Nos. 19-1442, 20-105

In The Supreme Court of the United States

WILLIE EARL CARR AND KIM L. MINOR, *Petitioners*,

v.

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

JOHN J. DAVIS, ET AL., *Petitioners*,

v.

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

On Writs Of Certiorari
To The United States Courts Of Appeals
For The Eighth and Tenth Circuits

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

The Institute for Justice ("IJ") is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. Central to that mission is advocating for an engaged judiciary that is willing to answer important constitutional questions, including holding executive officials accountable when those officials violate the Constitution.

IJ is interested in this case because it directly implicates IJ's mission to promote an engaged judiciary capable of securing Americans' essential constitutional rights. IJ grapples with administrative exhaustion doctrines in its own litigation, including in cases to protect property rights, free speech, and economic liberty. In the cases under review here, IJ is concerned that the approach to exhaustion adopted by the lower courts confuses the roles of the executive and judicial branches and, in doing so, places unwarranted barriers in the way of individuals seeking to vindicate constitutional rights. IJ therefore submits this brief in an effort to help the Court place the doctrine in this area on a proper constitutional footing.

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[1] Pursuant to this Court's Rule 37.3(a), all parties consented to the filing of this brief.

Pursuant to Rule 37.6, *Amicus* affirms that no party or counsel for a party authored this brief in whole or part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *Amicus*, its members, or counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

While this case concerns exhaustion of a specific claim before a specific agency, it also raises a broader question: Does a litigant *ever* waive a constitutional claim by failing to raise it before an administrative judge? This brief argues that the answer is and should be "no," particularly where, as here, exhaustion is not required by statute.

If that answer sounds overly categorical, it may help to highlight at the outset what this case is not about. This case does not implicate doctrines under which litigants are sometimes required to seek relief from an agency on non-constitutional grounds before litigating a constitutional claim. Such doctrines typically serve to *postpone* litigation, rather than preventing it entirely, and implicate ripeness considerations not at issue here. This case, by contrast, involves the doctrine of issue exhaustion, which is much stronger medicine. Under the doctrine of issue exhaustion, courts do not just postpone litigation in the hope that an agency will take action to moot a dispute; instead, issue exhaustion bars courts from addressing legal claims if they were not raised before an agency judge.

When it comes to constitutional claims, issue exhaustion effectively strips courts of jurisdiction to apply the Constitution based on the ins and outs of prior proceedings before the agency's administrative judges. That application of issue exhaustion raises serious constitutional concerns.

Most notably, issue exhaustion for constitutional claims interferes with the proper role of the courts under Article III. A requirement of issue exhaustion

would in effect position agency judges as the primary adjudicators for constitutional claims. But that is not the system that Article III adopts: As this Court explained in *Crowell v. Benson*, 285 U.S. 22, 57 (1932), to accept a rule that constrained judicial resolution of constitutional claims based on proceedings before an agency adjudicator "would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system." Both the executive and the judiciary have an obligation to uphold the Constitution in their respective spheres, and the judiciary cannot abdicate its role based on proceedings in the executive branch.

Those Article III problems are bad enough where issue exhaustion is mandated by statute; but, absent a statutory requirement, they become overwhelming. Because statutory issue exhaustion requirements effectively strip courts of jurisdiction to adjudicate certain claims, they must be narrowly construed to "avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *see, e.g.*, *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013). But there is no need even to grapple with such considerations here, as courts certainly should not self-abdicate their jurisdiction over constitutional claims to administrative agencies.

While agency courts may sometimes *look* like courts, it is essential to remember that the resemblance is superficial. While the executive branch may choose to administer benefit programs or

regulatory schemes through procedures that resemble adjudication in an Article III court, in doing so the executive is still *executing* the law. To the extent that there is a dispute about application—and particularly a constitutional dispute—that dispute remains an issue for the judicial branch. And just as litigants ordinarily do not waive their constitutional claims by failing to raise them before police officers, auditors, prosecutors, or bureaucrats, the same should be true for administrative judges.

Moreover, even beyond these Article III considerations, administrative issue exhaustion also raises due process concerns. Even imagining it was appropriate for an agency to assume primary responsibility to adjudicate constitutional claims, the fact is that most agencies do no such thing. In these cases, for instance, there can be no real dispute that Social Security Administration judges were powerless to remedy their admittedly unconstitutional appointments. In that context, issue exhaustion becomes a shell game—requiring litigants to raise claims in a forum where they cannot be considered, in order to avoid waiving them in an entirely separate forum. Even imagining such an odd procedure satisfies due process, there is no reason for courts to adopt such a topsy-turvy rule in the absence of a statutory exhaustion requirement.

