that nothing will be left of appellant's claim, asserted both in that proceeding and in this cause, concerning which it will have basis for complaint.[403]

In addition, if issue exhaustion mandates do not apply to constitutional claims, litigants who try their luck before the agency and lose on nonconstitutional grounds can engage in abusive "sandbagging" by raising new constitutional objections for the first time on judicial review as grounds for vacating the agency's ruling.[404] They thereby deprive the agency of an opportunity to take timely corrective action that could avoid the need for a costly do-over.

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400 For example, the *Axon* petitioner raised a merits defense that it did not violate the antitrust laws the FTC sought to enforce against it. Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 899 n.1 (2023).

401 Sims v. Apfel, 530 U.S. 103, 109 (2000); McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

402 *Cf.* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 582 (1979) ("Before deciding the constitutional question, it [i]s incumbent on . . . courts to consider whether . . . statutory grounds might be dispositive."); Ohio v. Yellen, 53 F.4th 983, 991–92, 991 nn.4–5 (6th Cir. 2022) (holding that an agency's construction of a statute challenged on constitutional grounds mooted any constitutional concerns).

403 Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 772 (1947).

404 *See supra* note 61 and accompanying text.

The record in *Smith v. Board of Governors of the Federal Reserve System*,[405] which the Tenth Circuit decided a few months after *Axon*, demonstrates the potential for abuse and waste when parties do not exhaust constitutional claims concurrently with nonconstitutional arguments. *Smith* concerned a Federal Reserve Board enforcement action that the Board had referred to an ALJ for adjudication.[406] In subsequent administrative litigation spanning twenty-seven months,[407] the ALJ resolved multiple discovery disputes, issued a partial summary adjudication ruling, held a five-day trial involving hundreds of exhibits, and authored a 107-page recommended decision.[408] In addition, the Board considered a request for interlocutory appeal on a statutory question,[409] and later issued its own detailed merits opinion barring two bank employees from the banking industry because it found they had misused their employing bank's information for personal gain.[410]

Only in their opening brief in the Tenth Circuit, more than two and a half years after the Board assigned the matter to the ALJ, did the employees—who did not challenge the merits of the agency's ruling[411]—attack the constitutionality of the ALJ's two layers of removal protection and demand a remand for new "proceedings before an adjudicator accountable to the President."[412] In their reply brief they also raised an Appointments Clause objection to the ALJ for the first time.[413] The agency argued that had the petitioners made their objection to ALJ removal protections during the administrative process, the agency heads, who are not subject to multiple layers of removal protection,[414] could have provided relief by adjudicating the matter themselves rather than utilizing an ALJ.[415] The court sua sponte reached a similar conclusion with respect

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405 73 F.4th 815 (10th Cir. 2023).

406 Smith, No. 18-036-E-I, 2018 WL 7413311, at *6 (Fed. Rsrv. Bd. Dec. 11, 2018) (notice of intent to prohibit).

407 Administrative Record at R2–R12, *Smith*, 73 F.4th 815 (No. 21-9538).

408 *Id.* at R2–R29; Smith, No. 18-036-E-I, 2020 WL 13157336 (Fed. Rsrv. Bd. A.L.J. Apr. 13, 2020), *aff'd and modified*, 2021 WL 1590337 (Fed. Rsrv. Bd. Mar. 24, 2021), *aff'd*, 73 F.4th 815 (10th Cir. 2023).

409 Smith, No. 18-036-E-I, slip op. at 2, 2021 WL 1590337, at *1 (Fed. Rsrv. Bd. Mar. 24, 2021), *aff'd*, 73 F.4th 815 (10th Cir. 2023).

410 *Id.* at 53–54, 2021 WL 1590337, at *30.

411 Although they challenged the Board's statutory jurisdiction over the matter, the petitioners did not contest the Board's merits findings against them. Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 818 (10th Cir. 2023).

412 Petitioners' Opening Brief at 17, *Smith*, 73 F.4th 815 (No. 21-9538).

413 Petitioners' Corrected Reply Brief at 1–2, *Smith*, 73 F.4th 815 (No. 21-9538).

414 12 U.S.C. § 242 (making Federal Reserve Governors directly removable by the President for cause).

415 Brief for Respondent at 11–12, *Smith*, 73 F.4th 815 (No. 21-9538).

to the Appointments Clause challenge, noting the availability of interlocutory review by the Board, which could have granted immediate relief by appointing a new ALJ.[416] The court consequently refused to consider the petitioners' structural arguments on issue exhaustion grounds.[417] Had the court instead granted relief on the constitutional claims, a tremendous waste of resources might have resulted due to the employees' failure to administratively object to alleged constitutional injuries that the agency could have fully redressed before proceeding on the merits.

3. Applying Specialized Knowledge on Intertwined Nonconstitutional Issues

A common justification for administrative exhaustion mandates is the ability of an agency to apply specialized knowledge.[418] In this regard, exhaustion of constitutional claims may be beneficial because even matters that may appear at first glance to be abstract constitutional questions may be intertwined with nonconstitutional issues to which an agency can apply its "experience and informed judgment."[419] Such issues may determine whether a statutory or regulatory scheme raises a constitutional question in the first place, or whether an allegedly unconstitutional statutory provision is severable in a manner precluding relief or avoiding the need to address the constitutional claim. Courts that mechanically excuse exhaustion of constitutional claims that they assume have nothing to do with agency expertise may therefore short-circuit a process by which an agency with specialized knowledge may construe relevant statutes or regulations in a manner that facilitates the resolution of the constitutional claim.

Because some statutory or regulatory interpretation is often necessary to determine if a statutory or regulatory scheme raises constitutional concerns in the first place, an agency's intimate familiarity

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

417 *Id.* at 822–23 (distinguishing *Carr v. Saul*, 141 S. Ct. 1352 (2021)).

