

Issue Exhaustion in Notice-and-Comment Rulemaking

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Issue Brief

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TABLE OF CONTENTS

- I. INTRODUCTION..... 1**
- II. THE DOCTRINE OF ISSUE EXHAUSTION 1**
 - What is issue exhaustion?..... 1
 - What sources of law ground the doctrine? 2
 - Which issues must be exhausted?..... 5
 - What must a commenter do to exhaust an issue?7
 - Who must exhaust an issue to preserve it for judicial review? 8
 - When is exhaustion not required? 9
 - Are there circuit splits on issue exhaustion in rulemaking? 12
- III. STRATEGIC CONSIDERATIONS..... 13**
 - Pay attention to the source of the issue exhaustion requirement..... 13
 - The bar to exhaust an issue is low. 13
 - Often, one commenter can exhaust an issue for all litigants—as can an agency..... 13
 - There are ancillary benefits to going deeper..... 14
- IV. UNCERTAINTY ABOUT ISSUE EXHAUSTION FOR RULES 14**
- V. CONCLUSION..... 17**
- APPENDIX: Summary of Selected Exhaustion Requirements..... 18**

I. INTRODUCTION

When reviewing agency action, courts frequently decline to adjudicate issues that the agency did not have an opportunity to consider during the administrative process. That means, at least in theory, that issues not raised in the comments on agencies' proposed rules are generally waived in court. But particularly in the notice-and-comment rulemaking context, the contours and requirements of this “issue exhaustion” doctrine are not always clear or consistent.

This Issue Brief explores that doctrine with an eye toward strategic considerations that commenters might bear in mind with an eye toward eventual litigation. Commenters should consider submitting comments geared toward issue preservation. They can achieve that purpose with relative efficiency by identifying the issue exhaustion regime applicable to a particular agency action, drafting a comment that succinctly flags key legal and factual arguments, and, when possible, coordinating with aligned parties and entities to produce comments sufficient to exhaust issues for any future litigant that might seek to raise them in court.¹

II. THE DOCTRINE OF ISSUE EXHAUSTION

What is issue exhaustion? Courts often decline to resolve issues that were not raised before the agency at the time it acted. The “general rule” is “that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its

¹ Governing for Impact has separately written about drafting adverse comments, see Governing for Impact, [Writing Adverse Comments](#) (May 2025), and about using comments to seek disclosure regarding the use of artificial intelligence in rulemaking, see Jordan Ascher, [Seeking Disclosure of AI Usage in Agency Rulemaking](#), Yale J. on Reg. Notice & Comment (July 19, 2025).

practice.”² This doctrine goes by several names, most commonly “issue exhaustion” or “issue waiver.”³

It is “black-letter administrative law” that issue exhaustion applies in court challenges to notice-and-comment rules.⁴ “[A] party will normally forfeit an opportunity to challenge an agency rulemaking on a ground that was not first presented to the agency for its initial consideration.”⁵

Issue exhaustion is not to be confused with exhaustion of administrative remedies, a related but distinct doctrine. According to the doctrine of exhaustion of remedies, parties to agency proceedings must generally adhere to “administrative and judicial procedures by which an injured party may seek review of an adverse decision” — for instance, a requirement to seek rehearing before going to court.⁶ Issue exhaustion, by contrast, relates to the arguments and issues that must be raised in agency proceedings to preserve them for litigation in court. Courts “have not always been precise in making the distinction.”⁷

What sources of law ground the doctrine? Issue exhaustion is sometimes required by statute or regulation, and sometimes by judge-made rule. A number of statutes require issue exhaustion in rulemakings issued pursuant to their authority.⁸ One is the Clean Air Act, which provides that “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . .

² *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

³ *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1149 (D.C. Cir. 2005). Some have treated these two terms as referring to different concepts, but “[t]he distinction between ‘issue exhaustion’ and ‘issue waiver’ is illusive, to say the least. Indeed, both terms appear in the case law without apparent distinction, and they are sometimes treated as if synonymous.” *Id.* The doctrine is sometimes also cast in terms of “administrative waiver,” 4 Charles H. Koch, Jr. & Richard Murphy, *Admin. L. & Prac.* § 12:22 (3d ed. Mar. 2026 update), and “forfeit[ure],” *Transportation Div. of Int’l Ass’n of Sheet Metal, Air, Rail and Transportation Workers v. Fed. R.R. Admin.*, 40 F.4th 646, 659 (D.C. Cir. 2022). This Issue Brief uses “issue exhaustion.”

⁴ *Advocates*, 429 U.S. at 1149 (internal quotation marks and alterations omitted) (quoting *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001)); see also *Nat’l Mining Ass’n v. Dep’t of Lab.*, 292 F.3d 849, 874 (D.C. Cir. 2002).

⁵ *Advocates*, 429 U.S. at 1150; *Koretzoff v. Vilsack*, 707 F.3d 294, 397 (D.C. Cir. 2013).

⁶ *Darby v. Cisneros*, 509 U.S. 137, 144, 153 (1993) (internal quotation marks omitted).

⁷ *Morris v. McDonough*, 40 F.4th 1359, 1362 n.1 (Fed. Cir. 2022).

⁸ Jeffrey Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 *Admin. L. Rev.* 109, 172 (2018).

may be raised during judicial review.”⁹ Another is the Securities Exchange Act of 1934: “No objection to an order or rule of the [Securities and Exchange] Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.”¹⁰ It is also “common for an agency’s own regulations to require issue exhaustion in administrative appeals. And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues.”¹¹ Importantly, though, courts “have imposed an issue-exhaustion requirement even in the absence of a statute or regulation” mandating it.¹² This judge-made issue exhaustion requirement applies in numerous challenges to agency rules brought under the Administrative Procedure Act.

The scope and stringency of the exhaustion requirement in a particular case will depend upon the specifics of the source of law creating the exhaustion requirement. One important dynamic is that different issue exhaustion requirements have different effects on a court’s power to adjudicate an issue. Courts may, in their discretion, excuse judge-made exhaustion. “Common law (or ‘judicial’) exhaustion doctrine . . . recognizes judicial discretion to employ a broad array of exceptions that allow a plaintiff to bring his case in district court despite his abandonment of the administrative review process.”¹³ Judge-made exhaustion, accordingly, is not “an ironclad rule.”¹⁴ Statutory exhaustion requirements, however, are generally mandatory, which means courts must abide by them (unless waived by the government).¹⁵ Further still, some exhaustion statutes are jurisdictional. Where these statutes apply, courts lack the subject-matter jurisdiction to consider unexhausted

⁹ 42 U.S.C. § 7607(d)(7)(B).

¹⁰ 15 U.S.C. § 78y(c)(1); see also, e.g., *id.* § 77i(a) (Securities Act); 29 U.S.C. § 160(e) (National Labor Relations Act); 29 U.S.C. § 210(a) (Fair Labor Standards Act); 47 U.S.C. § 405 (Communications Act). For more examples, see Lubbers, *supra* n.8, at 114–18.

¹¹ *Sims v. Apfel*, 530 U.S. 103, 108 (2000) (plurality opinion) (citation omitted).

¹² *Id.* at 108.

¹³ *Bastek v. Federal Crop. Ins. Corp.*, 145 F.3d 90, 93–94 (2d Cir. 1988) (discussing exhaustion of remedies).

¹⁴ *Advocates*, 429 F.3d at 1148.