Perhaps for these reasons, this Court has previously declined to require issue exhaustion for constitutional claims. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 329 n.10 (1976); *Mathews v. Diaz*, 426 U.S. 67, 76 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *see also Sims v. Apfel*, 530 U.S. 103, 115

(2000) (Breyer, J., dissenting) (arguing that issue exhaustion should be required, but noting an exception for constitutional claims). These decisions do not always articulate a reason for treating constitutional claims as different, but they are best understood as an effort to preserve the role of the judiciary as an independent forum for adjudication of constitutional disputes.

In this case, the Court should make it official: The Court should hold that, at least where exhaustion is not mandated by statute, there is no issue exhaustion requirement for constitutional claims.

ARGUMENT

Part I of this brief surveys the Court's prior decisions, which do not require issue exhaustion for constitutional claims. Part II explains that this rule is best understood as an application of Article III, as courts cannot abdicate their responsibility to provide an independent forum for constitutional claims based on proceedings before agency judges. Finally, Part III highlights due process concerns raised by application of issue exhaustion to constitutional claims.

I. This Court Does Not Require Issue Exhaustion for Constitutional Claims.

Administrative issue exhaustion is often described "as a general rule" of administrative law, under which parties cannot raise claims for the first time in federal court. *Sims v. Apfel*, 530 U.S. 103, 109 (2000). But, when it comes to constitutional claims, the "general rule" is the opposite: This Court has declined to require issue exhaustion for constitutional claims.

Most notably, in *Mathews v. Eldridge*, the Court held that failure to raise a constitutional challenge to agency procedures before the Social Security Administration would not stop the petitioner from raising the claim for the first time in federal court. 424 U.S. 319, 329 n.10 (1976). The Court explained that the agency would not have been required to consider a constitutional challenge if one was raised and, even if it had considered the challenge, "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." *Id*. at 330.

Other decisions involving the Social Security Administration are in accord. In *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975), the Court held that, once it was clear that the only question left concerned the "constitutionality of a statutory requirement," the agency had no "jurisdiction to determine" the constitutional claims and the justification for exhaustion (remedy exhaustion and by extension issue exhaustion) had expired. And in *Mathews v. Diaz*, 426 U.S. 67, 76 (1976), the Court likewise declined to require exhaustion on the ground that a "constitutional question is beyond the Secretary's competence."

Other cases, arising in distinct contexts, also follow in the same line. For instance, in *Public Utilities Commission of the State of California v. United States*, 355 U.S. 534, 540 (1958), the Court explained that "where the only question is whether it is constitutional to fasten the administrative

procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." In *NLRB v. Noel Canning*, 573 U.S. 513 (2014), the Court addressed an Appointments Clause challenge although it was not raised before the agency, despite an express statutory exhaustion requirement, and in doing so implicitly adopted the D.C. Circuit's reasoning that "both this court and the Supreme Court have considered objections to the authority of the decisionmaker whose decision is under review even when those objections were not raised below." 705 F.3d at 497. And in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 491 (2010), the Court held that a litigant could raise a constitutional challenge without following typical procedures for agency adjudication in part because "constitutional claims are also outside the Commission's competence and expertise."

Summarizing the case law in *Califano v. Sanders*, 430 U.S. 99, 109 (1977), the Court explained that decisions do not require issue exhaustion for constitutional claims because "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." The Court observed that application of issue exhaustion doctrine to constitutional claims would "effectively have closed the federal forum to the adjudication of colorable constitutional claims." *Id.*

Against this authority, there is little precedent from this Court supporting issue exhaustion for constitutional claims. Most cases requiring issue

exhaustion are easily distinguished on the grounds that they involve statutory or regulatory issues; for instance, *United States v. L.A. Tucker Truck Lines, Inc.*, 344 US. 33, 36–37 (1952), addressed the argument that an appointment did not comport with the Administrative Procedure Act, rather than the Appointments Clause. This Court's decision in *Woodford v. Ngo*, 548 U.S. 81, 83 (2006), did not involve agency adjudication at all, and instead involved application of a statutory exhaustion requirement in the unique context of prisoner litigation. And, meanwhile, cases like *Elgin v. Department of Treasury*, 567 U.S. 1, 17 (2012), and *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 15 (2000), hold that litigants must exhaust their remedies by proceeding before an administrative body when required to do so by statute, but they do not address the separate question of issue exhaustion. These cases are consistent with a rule under which issue exhaustion is not required for constitutional claims.