418 McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

419 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Despite recently emphasizing the judiciary's comparative expertise in statutory interpretation in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), the Supreme Court quoted with approval to earlier precedents noting that agencies can apply a relevant "body of expertise and informed judgment" when interpreting statutes and that their views on the issue are therefore entitled to "respect." *Loper Bright*, 144 S. Ct. at 2259, 2265 (internal quotation marks omitted) (first quoting *Skidmore*, 323 U.S. at 139–140; and then quoting Edwards' Lessee v. Darby, 12 U.S. (12 Wheat.) 206, 210 (1827)).

with the statutes and regulations it administers[420] may be highly relevant to the adjudication of a constitutional claim. In fact, the Supreme Court has held that resolving facial challenges to statutes requires consideration of "any limiting construction that a[n] . . . enforcement agency has proffered."[421] And in *Elgin*, it specifically noted that when a "challenged statute [is] one that the [Agency] regularly construes, . . . its statutory interpretation could alleviate constitutional concerns."[422] Consequently, the familiarity of agency personnel with the statutes their agency administers and the regulations it has promulgated may be relevant to adjudicating even seemingly "generic" structural challenges or facial challenges to these authorities.

For example, notwithstanding *Carr*'s assertion that the "Petitioners raise[d] constitutional claims about which SSA ALJs have no special expertise,"[423] resolving their Appointments Clause challenge to these ALJs would have first required construing SSA regulations and thus potentially implicated the ALJs' expertise. Specifically, determining whether an officer is subject to the Appointments Clause initially requires determining if that officer exercises "significant authority,"[424] necessitating an assessment of exactly what authority the officer exercises. *Lucia* made this assessment with respect to SEC ALJs by referencing government-wide provisions of the APA generally governing the role of ALJs at agencies that conduct formal proceedings on the record,[425] as well as related SEC regulations and administrative precedents.[426] In contrast to these SEC proceedings, SSA ALJ hearings are informal proceedings governed by agency-specific regulations[427] that give SSA ALJs somewhat different authority than the SEC ALJs whose status was at issue in *Lucia*.[428] The SSA is presumed to have a "nuanced

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420 United States v. Mead Corp., 533 U.S. 218, 227–28 (2001) (noting agencies' recognized expertise in construing the statutes they administer); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) ("Generally, agencies have a nuanced understanding of the regulations they administer." (internal quotation marks omitted) (quoting Brief for Respondent at 33, *Kisor*, 139 S. Ct. 2400 (No. 18-15))).

421 Ward v. Rock Against Racism, 491 U.S. 781, 795–96 (1989) (internal quotation marks omitted) (quoting Hoffman Ests. v. Flipside, Hoffman Ests., 455 U.S. 489, 495 n.5 (1982)).

422 Elgin v. Dep't of the Treasury, 567 U.S. 1, 23 (2012).

423 Carr v. Saul, 141 S. Ct. 1352, 1361 (2021).

424 Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

425 5 U.S.C. §§ 554(a), (c)(2), 556, 557; Lucia v. SEC, 585 U.S. 237, 248 (2018) (citing 5 U.S.C. § 556(c)(4)).

426 *Lucia*, 585 U.S. at 248–51.

427 Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73138, 73139–40 (Nov. 16, 2020) (to be codified at 20 C.F.R. pts. 404, 408, 411, 416, 422).

428 An association of current and former SSA ALJs contended in an amicus brief that the distinct SSA hearing process made *Lucia* inapplicable to SSA ALJs. *See* Brief of Amicus Curiae Collective of

understanding" of such agency rules defining its adjudicators' authority,[429] and therefore arguably had specialized expertise relevant to addressing a threshold legal question vital to adjudicating the structural constitutional claim raised by the *Carr* petitioners.

Even when a statute challenged on constitutional grounds is not one that an agency is responsible for implementing, the statute's interaction with *another statute* the agency administers may be relevant to whether a constitutional concern arises in a particular case. Two recent cases illustrate the potential relevance of such interactions even in the context of seemingly generic structural constitutional challenges to ALJ removal protections in government-wide federal civil service laws. In *Smith*, the petitioners claimed that these protections improperly sheltered Federal Reserve Board ALJs from presidential control.[430] But the Board argued that the Federal Reserve Act exempts its employees from otherwise-applicable civil service laws, allowing it to remove ALJs at will,[431] and that its proceedings therefore did not raise a constitutional question at all.[432] Conversely, in *Decker Coal Co. v. Pehringer*,[433] the Ninth Circuit sua sponte rejected a similar challenge to removal protections for Department of Labor ALJs, partly because it concluded that the Agency's organic act did not require it to use ALJs and thus the executive branch could simply elect not to use tenure-protected adjudicators,[434] which was an argument the Agency itself had not raised.[435] But as a subsequent court that had the benefit of the Agency's briefing on the issue explained, the statutory provision that *Decker Coal* cited had expired several decades earlier.[436] A categorical rule that structural or other "generic" constitutional challenges need never be exhausted would overlook such statutory interactions that may affect the constitutional analysis, which agencies are well positioned to consider.

Social Security Administration Administrative Law Judges in Support of Neither Party at 3, 5, 13, *Carr*, 141 S. Ct. 1352 (2021) (Nos. 19-1442, 20-105).

429 Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019).

430 Petitioners' Opening Brief at 17, Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815 (10th Cir. 2003) (No. 21-9538) (citing 5 U.S.C. § 7521(a)).

431 Brief for Respondent at 22 n.10, *Smith*, 73 F.4th 815 (No. 21-9538) (citing 12 U.S.C. § 244).

432 *Id.* at 23–25, 25 n.12.

