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, Comm'r of Social Security,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOHN J. DAVIS, et al.,
Petitioners,
v.
ANDREW M. SAUL, Comm'r of Social Security,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioners Willie Earl Carr, Kim Minor, John Davis, and Thomas Hilliard (collectively, "Carr").

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit legal foundation organized for the purpose of engaging in litigation and advocacy in matters affecting the public interest. PLF defends the principles of liberty and limited government, including defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the role of the Article III courts as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. *See*, *e.g.*, *Gundy v. United States*, 139 S. Ct. 2116 (2019); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013); *Rapanos v. United States*, 547 U.S. 715 (2006). PLF has offices in

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

California, Florida, and the District of Columbia, and regularly litigates Separation of Powers cases in state and federal courts across the country.

PLF has a particular interest in the outcome of this case because it represents clients in a variety of settings who are challenging administrative action under the Appointments Clause. *See*, *e.g.*, *Moose Jooce v. Food & Drug Admin.*, No. 18-CV-1615 (CRC), 2020 WL 680143, at *3 (D.D.C. Feb. 11, 2020), *aff'd*, No. 20-5048, 2020 WL 7034417 (D.C. Cir. Dec. 1, 2020). And more broadly, PLF represents individuals in lawsuits seeking judicial review of the constitutionality of agency decisions throughout the nation. *See*, *e.g.*, Petition for Writ of Certiorari, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Dkt. No. 20-787. All too often, such lawsuits are frustrated by the misapplication of prudential doctrines, including administrative-issue preclusion, that infringe upon the original jurisdiction of state and federal courts and deprive individuals of a meaningful opportunity to seek redress for constitutional injuries. A rule that allows issue preclusion to bar individuals from litigating constitutional claims in a court of original jurisdiction, will affect the ability of PLF's clients to obtain relief should they prevail on their Appointments Clause and other constitutional challenges. Because the decision below threatens to undermine foundational separation of powers and due process principles, PLF supports reversal of the Eighth and Tenth Circuit decisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This consolidated case raises a critically important question of administrative law. Specifically, the petitions ask whether the court-created doctrine of issue exhaustion requires individuals—who are often unrepresented—to litigate constitutional claims against the government in an administrative proceeding as a prerequisite to judicial review. The answer is no.

The Constitution's separation of powers instructs that only United States Courts are vested with the "judicial Power of the United States," U.S. Const. art. III, § 1, and, as a result, when it comes to the federal government, only those courts may resolve questions of constitutional law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). This Court recognizes that a litigant need not exhaust issues before an agency that lacks the "competence to resolve the particular type of issue presented, such as the constitutionality of a statute" or the "authority to grant the type of relief requested." *McCarthy v. Madigan*, 503 U.S. 140, 147–48, 148 (1992) (citations omitted). Here, the Social Security Administration (SSA)—an Executive Branch agency not vested with judicial power—lacks authority to consider, much less resolve, constitutional claims. Accordingly, compelling an SSA claimant to present an Appointments Clause challenge to the administrative law judge (ALJ) before whom the claimant appears would be "utterly futile." *Montana Nat'l Bank of Billings v. Yellowstone Cty.,* 276 U.S. 499, 505 (1928).

Ultimately, it is the constitutional doctrine of separation of powers—and not considerations of efficiency and convenience—that precludes application of the administrative-issue exhaustion.

Fidelity to the Constitution furthermore demands that, where an agency lacks authority to decide constitutional claims, or employs procedures that are too lax to provide due process, the proceeding cannot strip individuals of the right to seek redress of a constitutional injury in a court of law. *Marbury*, 5 U.S. (1 Cranch) at 147 (It is a "settled and invariable principle[] that every right, when withheld, must have a remedy, and every injury its proper redress."). The Third Circuit's decision in *Cirko on behalf of Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 156 (3d Cir. 2020), is consistent with the Constitution's separation of powers. The decisions of the Eighth and Tenth Circuits are not. Instead, they aggrandize the power of ALJs beyond their statutory authority and in a manner that infringes upon the exclusive authority of Article III courts and impairs the rights of citizens, like amicus' clients Moose Jooce and Preserve Responsible Shoreline Management (PRSM), to seek redress of constitutional harm. For these reasons, amicus curiae urges this Court to reverse the Eighth and Tenth Circuit's decisions and reaffirm that the courts have original jurisdiction over constitutional claims.