II. Under Article III, Litigants Should Not Be Required to Raise Constitutional Claims Before Agency Judges.

While the Court's decisions point to a general rule, under which issue exhaustion is not required for constitutional claims, the Court has previously wrapped its decisions in language addressing particular administrative procedures or particular constitutional claims. This approach has led to confusion in the lower courts—spawning these consolidated appeals—and is also unnecessary. Under Article III, litigants should not be required to

raise constitutional claims before administrative judges as a predicate for judicial review.

A. The doctrine of issue exhaustion gives binding effect to the presentation of arguments in agency adjudication, and, in doing so, effectively treats agency bodies as lower courts within the judiciary. Worse, the doctrine strips courts of the ability to decide constitutional issues, based solely on the course of procedure before an agency judge. That is contrary to the basic alignment of our constitutional scheme: Under Article III, primary responsibility to adjudicate constitutional disputes rests with the federal courts, not with agency tribunals.

This Court's foundational opinion in *Crowell v. Benson* sheds light on these Article III concerns. In that case, the Court upheld agency adjudication as constitutional, but, at the same time, explained that "the utility and convenience of administrative agencies … does not require the conclusion that there is no limitation of their use." 285 U.S. at 57. In particular, the Court emphasized that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id*. at 60. A contrary rule would "sap the judicial power as it exists under the federal Constitution" and would "establish a government of a bureaucratic character alien to our system." *Id.* at 57. That rule applies with full force here: Courts should not abstain from deciding constitutional claims based on proceedings before agency judges.

Indeed, those principles apply with additional force in the context of issue exhaustion, as the effect of issue exhaustion is to strip courts of the ability to resolve constitutional disputes. Such jurisdiction-stripping is problematic enough when it is mandated by Congress: This Court has explained that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear," and that this "heightened showing" is required "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603; *see also Califano*, 430 U.S. at 109. For that reason, courts hesitate to require issue exhaustion even when mandated by statute. *See, e.g.*, *Noel Canning*, 705 F.3d at 497-98. But such concerns are heightened further when courts strip themselves of jurisdiction through judge-made exhaustion doctrines. Courts certainly should not *voluntarily* cede their role as the primary forum for constitutional litigation under Article III.

It makes no difference, in this regard, that this case involves an administrative scheme to adjudicate "public" and not "private" rights. To be sure, issue exhaustion would also be inappropriate for claims involving private rights; after all, parties cannot be required to raise private rights claims before agency adjudicators, and, thus, failure to raise such a claim before an agency judge certainly could not waive the party's right to a judicial forum. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018). Conversely, at least as an Article III matter, issue exhaustion could have legitimate scope for pure issues of statutory law involving a

public rights scheme, as the Court has held such issues may properly be adjudicated before agency judges.[2] But, even when public rights are involved, that permissible scope "does not require the conclusion that there is no limitation" at all. *Crowell*, 285 U.S. at 57. Even in the public rights context, the Article III courts remain the appropriate forum for constitutional disputes. *Id.* Or, put differently, although the government is under no obligation to confer benefits, when it violates the Constitution when administering a benefits program that violation itself raises a question of private rights that should be resolved by the courts.[3]

As spelled out in Part I, this Court's prior issue exhaustion decisions already reflect these principles. Indeed, in *Califano*, 430 U.S. at 109, the Court expressly distinguished between issue exhaustion requirements for statutory and constitutional claims, explaining that requiring exhaustion of constitutional

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[2] Though, even there, Petitioners correctly observe that judge-made issue exhaustion doctrines can separately intrude on Congress's role to define when and how statutory rights should be enforced.

[3] At a minimum, if this Court does find issue exhaustion appropriate, the Court should take care to cabin its decision to cases involving administration of government benefits schemes. Cases where agency exhaustion requirements have been applied most liberally involve a special relationship between the government and the litigant—for instance prisoners, *see Ngo*, 548 U.S. at 83, or government employees, *see Elgin*, 567 U.S. at 17. Those cases involve distinct types of exhaustion, as noted above, but they also arise in a distinct factual context. We are not all prisoners or government employees—or claimants in a government benefits program—and principles arising from such cases should not be allowed to infect other areas of the law.

claims would "effectively have closed the federal forum to the adjudication of colorable constitutional claims" and that, particularly absent an express statutory command, courts will not "take the 'extraordinary' step of foreclosing jurisdiction." Yet, as the lower court decisions in these cases demonstrate, that clear distinction has not always penetrated to the lower courts. This Court should take the opportunity to make the point explicit.