433 8 F.4th 1123 (9th Cir. 2021).

434 *Id.* at 1133–34 (citing 30 U.S.C. § 932a).

435 The government conceded that strict ALJ removal protections would be unconstitutional and argued that the court should therefore interpret "good cause" for removal under 5 U.S.C. § 7521(a) broadly. Brief for the Federal Respondent at 26–44, *Decker Coal*, 8 F.4th 1123 (No. 20-71449).

436 K & R Contractors, LLC v. Keene, 86 F.4th 135, 148 (4th Cir. 2023).

In addition, the judicial preference for severing unconstitutional statutory provisions[437] necessitates analysis of the relevant statutory scheme, which helps to determine what relief may be available and can also provide a basis for avoiding constitutional questions altogether.[438] This analysis determines if a statute challenged on constitutional grounds can (and was presumably intended to) function without the allegedly unconstitutional provision(s).[439] It also addresses—where a constitutional violation results from "a number of statutory provisions that, working together, produce a constitutional violation"[440]—which provision(s) should be severed while doing the least damage to congressional intent.[441]

This "elusive inquiry"[442] into what "Congress, faced with the limitations imposed by the Constitution, would have preferred"[443] would appear to be precisely the type of complex statutory issue over which courts assume agencies that implement a statute (and may have even participated in its development) are likely to have specialized knowledge.[444] Agencies' institutional knowledge in this regard may be especially helpful given the self-proclaimed institutional limitations of "courts [that] are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent" as to severance,[445] with jurists often reaching conflicting conclusions. For example, in *United States v. Arthrex, Inc.*,[446] the Supreme Court disagreed with the Federal Circuit on which of two statutory provisions to sever in order to remedy a constitutional violation caused by the interaction of two different acts of Congress. The Federal Circuit determined that a provision of the Patent and Trademark Office Efficiency Act making Administrative Patent Judges ("APJs")

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437 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 509–10 (2010).

438 *See supra* notes 358–59 and accompanying text.

439 *Free Enter.*, 561 U.S. at 509.

440 *Id.*

441 United States v. Booker, 543 U.S. 220, 258–59 (2005).

442 INS v. Chadha, 462 U.S. 919, 932 (1983).

443 Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2209 (2020).

444 Barnhart v. Walton, 535 U.S. 212, 222 (2002) (deferring to an agency's statutory construction due to "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); Miller v. Youakim, 440 U.S. 125, 144 (1979) ("'[T]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute.' Administrative interpretations are especially persuasive [if] the agency participated in developing the provision." (citations omitted) (quoting Youakim v. Miller, 425 U.S. 231, 235–36 (1976) (per curiam))).

445 Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2350 (2020).

446 (*Arthrex II*), 141 S. Ct. 1970 (2021).

subject to government-wide civil service removal protections[447] should be severed.[448] The Supreme Court instead held that a provision in the America Invents Act allowing APJs appointed by the Secretary of Commerce to render final decisions for the USPTO[449] should be severed.[450] The lack of judicial unanimity over which provision to sever suggests that the USPTO, which had sought the personnel reforms adopted by the Patent and Trademark Office Efficiency Act[451] and was consulted when Congress drafted the America Invents Act,[452] may have had unique and relevant specialized knowledge.[453] Administrative exhaustion of constitutional claims gives agencies the opportunity to apply such institutional familiarity with nonconstitutional issues relevant to adjudication of constitutional claims.

4. Developing a Record for Review

The judicial assertion that exhaustion benefits courts by "produc[ing] a useful record for subsequent judicial consideration"[454] also holds true for many constitutional claims, because factual issues may impact resolution of various constitutional issues, including structural or facial constitutional challenges. For example, an appellate court held that "administrative proceedings are a more suitable venue" for initially

447 Pub. L. No. 106-113, sec. 4713, § 3, 113 Stat. 1501, 1501A-577 (1999) (codified at 35 U.S.C. § 3(c)) (making USPTO employees "subject to the provisions of title 5, United States Code, relating to Federal employees"); *see also* 5 U.S.C. § 7513(a) (permitting adverse employment actions against federal employees "only for such cause as will promote the efficiency of the service").

448 Arthrex, Inc. v. Smith & Nephew, Inc. (*Arthrex I*), 941 F.3d 1320, 1338 (Fed. Cir. 2019), *vacated and remanded sub nom.* United States v. Arthrex, Inc. (*Arthrex II*), 141 S. Ct. 1970 (2021).

449 Leahy–Smith America Invents Act, Pub. L. No. 112-29, § 7, 125 Stat. 284, 313 (2011) (codified at 35 U.S.C. § 6).

450 *Arthrex II*, 141 S. Ct. at 1987.

451 1 R. CARL MOY, MOY'S WALKER ON PATENTS § 2:22 (4th ed. 2023).

452 Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435, 437–38 (2012).

453 The USPTO did not have an opportunity to apply any specialized knowledge to the issue because the Appointments Clause challenge was not raised administratively. *Arthrex I*, 941 F.3d at 1326. The Federal Circuit indicated that an issue exhaustion mandate applied and would have ordinarily meant that the unexhausted argument had been waived, *id.*, but chose to exercise the discretion available to reviewing courts to consider waived structural constitutional arguments. *Id.* at 1326–27; *see also supra* note 79. Although the government sought certiorari on the waiver issue, Memorandum for the United States at 7, *Arthrex II*, 141 S. Ct. 1970 (No. 19-1458) (listing the third question presented as "[w]hether the court of appeals in *Arthrex* erred by adjudicating an Appointments Clause challenge that had not been presented to the agency"), the Supreme Court declined to consider the question, Arthrex, Inc. v. Smith & Nephew, Inc., 141 S. Ct. 551, 551 (2020) (granting certiorari only on the first two questions).