ARGUMENT

I.

THE SEPARATION OF POWERS PRECLUDES AN ADMINISTRATIVE-ISSUE EXHAUSTION REQUIREMENT HERE

The very suggestion that an administrative proceeding can limit an individual's right to seek a judicial remedy for a constitutional injury is anathema to the separation of powers, which doctrine lies "at the heart of our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976). This doctrine "was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Rather, the "ultimate purpose" of the "separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). The "leading Framers of our Constitution" thus "viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Comm'r*, 501 U.S. 868, 870 (1991). Therefore, while prudential concerns about convenience and efficiency of agency review may be valuable in the right context, the protection of individual liberty guaranteed by the separation of powers remains paramount.

A. Only the Judicial Branch is vested with judicial power

In establishing the United States government, the sovereign people vested all of the government's powers in three branches. *See The Federalist No. 47*, at 324 (Madison) (J. Cooke ed. 1961) (identifying the three "legislative, executive, and judiciary" powers as

"all" of the government's powers); *Metro. Wash. Airports Auth.*, 501 U.S. at 272. The people assigned to the three "departments" "their respective powers" and "establish[ed] certain limits not to be transcended by those departments." *Marbury*, 5 U.S. at 176. If "those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation[,]" then the "distinction, between a government with limited and unlimited powers, is abolished[.]" *Id.* at 176–77.

"The judicial Power of the United States" is "vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This power, so vested, "extend[s] to all Cases, in Law and Equity, arising under the Constitution [and] the Laws of the United States" and "to Controversies to which the United States [is] a party …." *Id.*, art. III, § 2, cl. 1. As a result, Congress "cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330–31 (1816). Rather, the "Constitution assigns that job—resolution of the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law—to the Judiciary." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (cleaned up). It is, therefore, "emphatically" the independent and exclusive "province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177.

B. The doctrine of Separation of Powers precludes application of administrative-issue exhaustion for questions of constitutional law

Here, the Government concedes that the SSA does not have the power to resolve issues of constitutional law. *See* Resp. Br. at 4 (Sept. 29, 2020) (*Carr v. Saul*, U.S. No. 19-1442) (noting that SSA instructed its ALJs that the agency "'lacks the authority to finally decide constitutional issues such as'" Appointments Clause challenges) (quoting SSA, *EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process* (Jan. 30, 2018)). The Government nonetheless argues that claimants must exhaust these issues in SSA proceedings before seeking judicial review, on the ground that the "general rule" of administration exhaustion serves "important public purposes." *Id.* at 8. But this Court has long recognized exceptions to this general rule. Thus, a litigant need not exhaust remedies before a decision-maker who lacks either the "competence to resolve the particular type of issue presented, such as the constitutionality of a statute," or the "authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148–49, 149 (citations omitted). Here, compelling an SSA claimant to present an Appointments Clause claim to the agency—indeed, to the very ALJ whose appointment is challenged—would be "utterly futile since [both the ALJ and SSA] [are] powerless to grant any appropriate relief…." *Montana Nat'l Bank of Billings*, 276 U.S. at 505.

A more fundamental principle is at stake, however. Ultimately, the question in these cases is not—or,

should not be—whether prudential considerations favor a general exhaustion rule or one of its exceptions. The paramount question is whether the Separation of Powers permits an issue-exhaustion requirement in the first place. This question, in turn, depends on whether the Constitution has vested the initial decision-maker with the power to resolve the issue presented. No one claims that either the SSA or one of its ALJs has authority to address questions of constitutional law. Properly so. The Constitution vests the "judicial Power of the United States" solely in the Judicial Branch. U.S. Const. art. III, § 1. The initial decision-maker here, therefore, lacks the power to address the Appointments Clause challenge—a question of law reserved for those vested with judicial power. Accordingly, a claimant may obtain relief for an Appointments Clause challenge only from an Article III court, and, under the Separation of Powers, that claimant cannot exhaust an issue of constitutional law in an agency that lacks power to consider and resolve the issue. In other words, the Separation of Powers does not allow an issue-exhaustion requirement when the initial decision-maker cannot address the issue.