B. The Eighth Circuit, justifying its contrary conclusion below, contended that "[c]onstitutional considerations, no matter how important or 'fundamental,' can be forfeited." *Davis v. Saul*, 963 F.3d 790, 794 (8th Cir. 2020). But that invocation of waiver principles ultimately highlights the problem with the doctrine of issue exhaustion. Agencies are not courts, and, just as one does not "waive" a constitutional argument by failing to present it to a police officer or a bureaucrat, one also should not "waive" a constitutional claim by failing to present it to an administrative judge.

When executive action violates the Constitution, this Court has held that the courts are open to vindicate constitutional rights. The "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *see generally Ex Parte Young*, 209 U.S. 123 (1908). Thus, for instance, in *Free Enterprise Fund*, the Court held that plaintiffs could challenge the appointment of executive officers outside the context of an

enforcement proceeding, explaining that "constitutional claims are also outside the Commission's competence and expertise." 561 U.S. at 491. In the context of such suits, a party does not "waive" a constitutional claim by failing to present it in the first instance to the executive officer.

The same rule should apply regardless of whether agencies dress themselves up in judicial garb. The Constitution assigns clear and distinct roles to the executive and the judiciary: It is the role of the executive to apply the law, and it is the role of the judiciary to resolve disputes about its application. Both the executive and the judiciary have an obligation to adhere to the Constitution in their respective roles. And, at times, agencies may adopt judicial-like proceedings as the most efficient or effective means to administer a benefits program or regulatory scheme. But such agency adjudication is ultimately just a tool for *execution* of the laws, and, as such, does not transform an administrative agency into anything but an organ of the executive.[4]

"The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims*, 530 U.S. at 108–09. But that analogy is fundamentally unsound; and, in fact, the Court has "warned against reflexively assimilating the relation of … administrative bodies

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[4] A separate set of considerations applies to territorial and military courts, which operate in areas where ordinary separation of powers principles do not apply. *See Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018) (military courts); *Benner v. Porter*, 50 U.S. 235, 242–44 (1850) (territorial courts).

and the courts to the relationship between lower and upper courts." *Id.* at 110 (marks and citation omitted). Under Article III, agencies are not and cannot be treated as if they were an extension of the judicial system. The judiciary cannot cede its constitutional role to the executive, any more than the executive could do the reverse.[5]

C. These are not abstract concerns. The last century has been marked by a staggering expansion of the administrative state nowhere contemplated in the original constitutional scheme. And a significant part of that expansion has involved the growth of administrative adjudication. By limiting the application of issue exhaustion, the Court can ensure that the federal judiciary nonetheless remains available to vindicate constitutional claims.

The hallmark of the Article III courts is their independence, and the need for such independence is at the highest when the disputes involved are of a constitutional nature. As Alexander Hamilton explained, a limited Constitution can be preserved only "through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78, p. 380 (Dover ed. 2014). The Article III courts are to be "bulwarks of a limited Constitution against legislative encroachments." *Id.* at 382. Independence from the other two branches is necessary for the courts to succeed in this role; indeed,

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[5] For this reason, the outcome of this appeal should not turn on the "inquisitorial" or "adversarial" nature of agency procedures. Agencies do not become courts simply by adopting court-like procedures.

independence is "essential to the faithful performance of so arduous a duty." *Id*.

Yet much adjudication now takes place in front of non-Article III adjudicators. These adjudicators do not have the independence that Article III judges do. In fact, the underlying claim in this case suggests that such judges are not constitutionally *allowed* to have independence: The implication of this Appointments Clause challenge is that the agency's administrative judges—for better or worse—enjoyed too much protection from removal. *See Carr v. Comm'r*, 961 F.3d 1267, 1268 (10th Cir. 2020); *Davis*, 963 F.3d at 791. And, more generally, administrative adjudicators are "precommitted to carrying out the government's policy in its regulations, and they must submit to having their decisions reconsidered by executive officers—neither of which is compatible with judicial independence." Philip Hamburger, *Is Administrative Law Unlawful?*, 234–35 (2014). Administrative judges will never, and can never, have the level of independence afforded to the Article III courts.