¹⁵ See *EPA v. EME Homer City Gen., LP*, 572 U.S. 489, 512 (2014) (“Had EPA pursued the ‘reasonable specificity’ argument vigorously before the D.C. Circuit, we would be obligated to address the merits of the argument.”); *Bastek*, 145 F.3d at 94 (“Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them.”).

issues.¹⁶ A statute also might specify the degree of specificity with which an issue must be articulated before the agency to satisfy exhaustion¹⁷ or identify a particular party that must have been the one to exhaust an issue in order for it to be preserved.¹⁸ We discuss these distinctions below. When it comes to exhaustion, the Supreme Court has emphasized that “[t]he question in all cases is one of statutory construction, which must be resolved using ordinary interpretive techniques.”¹⁹

Nevertheless — at least in the past — courts have sometimes glossed over important variations in exhaustion requirements and treat issue exhaustion as a relatively unified body of law. That might reflect a judgment that codified exhaustion requirements are generally meant to invoke the same doctrine. For instance, as Judge Patricia Wald observed,

[n]umerous statutes contain an explicit exhaustion requirement. Only some of these statutes explicitly permit exceptions, and the statutes that permit exceptions use different wording to describe the scope of the exceptions, with no apparent rhyme or reason for the differences. The very senselessness of these differences in language suggests that Congress meant, in all these statutes, merely to codify the judicial doctrine of exhaustion of administrative remedies.²⁰

Or the relative unity of exhaustion law might be understood as the result of careful statutory interpretation: “an exhaustion provision . . . might be best read to give judges the leeway to create exceptions or to itself incorporate standard administrative-law exceptions.”²¹ Either way, courts do sometimes appear to apply a generic form of issue exhaustion without particular regard to the source of the

¹⁶ The Federal Power Act, discussed below, is one such statute. *Shafer & Freeman Lakes Env't Conservation Corp. v. FERC*, 992 F.3d 1071, 1088 (D.C. Cir. 2021).

¹⁷ See 42 U.S.C. § 7607(d)(7)(B) (Clean Air Act).

¹⁸ See *Shafer & Freeman Lakes*, 992 F.3d at 1088.

¹⁹ *Ross v. Blake*, 578 U.S. 632, 642 n.2 (2016) (discussing a statutory requirement of exhaustion of administrative remedies).

²⁰ *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 682 n.6 (D.C. Cir. 1983) (citations omitted).

²¹ *Ross*, 578 U.S. at 642 n.2.

requirement.²² This somewhat freewheeling approach may prove to be inconsistent with the modern Supreme Court’s formalist approach to statutory interpretation and administrative procedure—even if it does, sometimes, reflect how lower courts actually approach issue exhaustion.

Which issues must be exhausted? In general, commenters must exhaust both “factual” and “legal” issues with a proposed rule to preserve them for judicial review.²³ Or, at least, that is the black-letter rule. Courts have at times excused exhaustion for legal issues that do “not require the development of a factual record.”²⁴

For constitutional issues in particular, at least in the adjudication context, the emerging rule appears to be that structural constitutional questions—like those going to the agency’s structure or composition or the constitutionality of statutes—might not need to be exhausted, but case-specific constitutional issues as to how an agency has exercised its authority are subject to exhaustion.

The Supreme Court recently held in *Carr v. Saul* that Social Security disability plaintiffs were not required to exhaust before agency administrative law judges (“ALJs”) the question whether those ALJs were improperly appointed under the Appointments Clause.²⁵ In that case, the purported issue exhaustion requirement was “judicially created,” not statutory.²⁶ As particularly relevant, the Court identified two reasons not to require exhaustion. First, “agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators’ areas of technical expertise. As such, 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

²² See Lubbers, *supra* n.8, at 124 (“Courts have not done a good job of sorting through these distinctions. As Professor [William] Funk notes, ‘Unfortunately, some courts have ignored the specific statutory origin for [issue exhaustion] and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute.’” (quoting William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 Pace Env’tl. L. Rev. 1, 17 (2000))).

²³ *Advocates*, 429 F.3d at 1149; see also *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002).

²⁴ *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1338 (D.C. Cir. 1983).

²⁵ 593 U.S. 83, 85 (2021).