The "'intensely practical'" application of the exhaustion doctrine, *Bowen v. City of New York*, 476 U.S. 476, 484 (1986) (quoting *Matthews v. Eldridge,* 424 U.S. 319, 331(1976)), must cede to the Constitution's limits. Therefore, the two prudential justifications offered in support of issue exhaustion—(1) protecting administrative autonomy by giving an agency the opportunity to correct its own mistakes, *Woodford v. Ngo*, 548 U.S. 81, 89 (2006), and (2) judicial efficiency through administrative resolution on alternative

grounds or, otherwise, the development of a useful factual record, *Madigan*, 503 U.S. at 145—cannot carry the day.

First, agencies lack the power to correct mistakes of constitutional law. To be sure, agencies may voluntarily alter their practices or revise a legal interpretation in the face of a constitutional challenge, but they are certainly not required to do so, and they could always later reconsider and return to the previously challenged practice or interpretation. Until an Article III court resolves the constitutional issue, an agency need not recognize, much less correct, alleged mistakes. Ultimately, agencies are constitutionally precluded from definitively resolving a constitutional error of law.

Second, discussed below, requiring litigants to give agencies the first crack at a constitutional claim deprives litigants of their due process rights to a legal resolution by a court of competent jurisdiction. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012) (noting that for centuries, "due process" has "consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law.").[2]

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[2] SSA disbursements are, of course, a "public right" or public benefit, and decisions concerning these disbursements involve the exercise of executive power—even when the executive employs adjudicatory-like procedures. William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1536, 1540–54 (2020) (discussing exercise of executive power in the disbursement of public benefits); *see id.* at 1513 (It's not "about the process of adjudication."). But in administering the laws, the Executive

In short, constitutional questions are "obviously" "unsuited to resolution in administrative hearing procedures." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). *See also Crowell v. Benson*, 285 U.S. 22, 64 (1932) ("We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1868 (2015) (noting that broad exhaustion requirements could wrongly "bar legitimate constitutional complaints" beyond the agency's power to resolve).

C. The Separation of Powers and the allied guarantees of due process guard against arbitrary power

Because only the Judicial Power is vested with the authority to issue legal judgments, the comparison between administrative-issue exhaustion and judicial review offered in *Hormel* is inapt. This is particularly true when an agency action affects a constitutional right, entitling the individual to due process of law. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 17, 23–24 (2000) (the idea of an unreviewable agency decision-making that impairs a constitutional right raises "serious" and "difficult" questions). And, while agencies often de facto exercise all three of the

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Branch may not act contrary to the Constitution. It may not, for example, establish an oversight board whose members enjoy two levels of for-cause removal protection. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010). And only the Judicial Branch may, under the Constitution, ultimately determine whether the Executive Branch is acting contrary to law.

government's powers,[3] an administrative-issue exhaustion requirement in these circumstances threatens to further extend agencies' improper exercise of judicial power.

Separation of Powers demands a close examination of the agency decision and procedure to ensure that an individual's right to due process is satisfied.[4] Thus, in *McNary v. Haitian Refugee Center, Inc.*, this Court affirmed its authority to hear a constitutional challenge to an administrative decision where the agency's procedures would "not allow applicants to assemble adequate records." 498 U.S. 479, 496 (1991). Similarly, in *Crowell*, this Court held that Article III courts must be able to decide constitutional facts de novo—those facts that form the basis of a constitutional claim—as a matter of protecting separation of powers. 285 U.S. at 64. And in his dissenting opinion in *Elgin v. Department of Treasury*, Justice Alito concluded that any presumption in favor of exhaustion must flip when the party presents a facial constitutional challenge. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 28 (2012) (Alito, J., dissenting) ("[N]either efficiency nor agency expertise can explain why Congress would want the [agency] to have exclusive jurisdiction over claims like these.").