454 McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

resolving a Spending Clause challenge to the Department of Education's interpretation of a statute that allegedly compelled a state to expend its own funds.[455] It reasoned that agency proceedings "will allow for fact-intensive inquiries related to educational finance, the agency's area of expertise."[456]

Structural claims, which courts often presume are "generally ill suited" for administrative resolution,[457] may also present various factual questions that can potentially benefit from the development of a relevant record in proceedings before the agency. For example, relief for unconstitutional removal protections is available only to litigants who make a showing that "the unconstitutional removal provision inflicted harm."[458] Similarly, whether constitutionally unauthorized action was subsequently ratified is a "case-specific factual . . . question[]."[459] Assessing compliance with the Appointments Clause often requires resolution of factual questions concerning the manner in which an inferior officer was appointed.[460] And resolution of separation of powers claims may rest on inferences about the practical impact of challenged statutes on executive branch officials or the impact of these officials' actions on regulated entities.[461] An agency may therefore be able to develop a record helpful to

455 Connecticut v. Duncan, 612 F.3d 107, 114 (2d Cir. 2010).

456 *Id.*

457 Carr v. Saul, 141 S. Ct. 1352, 1360 (2021).

458 Collins v. Yellen, 141 S. Ct. 1761, 1789 (2021).

459 Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2208 (2020).

460 *See, e.g.*, Rodriguez v. Dep't of Veterans Affs., 8 F.4th 1290, 1308–09 (Fed. Cir. 2021) (refusing to consider an Appointments Clause objection because "Mr. Rodriguez has not made a record that enables us to determine [the issue]." "In particular, Mr. Rodriguez failed to offer evidence as to how the Board's administrative judges generally, and the administrative judge in this case in particular, were appointed."); Timbervest, LLC, Investment Advisers Act Release No. 4096, Investment Company Act Release No. 31652, 111 SEC Docket 3577, 3577, 2015 WL 3398239, at *1 (May 27, 2015) (ordering discovery concerning how ALJs were appointed in connection with an Appointments Clause challenge), *vacated per stipulation*, Investment Advisers Act Release No. 5093, 2018 WL 6722760 (Dec. 21, 2018).

461 *E.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 504 (2010) (reasoning that control over an agency's budget does not provide sufficient control over agency officers protected from at-will removal); Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1338, 1339 (D.C. Cir. 2012) (holding that administrative adjudicators were noninferior officers partly because they regulate a bilateral monopoly in which "the range of possible market prices is likely to be very wide" and "billions of dollars and the fates of entire industries can ride on [their] decisions" (internal quotation marks omitted) (quoting SoundExchange, Inc. v. Libr. of Cong., 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring))).

subsequent judicial resolution of structural disputes,[462] particularly since any factual inquiry is likely to focus on the *agency*'s own processes.[463]

Even facial challenges to statutes are often adjudicated based on scientific, economic, or other factual considerations,[464] and resolution of various other constitutional issues often requires some factfinding.[465] Thus, an early Supreme Court opinion concerning exhaustion of facial and as-applied constitutional claims expressed concern that absent exhaustion, "important and difficult constitutional issues would be decided devoid of factual context."[466] Allowing an agency with expertise or relevant experience to develop an appropriate record may therefore facilitate judicial review. It is thus hardly surprising that in *Elgin*, the Supreme Court reasoned that despite an agency's refusal to render a decision on a facial constitutional challenge to a statute, its ability to create a record on the issue supported requiring exhaustion.[467]

IV. Determining Whether Constitutional Claims Must Be Exhausted

Given the lack of a binary dichotomy between courts that can effectively address constitutional claims and agencies supposedly unable to do so, courts should not mechanically relieve litigants bringing such claims from otherwise-applicable exhaustion mandates. Instead, courts

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462 *E.g.*, Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1137 (9th Cir. 2021) (noting that "factual development" was necessary to assess harm from removal restrictions and denying relief where no evidence of harm was presented in the agency adjudication under review); *Timbervest*, 111 SEC Docket 3577, 2015 WL 3398239, at *1 (ordering discovery to facilitate resolution of an Appointments Clause challenge).

463 *E.g.*, Cmty. Fin. Servs. Ass'n of Am. v. CFPB, 51 F.4th 616, 633 (5th Cir. 2022) (denying relief because "the record before us plainly fails to demonstrate any nexus between [the challenged agency action and] the President's purported desire to remove" an agency official who was unconstitutionally protected from removal), *rev'd and remanded on other grounds*, 601 U.S. 416 (2024).

464 *E.g.*, Gonzales v. Carhart, 550 U.S. 124, 161–67 (2007) (rejecting a facial challenge to statutory restrictions on abortion based in part on evidence presented in district court of "medical uncertainty" over whether the restrictions created "significant health risks"); United States v. Morrison, 529 U.S. 598, 614 (2000) ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial . . . question." (internal quotation marks omitted) (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995))); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 132 (1992) (relying on testimony from an evidentiary hearing concerning how legislation was construed and implemented in practice in order to resolve a facial challenge).

465 Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislation Fact-Finding*, 84 IND. L.J. 1, 5 (2009) (noting that factual considerations "underlie most constitutional decision making"); Gelpe, *supra* note 119, at 45 ("[I]f a statute is challenged as applied, facts are important, and the administrative remedy will probably help to develop the facts.").