²⁶ *Id.* at 88.

proceedings.”²⁷ Second, “[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.”²⁸ The Court allowed, however, that “[o]utside the context of Appointments Clause challenges, such as in the sphere of routine objections to individual benefits determinations, the scales might tip differently” with respect to the exhaustion question.²⁹

Courts of appeals seem to have adhered to this distinction. For instance, in *Morris v. McDonough*, the Federal Circuit held that a veterans disability benefits claimant was required to exhaust a case-specific due process argument with the agency in order to raise it before the Court of Appeals for Veterans Claims.³⁰ The Federal Circuit first noted that unlike the “judicially created issue-exhaustion requirement” in *Carr*, the exhaustion requirement in *Morris* was “rooted in the statute.”³¹ Setting that distinction aside, the court found dispositive that “the constitutional issue is not a ‘structural’ one, but, rather, a due process issue specific to the [claimant’s] case.”³² Further distinguishing *Carr*, the *Morris* court found, first, that agency adjudicators “routinely deal[] with” due process questions, placing the issue within their expertise and, second, that the agency could have remedied the claimed due process issue, “so it would not have been futile to bring the argument first to the” agency.³³ Other courts have similarly drawn the line between “facial constitutional challenges outside the limited scope of an [agency’s] adjudicative authority” and “as-applied challenges” in which an agency “can grant the requested relief.”³⁴

But courts have not always spoken with one voice on this issue. Some courts considering issue exhaustion have been influenced by a separate doctrine, articulated in *Thunder Basin Coal Co. v. Reich*,³⁵ concerning how to discern when Congress has divested district courts of subject-matter jurisdiction over certain

²⁷ *Id.* at 92 (citations omitted).

²⁸ *Id.* at 93.

²⁹ *Id.* at 92 n.5.

³⁰ 40 F.4th 1359, 1360 (Fed. Cir. 2022).

³¹ *Id.* at 1363–64 (emphasis and internal quotation marks omitted).

³² *Id.* at 1364.

³³ *Id.*

³⁴ See *Edd Potter Coal Co., Inc. v. Dep’t of Lab.*, 39 F.4th 202, 211 (4th Cir. 2022) (internal quotation marks omitted).

³⁵ 510 U.S. 200 (1994).

claims by channeling them to agency adjudication. In the *Thunder Basin* context, the rule is sometimes that even structural constitutional claims that the agency lacks the power or expertise to decide are channeled through agency proceedings so long as they are ultimately subject to review in an Article III court.³⁶ In some issue exhaustion cases, the D.C. Circuit adapted that rule into a requirement that *all* constitutional objections to agency action, even structural ones, must be exhausted.³⁷ That approach, however, is hard to square with the more recent *Carr*, and even with other D.C. Circuit decisions. For instance, in the D.C. Circuit’s decision in *Noel Canning v. NLRB*, which involved a constitutional objection to recess appointments to the National Labor Relations Board, the court excused the petitioner’s failure to raise that issue before the agency under the relevant statute.³⁸ “[T]he objections before us . . . go to the very power of the Board to act and implicate fundamental separation of powers concerns.”³⁹ “[T]hey are governed by the ‘extraordinary circumstances’ exception” in the relevant issue-exhaustion statute “and therefore are properly before us for review.”⁴⁰

What must a commenter do to exhaust an issue? In general, an issue is exhausted when it is flagged for the agency or the agency has had an “opportunity” to address it.⁴¹ “[A] claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised. Accordingly, alerting the agency in general terms will be enough.”⁴² This general principle appears to govern both the judge-made issue exhaustion doctrine and run-

³⁶ See *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10–15 (2012). But see *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023) (not requiring channeling of structural constitutional challenges).

³⁷ *Springsteen-Abbott v. SEC*, 989 F.3d 4, 8–9 (D.C. Cir. 2021); see also *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 115 (D.C. Cir. 2022).