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[3] *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 446 (1987) ("[T]he New Deal agency combines executive, judicial, and legislative functions."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248 (1994) ("Administrative agencies routinely combine all three governmental functions in the same body, and even the same people within that body.");

[4] *Opp Cotton Mills v. Adm'r*, 312 U.S. 126, 152, 153 (1941) (When agency action affects a liberty or property interest, the Due Process Clause must be honored.).

It is evident from these precedents that a default rule requiring exhaustion for constitutional claims would raise serious separation of powers and due process problems. *See Shalala*, 529 U.S. at 17, 23–24 (avoiding a "serious constitutional question" by construing the Medicare statute to allow review of an agency decision by a federal district court with "authority to develop an evidentiary record"); *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 450 (1985) (finding it unnecessary to answer the "difficult question" whether "legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights"); *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (citing cases).

Most fundamentally, such a rule would be contrary to the "settled and invariable principle[] that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury*, 5 U.S. (1 Cranch) at 147; Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1778–79 (1991) (describing the constitutional tradition of this remedial principle).

Finally, the issue exhaustion doctrine presents greater threats to liberty and property when invoked by agencies with coercive powers. Agencies like the Consumer Financial Protection Bureau (CFPB), Securities and Exchange Commission (SEC), and Federal Trade Commission have broad powers to investigate and charge individuals with violations of laws—and of the agencies' own regulations—prosecute alleged violations through in-house administrative proceedings,

and impose penalties.[5] *See, e.g.*, *Seila Law v. CFPB*, 140 S. Ct. 2183, 2193 (2020). The question whether these agencies' structure and proceedings are constitutional is a question of law for the judicial branch. *Id.* at 2197 (holding that the CFPB's leadership by a single individual removable only for cause violates the separation of powers); *Lucia*, 138 S. Ct. at 2049 (holding that ALJs in the SEC are "officers of the United States").

These and other executive agencies "now wield[] vast power [that] touches almost every aspect of daily life." *Free Enterprise Fund*, 561 U.S. at 499. And they

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[5] The CFPB, for example, may issue binding regulations defining "unfair, deceptive, or abusive" acts or practices. 12 U.S.C. §§ 5531(a)–(b), 5536(a)(1)(B), 5581(a)(1)(A), (b). It has "potent" enforcement powers. *Seila Law*, 140 S. Ct. at 2193. It may conduct investigations, issue subpoenas and civil-investigative demands, and initiate enforcement actions either—at its sole discretion—through in-house administrative hearings or in federal court, 12 U.S.C. §§ 5562, 5564(a), (f), and it may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day a violation occurs, *id.* §§ 5565(a), (c)(2); 12 C.F.R. § 1083.1(a), Table (2020). When the CFPB proceeds in-house, it exercises "extensive adjudicatory authority." *Seila Law*, 140 S. Ct. at 2193. The in-house hearing officer may issue subpoenas, order depositions, and resolve any motions filed by the parties. *Id.* (citing 12 C.F.R. § 1081.104(b)). The hearing officer issues a "recommended decision," which is then considered by the CFPB Director, who "issue[s] a final decision and order." 12 C.F.R. §§ 1081.400(d), 1081.402(b); *see also id.* § 1081.405. The CFPB—*i.e.*, the Director—is empowered to "to grant any appropriate legal or equitable relief." 12 U.S.C. § 5565(a)(1).

The SEC enjoys similar authority to enforce the federal securities laws. *See* 15 U.S.C. §§ 78d(a), 78u, 78u-2, 78u-3, 78v; 17 C.F.R. Subpart D (SEC Rules of Practice governing administrative proceedings).

enjoy vast discretion as they investigate and prosecute. *See, e.g.*, *CFPB v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683, 688 (D.C. Cir. 2017) ("Pursuant to their 'power of inquisition,' agencies may use subpoenas to 'investigate merely on suspicion that the law is being violated, or even just because [they] want[ ] assurance that it is not.'") (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950) (bracketed information in the original). Such broad power threatens unconstitutional and arbitrary exercise of executive authority. And it is the Judicial Branch's duty to police the Constitution's separation of powers and hold the Executive Branch accountable for overreach—if for no other reason than that only the Judicial Branch is vested with the power to resolve questions of constitutional law. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001). Accordingly, a litigant cannot be compelled to exhaust an issue before a tribunal that lacks the power to resolve it.