466 W.E.B. DuBois Clubs of Am. v. Clark, 389 U.S. 309, 311–12 (1967) (per curiam).

467 Elgin v. Dep't of the Treasury, 567 U.S. 1, 19–21 (2012).

should apply a standard administrative exhaustion analysis. They thus should give effect to any express statutory or regulatory exhaustion mandate that might apply to the claim, and otherwise balance the standard factors used to determine if an implied or prudential exhaustion mandate applies based on how effectively the applicable administrative scheme can address the particular claim at issue.[468] As part of this process, courts would consider any impact the constitutional nature of a claim may have under the relevant statutory, regulatory, or jurisprudential criteria for requiring exhaustion. This framework would comport with holdings in cases like *Axon*, *Carr*, and *Eldridge* that involved a constitutional claim together with other compelling factors weighing against requiring exhaustion, without mechanically extending these holdings to other situations where the case for exhaustion is stronger. Instead, to the extent relevant to a standard exhaustion analysis, courts would consider an agency's willingness and ability to address constitutional claims, and whether (1) its rules facilitate early resolution of threshold objections to the administrative process, (2) nonconstitutional issues to which it can apply specialized knowledge might impact on the constitutional controversy, and (3) it can create a useful record for judicial review.

A. *Applicability of Express Exhaustion Mandates*

Courts determine if any express statutory or regulatory exhaustion mandate applies using regular canons of construction before considering whether a prudential or implied exhaustion mandate should apply.[469] If an expressly worded mandate applies to all claims, courts must apply it without regard to the constitutional nature of a claim. But if the mandate's applicability depends on characteristics of the claim or administrative scheme, factors such as whether a claim arises under the Constitution, as well as an agency's willingness or ability to grant relief on the claim, provide for immediate review of threshold legal questions, or develop an adequate record, may be relevant.

Some express exhaustion mandates, by their own terms, apply to all claims, including constitutional claims. For example, the statute at issue in *Clintwood Elkhorn* required taxpayers to administratively request a refund before suing, providing that absent such exhaustion, "*[n]o suit* . . .

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[468] Weinberger v. Salfi, 422 U.S. 749, 765 (1975) ("[T]he doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue.").

[469] McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." (citations omitted)); *cf.* Carr v. Saul, 141 S. Ct. 1352, 1358 (2021) ("*Where statutes and regulations are silent*, . . . courts decide whether to require [prudential] exhaustion . . . ." (emphasis added)).

shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed or collected."[470] The Court reasoned that because this provision is broadly worded,[471] it applies to suits seeking tax refunds "whatever the source of the cause of action"[472] and "plainly cover[ed]" a facial challenge to a tax statute based on the Export Clause.[473] In such situations, where an express exhaustion mandate in a statute or regulation[474] clearly applies to all claims and makes no exceptions, a court should proceed no further if the plaintiff has not exhausted a constitutional claim.[475] The Sixth and Fourth Circuits therefore erred by relying on *Axon* and *Carr*, which did not involve an express exhaustion requirement, to excuse issue exhaustion of constitutional claims for which agency rules lacking any exceptions expressly required exhaustion.[476]

The applicability of some express exhaustion mandates or codified exceptions to such mandates varies based on characteristics of a claim or administrative scheme. The constitutional, facial, or collateral nature of a claim and whether an agency can effectively address the particular type of claim at issue may therefore affect such a mandate's applicability. For example, *McNary* applied standard canons of construction to hold that a statute barring "judicial review of *a determination* respecting an application" absent exhaustion[477] did not mandate exhaustion of a collateral facial constitutional challenge (or other facial objections) to agency *procedures* if the challenger did not seek "review 'of a determination'" on a particular application.[478] Similarly, the Supreme Court construed statutory language referencing claims concerning "any question of law or fact under any law administered by the [Agency]" as not encompassing claims that "arise under the Constitution" rather than

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470 United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 7 (2008) (quoting I.R.C. § 7422(a)).

471 *Id.* (observing that the use of multiple "'any's' in one sentence [implies] that Congress meant the statute to have expansive reach").

472 *Id.* at 9.

473 *Id.* at 7–8.

474 Agency rules may impose mandatory exhaustion requirements. Darby v. Cisneros, 509 U.S. 137, 146–47 (1993).

475 Ross v. Blake, 578 U.S. 632, 639 (2016) ("[M]andatory language means a court may not excuse a failure to exhaust . . . . [M]andatory exhaustion statutes . . . establish mandatory exhaustion regimes, foreclosing judicial discretion.").

476 *See* K & R Contractors, LLC, v. Keene, 86 F.4th 135, 145 (4th Cir. 2023); Calcutt v. FDIC, 37 F.4th 293, 312 (6th Cir. 2022), *rev'd on other grounds*, 143 S. Ct. 1317 (2023).

477 8 U.S.C. § 1160(e)(1) (emphasis added).

478 McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 491–92 (1991) (emphasis omitted) (quoting 8 U.S.C. § 1160(e)(1)) ("'[D]etermination' describes a single act rather than . . . a practice or procedure employed in making decisions.").

under a statute administered by the agency.[479] Accordingly, an exhaustion mandate phrased in such terms would not apply to constitutional claims.

The particular phrasing of other express exhaustion mandates may make an agency's refusal or inability to consider or provide immediate relief on constitutional challenges, or to create a record facilitating meaningful judicial review, relevant to the mandate's applicability. For example, for purposes of statutes or regulations requiring litigants to exhaust "available" remedies,[480] no administrative remedy is "available" if responsible officials are "unable or consistently unwilling to provide any relief."[481] An agency's willingness to address constitutional challenges is therefore relevant to the applicability of such mandates to constitutional claims. Some agencies refuse to adjudicate facial constitutional challenges to statutes or other constitutional claims,[482] or have adopted procedural rules that do not provide access to decision-makers able to grant relief on some constitutional claims, as occurred in *Carr*.[483] In these or comparable situations, a requirement to exhaust "available" remedies would not apply to constitutional claims on which the agency will not or cannot grant relief. But the Supreme Court has refused to adopt a "mandatory" rule barring agencies from considering even facial challenges to statutes,[484] and some agencies have claimed authority to consider facial, structural, and other constitutional challenges.[485] In such cases, an administrative remedy is "available," and the applicable exhaustion mandate should apply. Moreover, even in court, litigants do not have an unqualified right to broad declarations of facial invalidity when more limited relief is adequate.[486] An agency's purported inability to "declare" statutes invalid therefore does not render administrative relief "unavailable," nor does it