To the contrary, the reality is that administrative judges face significant pressure from their employing agencies. A 1992 survey from the Administrative Conference of the United States found that 61% of ALJs across all agencies reported that agency interference was a problem, with 26% reporting that it was a frequent problem.[6] More recently, a study

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[6] Paul R. Verkuil et al., Administrative Conference of the United States, *The Federal Administrative Judiciary* 916-17 (1992), https://bit.ly/2WQHMox.

contrasted the Securities and Exchange Commission's success rate of 90% before its own ALJs with the agency's win-rate of 69% in federal court.[7] The same article quoted a former ALJ who stated that she "came under fire" for ruling too often for defendants and ultimately retired as a result. These pressures are a natural result of the top-down structure of the executive branch. It is no slight to hard-working and professional ALJs to say that, as a structural matter, they should not be entrusted with the resolution of constitutional disputes.

A rule limiting the application of issue exhaustion to constitutional claims would balance the historical growth of the administrative state—perhaps too far advanced to ever be fully unwound—against the need to retain the vitality of the Article III courts. Such a rule would allow agencies to address issues of statutory and regulatory interpretation in the first instance, at least where such issues involve questions of public rights.[8] But, at the same time, such a rule would ensure that courts remain fully available to vindicate constitutional claims—and would, in fact, position the Article III courts as the primary forum for adjudication of such claims. Particularly where no statute mandates an opposite approach, such a rule

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[7] Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J., May 6, 2015, http://on.wsj.com/2hFczUw; *see also* Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. Pa. J. Const. L. 45, 64–65 (2016).

[8] Even so, the Court's expansive definition of "public rights" should be reconsidered. *See, e.g.*, *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 447 (1977). But that is a question for another case.

would provide a simple and effective means to reclaim the jurisdiction of the Article III courts.

III. Issue Exhaustion for Constitutional Claims Raises Due Process Concerns.

Even if agency courts were appropriate forums to decide constitutional claims—and, as explained above, they are not—the fact would remain that many agencies do not actually decide constitutional issues. For that reason, a requirement of issue exhaustion for constitutional claims would be futile in many instances (including this one) and would not serve any of the practical objectives generally advanced by application of waiver doctrines. Such a rule would deprive litigants of meritorious claims for no real apparent reason and, in doing so, would raise additional due process concerns.

A core aspect of due process is the right to notice and a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Application of issue exhaustion in the circumstances presented here implicates that right, because it deprives litigants of a meaningful forum for their constitutional claims: To raise the constitutional claim before the agency would have been futile, as the defective appointments ultimately required an executive order to cure. *See* 83 Fed. Reg. 32,755, 32,756 (July 10, 2018). Indeed, the result of raising the issue was foreordained; agency judges were directed to note Appointments Clause challenges in the case file but to take no other action. Yet, under the doctrine of issue exhaustion, a litigant who does not perform that empty gesture is denied any forum for his constitutional claims.

Moreover, this case is hardly unique in that respect; agencies often decline to hear constitutional claims. For example, in *Mathews v. Eldridge* the Court explained that it would be "unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context" and that the Secretary "would not be required even to consider such a challenge." 424 U.S. at 330. Because of the top-down structure of the executive, broader decisions about policy—including concerns about constitutionality—will generally be addressed by top-level decisionmakers, with line officers (including administrative judges) left little discretion other than to apply agency policy to the particular facts. Yet issue exhaustion requires litigants to "exhaust" constitutional claims before agency judges without any regard for whether those judges have any policymaking role.[9]

In this context, the doctrine of issue exhaustion becomes a shell game calculated to deprive litigants of a meaningful hearing for their constitutional claims. A hearing before an agency judge who cannot

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[9] Application of issue exhaustion in such circumstances does not advance any function typically served by waiver doctrines—and, to the contrary, borders on the absurd. It makes no sense to say that an agency is somehow "sandbagged" when a litigant raises a question in the first tribunal that will actually address it. And, unlike in the judiciary, where appellate courts benefit from the views of trial judges, courts do not assign any particular weight to the opinions of agency judges on constitutional questions—which is part of the reason why agency judges often do not address those questions at all.

even *consider* a claim certainly cannot be considered "meaningful." And a hearing before a federal court that likewise cannot adjudicate the claim—because of issue exhaustion—also cannot be described as a meaningful opportunity to be heard. The only way for a litigant to obtain an actual hearing in such a system is to first raise the claim in the forum where it cannot be adjudicated, in order that it can later be considered in an entirely different forum before an entirely different branch of the government. Even if such a topsy-turvy rule might technically satisfy due process, courts should not adopt such a rule in the absence of an express statutory requirement.

CONCLUSION

The Court should reverse the decisions below and hold that the doctrine of issue exhaustion does not apply to constitutional claims.

Respectfully submitted.

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