D. Due Process guarantees that an aggrieved person be provided an opportunity to put on evidence in support of his claims

As discussed above, the imperfect analogy that equates an agency decision with a court judgment turns on whether the agency proceeding provided notice and opportunity sufficient to satisfy due process. *Sims v. Apfel*, 530 U.S. 103, 112 (2000) (Thomas, J., lead opinion); *id.* at 113 (O'Connor, J., concurring). Key to this inquiry is whether the agency provided an opportunity for the individual to put on evidence in support of the constitutional claim. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (process allowing

government's factual assertions to go unchallenged or be presumed correct without an opportunity to present contrary evidence violates due process). At its most basic, due process guarantees litigants the right to present evidence to support their claims. *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) ("The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause."); *see also Wolff v. McDonnell*, 418 U.S. 539, 566 (1974); *Morgan v. United States*, 304 U.S. 1, 18 (1938); *Balt. & Ohio R.R. Co. v. United States*, 298 U.S. 349, 369 (1936). Accordingly, this Court has repeatedly held that plaintiffs alleging constitutional violations must be allowed to introduce facts to support those allegations. *See Hamdi*, 542 U.S. at 537; *Shalala*, 529 U.S. at 23–24; *McNary*, 498 U.S. at 483–84, 493; *Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 319–20 (1953). This due process guarantee is essential to the protection of constitutional rights because, to vindicate those rights, a plaintiff must be able to introduce evidence to prove a violation and to rebut fact-based defenses. *See Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) (plaintiff bears "initial burden of proving a constitutional violation").

Consistent with this guarantee, this Court, in *City of Chicago v. International College of Surgeons*, rejected an argument that judicial review of a facial constitutional claim should be limited to the agency's findings and based on the agency record. 522 U.S. 156, 180 (1997). The Court stated that, even though the federal claims were "raised by way of a cause of action created by [the state's administrative review] law," as to those claims, the federal court would "proceed[ ] independently, not as [a] substantial evidence reviewer on a nonfederal agency's record." *Id.* at 164. In similar

fashion, the D.C. Circuit has noted that "courts and legal scholars routinely assume that there is a due process right to have the scope of constitutional rights determined by some independent judicial body—and the Supreme Court has never held or hinted otherwise." *Bartlett v. Bowen*, 816 F.2d 695, 706 (D.C. Cir. 1987) (emphasis added).

Certainly, the right to present evidence in support of constitutional claims does not always require that the facts be initially adjudicated in a court. Thus, this Court has upheld administrative procedures that guarantee the parties a "full and fair opportunity to litigate the claim or issue." *Allen v. McCurry*, 449 U.S. 90, 101 (1980). In such circumstances, the responsibility for finding facts relating to constitutional claims may be delegated to administrative agencies, "assuming due notice, proper opportunity to be heard, and that findings are based upon evidence." *Crowell*, 285 U.S. at 47; *see also R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 572 (1941) (decision of state administrative railroad commission "satisfie[d] all procedural requirements" because it included "a specific hearing affecting the immediate situation, with full opportunity . . . to develop the facts and arguments"); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (discussing fact-finding by administrative agencies); *cf. Yakus v. United States*, 321 U.S. 414, 433 (1944) (holding that channeling certain cases to an administrative appeal process, with review by a special Emergency Court, did not offend due process "so long as it affords to those affected a reasonable opportunity to be heard and present evidence").

But, even in that circumstance, the ultimate responsibility for determining constitutional claims remains with the court. *Califano*, 430 U.S. at 109 (Constitutional questions are "unsuited to resolution in administrative hearing procedures."); *see also Petruska v. Gannon Univ.*, 462 F.3d 294, 308 (3d Cir. 2006) ("[A]s a general rule, an administrative agency is not competent to determine constitutional issues."). Thus, many federal and state court have avoided the serious separation of powers and due process problems by recognizing that agencies are outright barred from resolving constitutional issues. *See*, *e.g.*, *Shalala*, 529 U.S. at 23; *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975); *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wash. App. 172, 196 n.21 (2012) (As an agency, the State's Growth Board lacks authority to determine constitutional issues); *Com. v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001) ("[A]n administrative agency cannot decide constitutional issues."); *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 452 (Tenn. 1995) (similar); *Christian Bros. Inst. of N.J. v. N. N.J. Interscholastic League*, 86 N.J. 409, 416 (1981) ("Administrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction."); *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977) ("[T]he constitutional issue was not and could not have been presented to or passed upon by the administrative bodies below.").