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479 Johnson v. Robison, 415 U.S. 361, 367 (1974) (emphasis omitted) (first quoting 38 U.S.C. § 211(a) (1970); and then quoting Robison v. Johnson, 352 F. Supp. 848, 853 (1973)). In contrast to an exhaustion requirement, which delays judicial review of agency action until a litigant has exhausted administrative remedies, the statute in *Johnson* completely precluded judicial review of the claims that it referenced. *Id.* at 365.

480 8 U.S.C. § 1252(d)(1) (allowing judicial review of alien removal orders only if "the alien has exhausted all administrative remedies available to the alien as of right"); *see also* 42 C.F.R. § 402.21 (2024) (stipulating that a respondent assessed a penalty by the Centers for Medicare & Medicaid Services may seek judicial review "[a]fter exhausting all available administrative remedies").

481 Ross v. Blake, 578 U.S. 632, 643 (2016).

482 *See, e.g.*, *supra* notes 32, 84, 115 and accompanying text.

483 Carr v. Saul, 141 S. Ct. 1352, 1361 (2021).

484 *See* Elgin v. Dep't of the Treasury, 567 U.S. 1, 17 (2012).

485 *See supra* notes 162–68 and accompanying text.

486 United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 477–78 (1995).

make exhaustion "a pointless exercise"[487] as long as the agency can grant other adequate relief, such as dismissal of an enforcement proceeding.

Similarly, if a constitutional claim implicates a cognizable "right not to stand trial" before the agency, administrative relief may not be "available" if agency rules do not permit immediate review of threshold legal questions before merits litigation. But if an agency offers such review, administrative remedies are "available," and courts should therefore require exhaustion even when a party challenges the constitutionality of the administrative process itself.

In some situations, an exhaustion provision permits judicial review only of an agency's "final decision," as was the case with the statute at issue in *Eldridge*,[488] whose holding suggests that lack of an avenue for immediate relief on constitutional (or other) collateral attacks on the administrative process may effectively make an otherwise-interlocutory agency decision into a "final decision" eligible for immediate judicial review under such a statute. In *Eldridge*, where the respondent claimed that termination of his federal disability benefits without a predeprivation hearing violated due process and caused immediate hardship,[489] the Court deemed the termination itself to be a "final decision" because of the immediate burdens it imposed on the respondent pending any judicial review.[490] Therefore, the Court did not require pursuit of post-termination administrative relief before suing.[491] With respect to such claims separate from the merits that challenge the administrative process itself and implicate a cognizable "right not to stand trial," various agency actions may be "final" for purposes of an exhaustion mandate phrased in terms of finality if the agency does not provide an adequate mechanism for obtaining timely relief on the claim prior to the litigation of any merits issues.[492]

If an exhaustion mandate is not clearly worded, the general presumption that Congress prefers to subject agency action to meaningful judicial review favors constructions rendering the mandate inapplicable if

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487 Calcutt v. FDIC, 37 F.4th 293, 312–13 (6th Cir. 2022) (excusing exhaustion of a structural challenge to administrative penalty proceedings because even if the agency had vacated the penalty in response to a challenge to the constitutionality of agency heads' removal protections, "the removal restrictions would persist"), *rev'd on other grounds*, 143 S. Ct. 1317 (2023).

488 42 U.S.C. § 405(g) (1970) ("Any individual, after any final decision of the [Secretary] . . . may obtain a review of such decision by a civil action . . . .").

489 Mathews v. Eldridge, 424 U.S. 319, 325, 331 (1976).

490 *Id.* at 332.

491 *Id.* ("We conclude that the denial of Eldridge's request for benefits constitutes a final decision for purposes of § 405(g) jurisdiction . . . .").

492 *Cf. id.*; *see supra* text accompanying notes 392–94.

delayed judicial review might be inadequate.[493] This situation can arise if an adjudicatory scheme requires judicial review on an agency record but does not permit development of an adequate administrative record with respect to a constitutional claim. For example, in *McNary*, the applicable administrative scheme provided for only a limited record focused on individual merits rulings and therefore did not ensure an adequate record for a facial constitutional challenge to agency rules.[494] Similarly, if a constitutional claim concerns a cognizable "right not to stand trial" that would be lost if parties must first litigate the merits in an administrative process that lacks a mechanism for immediate relief on threshold collateral issues,[495] it may be appropriate to construe any statutory ambiguity against requiring exhaustion.

Lastly, where express exhaustion mandates incorporate exceptions for "extraordinary circumstances" or "reasonable grounds,"[496] and such exceptions have been construed to encompass futility or undue burden considerations,[497] an agency's refusal to consider constitutional claims or lack of a procedural mechanism for obtaining immediate relief on a cognizable "right not to stand trial" may implicate the exception. In the absence of such shortcomings, however, these exhaustion mandates should apply to constitutional claims.

B. *Applicability of Implied or Prudential Exhaustion Mandates*

When no statute or regulation expressly requires exhaustion, courts may still read implied exhaustion mandates into statutes creating comprehensive administrative review schemes, or they may impose judge-made prudential exhaustion requirements. In assessing whether a statute implicitly requires exhaustion of remedies, courts apply the *Thunder Basin* factors, assessing whether delayed judicial review would be inadequate as well as whether a claim is "wholly collateral" to the statutory scheme and falls outside an agency's competence and "expertise."[498] Similar considerations guide decisions on whether to require prudential exhaustion based on factors such as prejudice from delayed judicial review and an agency's ability to apply special expertise when resolving a claim.[499]

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493 McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

494 *Id.* at 496–97.