II.

GIVING AGENCY DECISIONS BROAD PRECLUSIVE EFFECT CREATES AN UNTENABLE CATCH-22

Questions of due process and the separation of powers aside, the United States, in its response to the petitions, suggested that this Court should adopt a broad default rule that would presume that agency decisions have a preclusive effect on the courts. Such a rule, however, would create a Catch-22 for individuals who suffer a constitutional injury at the hands of the agency, seriously undermining any prudential justification for issue exhaustion. Indeed, the facts of this case illustrate the plain injustice that results from such a rule. The ALJs who denied Carr's benefits claim were unconstitutionally appointed. *Lucia*, 138 S. Ct. at 2049. Thus, it was the agency proceeding itself that caused the constitutional injury. And yet the Petitioners find themselves prudentially barred from the judicial remedy to which they are constitutionally entitled. *Lucia*, 138 S. Ct. at 2055 ("[T]he 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official.") (quoting *Ryder v. United States*, 515 U.S. 177, 183, 188 (1995)); *Marbury*, 5 U.S. (1 Cranch) at 147 (a violation of the constitution requires a remedy).

Unfortunately, this Kafkaesque result is an all-too-common experience for individuals who are required to have their rights and liberties determined by agencies. Although Carr's petition focuses on federal administrative law, the question whether an individual must litigate constitutional claims in an administrative proceeding—before an executive officer

not vested with judicial power—as a prerequisite to judicial review is also subject to a deep split of authority among the state courts of last resort.[6] *See*, *e.g.*, Petition for a Writ of Certiorari, *Preserve Responsible Shoreline Management v. City of Bainbridge Island (PRSM)*, No. 20-787 (Dec. 4, 2020) ("Does it violate the Fourteenth Amendment's Due Process Clause for a state's judicial review statute to bar the introduction of evidence outside the administrative record where the evidence is needed to resolve federal constitutional claims over which the agency lacked jurisdiction?").

PRSM is a good example of the Catch-22 resulting from a reflexive and uncritical application of administrative preclusion. There, a group of homeowners wanted to bring a constitutional challenge to a local land-use ordinance that required property owners to dedicate a 5-year access easement and perpetual conservation easement as a mandatory condition on any

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[6] Variations of this question have been presented to this Court in several recent petitions. *See*, *e.g.*, Petition for a Writ of Certiorari, *Jewish Home of Eastern Pennsylvania v. Sebelius*, No. 11-433, 2011 WL 4802808 (U.S.) ("[W]hether the Constitution permits Congress to channel all challenges to agency action through a process that does not permit an evidentiary hearing on constitutional defenses."); Petition for Writ of Certiorari, *Stahl York Ave. Co. v. City of New York*, No. 18-1429, 2019 WL 2121700 (U.S.) (whether a takings plaintiff "is entitled to develop the facts supporting the claim in court, rather than being bound by fact-findings the agency itself made in the very proceeding in which it is alleged to have taken the property without just compensation"); Petition for Writ of Certiorari, *Clover Park School Dist. No. 400 v. Steilacoom Sch. Dist. No. 1*, No. 06-1215, 2007 WL 700937 (U.S.) (whether the State of Washington violated due process by disallowing discovery related to constitutional claims outside the administrative process).

new development. *PRSM* Pet. at 11–12, 15. But state law requires that aggrieved property owners litigate all questions of statutory compliance to the state's Growth Management Hearings Board. *Id*. at 8. Although the Board lacks authority to rule on constitutional issues and does not engage in factfinding (*id*. at 8–9), the state courts held that PRSM was required to present all evidence of the constitutional violation during the agency proceeding. *Id*. at 16–18. They were outright barred from doing so when the claims are properly raised for the first time to the first adjudicative body with authority over the claims. *Id*. In upholding the exhaustion rule, the state court refused to address PRSM's separation of powers and due process arguments. *Id*. at 18.

The injustice of that holding is emphasized by arguments made by the government and accepted by the Washington courts. Throughout the administrative process, the government was statutorily authorized to withhold its factual position on constitutional claims. *Id*. at 13–14. Because of that, the government obtained an unfair litigation advantage when the matter made its way to the trial court. There, the government relied on the lack of evidence—evidence that was barred by statute—to argue that the agency record did not contain facts necessary to establish standing and to establish the scope of constitutional review.[7] *Id*. at

[7] On this topic, PRSM is illustrative of a common problem in administrative law: issue preclusion often operates as a one-way ratchet, allowing the government to raise new issues on judicial review while barring individuals from responding in kind. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, *Wash.*, 554 U.S. 527, 544–45 (2008) (allowing the government to change its legal arguments on judicial review);

16. Then the City opposed Petitioners' motion for leave to submit the very evidence required to address those threshold questions. *Id.* at 16. The Washington courts agreed with the City, stripping Petitioners of any opportunity to fairly litigate their claims. *Id.* at 16–18.

Due process demands better. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."). Not only does due process guarantee the right to present evidence to support one's claims (*Jenkins*, 395 U.S. at 429), it also insists that any limitation on the duty to disclose one's evidence be reciprocal. *See*, *e.g.*, *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) ("[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded … it does speak to the balance of forces between the accused and his accuser."); *see also id.* at 475 (To avoid a due process violation, "discovery must be a two-way street."); *id.* at 474 n.6 (This Court has been "particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack

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Canonsburg Gen. Hosp. v. Burwell, 807 F.3d 295, 304–06 (D.C. Cir. 2015) (court may consider new legal issues to affirm an agency decision that was based on incorrect reasoning); *Graceba Total Commc'ns, Inc. v. F.C.C.*, 115 F.3d 1038, 1041 (D.C. Cir. 1997) (court is authorized to consider post-hoc arguments from the government even if they "appear[] nowhere" in the agency record.); *but see Smith v. Berryhill*, 139 S. Ct. 1765, 1779–80 (2019) (It is error for the court to rule on an issue that was not raised to the agency—whether the argument supports reversal or affirmance.).

of reciprocity interferes with the defendant's ability to secure a fair trial."); *see also Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977) ("An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process."). Thus, at minimum, due process demands that any invocation of administrative-issue exhaustion require "careful examination of 'the characteristics of the particular administrative procedure provided'" that this Court requires, *Sims*, 530 U.S. at 113 (O'Connor, J., concurring) (quotation marks and citation omitted), to ensure "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). A decision from this Court explaining the limited nature of issue preclusion—particularly in the context of constitutional claims—would curtail the weaponization of what is intended to be an equitable doctrine.

Clarification of this doctrine—which is frequently invoked to limit an individual's right to judicial review of government actions—is of particular importance to the nation's property owners, whose use and development rights are typically decided by agencies like zoning boards. In that circumstance, administrative-issue exhaustion would work an injustice because the agency cannot competently decide facts related to a constitutional violation where the agency's decision *itself* causes the violation. A good example of this is a regulatory takings claim premised on the denial of a zoning variance. There, the taking is not complete until the agency issues its decision denying the variance. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), *overruled on other grounds*, *Knick v. Township of Scott, Pa.*, 139 S.

Ct. 2162 (2019). Consequently, as recognized by some state courts (but not all), the affected property owner would have no prior opportunity to develop and present evidence relevant to the taking—let alone, respond to the government's factual and legal arguments. *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107, 1119–20 (2002) (refusing to "vest the [zoning] board with the responsibility of deciding the facts underlying the plaintiff's constitutional claim" because "the board's decision itself is the action that gives rise to the constitutional claim.") (emphasis omitted); *see also Hensler v. City of Glendale*, 8 Cal. 4th 1, 15–16 (1994) ("[A]n administrative agency is not competent to decide whether its own action constitutes a taking . . . .").

CONCLUSION

The judgments of the United States Courts of Appeals for the Eighth and Tenth Circuits should be reversed.

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Respectfully submitted,

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