495 *See supra* Section III.B.4.

496 *E.g.*, 29 U.S.C. §§ 160(e), 210(a).

497 *See* cases cited *supra* note 74.

498 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994) (internal quotation marks omitted) (quoting Heckler v. Ringer, 466 U.S. 602, 618 (1984)).

499 McCarthy v. Madigan, 503 U.S. 140, 146–48 (1992).

In applying these tests to constitutional claims, certain characteristics of the claim or administrative scheme may be especially relevant to assessing whether an exhaustion requirement should be implied or imposed on prudential grounds—including (1) the agency's willingness to grant relief on constitutional claims, (2) the potential relevance of statutory or regulatory questions within the agency's expertise to resolving the controversy, (3) the ability to obtain immediate rulings on threshold legal questions implicating a cognizable "right not to stand trial," and (4) the utility of an agency record for judicial review. Courts should consider the impact of these characteristics on the *Thunder Basin* factors used to determine if a statute implicitly requires exhaustion or on the factors relevant to determining whether to require prudential exhaustion. Because both tests are balancing tests,[500] no single factor is necessarily dispositive. Additional factors unrelated to the constitutional nature of a claim may also be relevant to the analysis, such as whether an agency's adjudicative process is efficient, whether extreme hardship could result from delayed judicial review, or, with respect to prudential issue exhaustion, whether the agency's administrative processes are comparably adversarial to trial court proceedings.[501]

An agency's willingness to grant relief on constitutional claims is relevant to the implied exhaustion analysis under *Thunder Basin* because if the agency typically refuses to address constitutional issues in its administrative proceedings, such issues are likelier to be collateral to the relevant adjudication scheme and the agency is likelier to lack relevant "expertise."[502] Similarly, futility and lack of agency expertise weigh against requiring prudential exhaustion.[503] Thus, for example, *Carr* declined to require prudential issue exhaustion after considering factors such as agency guidance instructing adjudicators not to consider Appointments Clause challenges as well as procedural rules precluding direct

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500 Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 900 (2023) (noting that *Thunder Basin*'s test for implied preemption is relevant even "if the [*Thunder Basin*] factors point in different directions"); *id.* at 911 (Gorsuch, J., concurring in judgment) (describing the *Thunder Basin* test as a "multi-factor balancing test"); *McCarthy*, 503 U.S. at 146 (deciding whether to require prudential exhaustion requires courts to "balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion").

501 *See supra* notes 66–69 and accompanying text.

502 *See Thunder Basin*, 510 U.S. at 212–13. *But see* Elgin v. Dep't of the Treasury, 567 U.S. 1, 21–23 (2012). *Elgin* explained that even where the agency refused to adjudicate facial constitutional challenges to statutes, such a challenge was not entirely collateral to the administrative adjudication scheme where the agency could still have developed a relevant record for subsequent judicial review. 567 U.S. at 21–23.

503 *See McCarthy*, 503 U.S. at 146–48.

participation in adjudications by an official able to remedy unconstitutional appointments.[504]

The relevance of nonconstitutional issues, on which an agency may have specialized knowledge, to resolving a constitutional claim or an entire controversy also favors requiring exhaustion under the *Thunder Basin* test or the prudential exhaustion jurisprudence. In some cases, a statutory or regulatory question may determine whether a constitutional controversy arises in the first place, and as *Elgin* recognized, when a "challenged statute [is] one that the [Agency] regularly construes, . . . its statutory interpretation could alleviate constitutional concerns."[505] Thus, the claim in *Smith* that Federal Reserve Board ALJs unconstitutionally enjoy two layers of removal protection under government-wide civil service laws might have been resolved by application of the "informed judgment"[506] of the Board, which construes its organic act as making these laws inapplicable to its employees.[507] In other cases, a question of statutory interpretation may bear on severability. For example, in the *Arthrex* litigation, the Supreme Court and Federal Circuit reached very different conclusions on whether an Appointments Clause violation affecting USPTO officials should be remedied by severing a provision in one of two different patent acts, suggesting that the USPTO, which administered and contributed to the development of both statutes, may have had relevant institutional knowledge.[508] Elsewhere, the presence of both nonconstitutional and constitutional claims or defenses may allow a ruling on a nonconstitutional claim or defense to resolve a dispute without reaching the constitutional issue.[509]

These three types of nonconstitutional issues that can affect the resolution of controversies involving constitutional claims can mean that constitutional controversies are not "wholly collateral" or outside the agency's "competence and expertise" under the *Thunder Basin* test for implied exhaustion mandates. Since a key consideration in a prudential

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504 Carr v. Saul, 141 S. Ct. 1352, 1361–62 (2021).

505 *Elgin*, 567 U.S. at 23.

506 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

507 *See supra* note 431 and accompanying text; *see also* 12 U.S.C. § 244 (stating that Board employment "shall be governed solely by" the Federal Reserve Act); Rules Regarding Equal Opportunity, 66 Fed. Reg. 7703 (proposed Jan. 25, 2001) (to be codified at 12 C.F.R. pt. 268) ("Section 10(4) of the Federal Reserve Act (Act), 12 U.S.C. 244, provides that the 'employment, compensation, leave, and expenses' of Board employees is governed solely by that Act rather than by the laws governing federal employers generally.").

508 *See supra* notes 447–52 and accompanying text.

509 *Elgin*, 567 U.S. at 22–23. In *Elgin*, federal employees challenged their dismissals on constitutional grounds. *Id.* The Court noted that the Agency might uphold the dismissals on unrelated statutory grounds, thus avoiding the constitutional issue. *Id.*

exhaustion analysis is whether adjudication would benefit from an agency's specialized knowledge,[510] the potential relevance of statutes or regulations administered by the agency to the resolution of a controversy involving constitutional claims would similarly favor requiring prudential exhaustion.

Some constitutional claims challenge the administrative process itself, and thus potentially implicate a "right not to stand trial," as in *Axon* and *Eldridge*.[511] In such cases, the ability to obtain timely administrative relief on threshold legal questions may bear on the adequacy of delayed judicial review, which is relevant to both a *Thunder Basin* and prudential exhaustion analysis.[512] For example, in *Axon*, where the government asserted that the petitioner would have to first litigate the merits before the agency just to obtain judicial review of a claim that the agency was *constitutionally barred from deciding these merits*, the Court held that this factor weighed against requiring exhaustion.[513] Conversely, in *Smith*, the Tenth Circuit noted that the availability of interlocutory appeal to agency heads able to grant immediate relief on a structural constitutional claim supported requiring issue exhaustion.[514]

Lastly, because factual issues are often relevant to resolution of even facial or structural constitutional claims,[515] whether a constitutional claim may raise factual issues on which the agency can develop a record for subsequent judicial review may be relevant to both the *Thunder Basin* collaterality factor[516] and to assessing the relative benefits of requiring prudential exhaustion.[517] And if resolving a constitutional claim may require factual development, an agency's inability to create a relevant record may weigh against requiring exhaustion under either test if it precludes meaningful judicial review. For example, the Court in *Elgin*, applying *Thunder Basin*, held that a facial challenge to a statute was not "wholly collateral" to a statutory review scheme where the agency could develop a record relevant to subsequent judicial review, notwithstanding the agency's own refusal to pass on the constitutionality of statutes.[518]

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510 McCarthy v. Madigan, 503 U.S. 140, 145–46 (1992).

511 Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 903–04 (2023) (petitioner asserted a right not to litigate the merits before an ALJ with two layers of removal protection); Mathews v. Eldridge, 424 U.S. 319, 325 (1976) (claimant challenged the Agency's practice of providing a hearing only after terminating benefits).

512 *See Elgin*, 567 U.S. at 15–17; *McCarthy*, 503 U.S. at 146.

513 *Axon*, 143 S. Ct. at 903–05.

514 Smith v. Bd. of Governors of the Fed. Rsrv. Sys., 73 F.4th 815, 823 (10th Cir. 2023).

515 *See generally supra* Section III.B.4.

516 *See Elgin*, 567 U.S. at 19–21.

517 *McCarthy*, 503 U.S. at 145–46.

518 *Elgin*, 567 U.S. at 21–23.

Conversely, the Court in *McNary* held that because an administrative adjudication scheme lacked a mechanism for developing an adequate record for assessing facial challenges, requiring exhaustion of such challenges would preclude effective judicial review.[519] An agency's ability or inability to develop a relevant record on constitutional claims is therefore among the factors relevant to the nuanced analysis necessary to determine if litigants must exhaust such claims.

Conclusion

Axon Enterprise, Inc. v. FTC and similar rulings declining to require administrative exhaustion of constitutional claims often use broad language that disparages agencies' ability to address such claims, implying a stark dichotomy between courts that can effectively do so and agencies that cannot. The Supreme Court has never held outright that agencies cannot resolve constitutional challenges, but these cases' broad language might imply that exhaustion of such claims is categorically futile and therefore should generally be excused.

The reality is far more nuanced. Agencies often have extensive experience comparable to many courts in addressing the constitutional issues most likely to arise in their proceedings. And even if agencies ostensibly cannot "declare" statutes or other official acts unconstitutional as can courts, they may still take measures to conform their actions, including administrative adjudications, to the Constitution. Constitutional, statutory, judicial, and historical authorities indicate that agencies can and should avoid taking unconstitutional action, whether by relying on their typically broad prosecutorial and statutory discretion or, in rare cases, by potentially declining to implement unconstitutional statutes. By doing so, agencies can often provide meaningful relief to parties raising constitutional claims that is not categorically inferior to court-awarded relief.

Moreover, although the issue was not presented to the *Axon* Court and therefore not addressed in its ruling, many agencies' procedural rules allow for immediate rulings on threshold legal issues, and circuit courts of appeals generally allow immediate judicial review of agency rulings raising a cognizable claim of a "right not to stand trial" before the agency. When litigants raise a cognizable claim to a right not to litigate the merits before an agency based on a constitutional challenge to its structure or its administrative processes, requiring exhaustion would not result in a loss of this right if the agency has adopted such rules.

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[519] McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496–97 (1991).

In addition, the benefits typically associated with exhaustion may apply to many constitutional claims. Agency consideration of these claims may prevent constitutional violations from occurring in the first place and obviate the need for court litigation. It can also prevent piecemeal litigation and improper "sandbagging" by opportunistic litigants when both nonconstitutional and constitutional claims are at issue. In addition, agencies may have relevant institutional knowledge of statutes or regulations bearing on whether a constitutional issue arises in the first place or whether allegedly unconstitutional provisions may be severed. And they may be able to develop a useful record for judicial review.

Thus, rather than the sharp divide that some judicial opinions paint between the respective ability of agencies and courts to address constitutional challenges in the first instance, a more nuanced span exists, depending on the specific claim and the relevant administrative scheme. Consequently, when assessing whether to require exhaustion of constitutional claims, courts should apply a traditional administrative exhaustion analysis, taking account of the constitutional nature of a claim only to the extent it impacts the standard factors that determine whether exhaustion is required.