³⁸ 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d*, 573 U.S. 513 (2014).

³⁹ *Id.*

⁴⁰ *Id.*; see 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”). Exceptions to the issue exhaustion requirement are discussed below.

⁴¹ *CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105, 117 (D.C. Cir. 2006); accord *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002).

⁴² *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (citation omitted).

of-the mill exhaustion statutes.⁴³ Importantly, though, “argument[s],” not just “general legal issues,” must be exhausted.⁴⁴ And it is likely “not enough to merely to mention a possible argument in the most skeletal way.”⁴⁵

Some statutes contain specific requirements, for example conditioning exhaustion on arguments being raised with “reasonable specificity” before the agency.⁴⁶ But the Supreme Court has said that even a statutory “‘reasonable specificity’ requirement does not call for a hair-splitting approach. A party need not rehearse the identical argument made before the agency; it need only confirm that the government had notice of the challenge during the public comment period and a chance to consider in substance, if not in form, the same objection now raised in court.”⁴⁷

Who must exhaust an issue to preserve it for judicial review? In general, exhaustion is satisfied so long as an agency had the “opportunity” to consider an issue, whether it was raised by a commenter or addressed by the agency on its own initiative.⁴⁸ Where that general rule applies, a litigant raising a particular issue in court need not have been the commenter who raised it to the agency; “it suffices that another person has raised the issue in a timely way, allowing the agency to consider it,”⁴⁹ or that the agency considered the issue of its own accord.

Some statutes deviate from this general rule. For instance, the Hobbs Act, which provides for judicial review of actions of several agencies—including certain FCC, Department of Agriculture, and Department of Transportation actions⁵⁰—has been

⁴³ See *NTCH, Inc. v. FCC*, 841 F.3d 397, 408 (D.C. Cir. 2016) (“[O]ur precedent construing [the Federal Communications Act, 47 U.S.C. § 405(a)] does not require an argument to be brought up with specificity, but only reasonably ‘flagged’ for the agency’s consideration.”).

⁴⁴ *Koretov v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013); accord *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1291 (D.C. Cir. 2004).

⁴⁵ *Springsteen-Abbott*, 989 F.3d at 8 (internal quotation marks omitted).

⁴⁶ See 42 U.S.C. § 7607(d)(7)(B) (Clean Air Act); 16 U.S.C. § 825l(a) (Federal Power Act).

⁴⁷ *Ohio v. EPA*, 603 U.S. 279, 296 (2025) (citations, quotation marks, and alterations omitted) (interpreting 42 U.S.C. § 7607(d)(7)(B)).

⁴⁸ *Petroleum Comms., Inc. v. FCC*, 22 F.3d 1164, 1170 (D.C. Cir. 1994); accord *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163–64 (D.C. Cir. 1987).

⁴⁹ 23 Richard Murphy, Fed. Prac. & Proc. § 8184 (2d ed. Apr. 2026 update).

⁵⁰ 28 U.S.C. § 2342.

read to require a litigant to have itself participated in agency proceedings.⁵¹ It permits “[a]ny party aggrieved” by an order covered by the statute to file a petition for review in a court of appeals.⁵² The D.C. Circuit “has consistently interpreted the phrase ‘party aggrieved’ to require as a general matter that petitioners be parties to any proceedings before the agency preliminary to issuance of its order.”⁵³ Similarly, the Federal Power Act requires a party aggrieved by an order of the Federal Energy Regulatory Commission to “set forth specifically” its objections to a Commission order in a rehearing petition,⁵⁴ permits judicial review “after the order of the Commission upon the application for rehearing,” and provides that “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”⁵⁵ Courts have interpreted this stringent statute to require the federal court petitioner to have been the party that exhausted the “specific objections” in agency proceedings.⁵⁶ Even “the Commission’s consideration of an issue cannot . . . cure a petitioner’s failure to raise that issue.”⁵⁷ These statutes, by requiring particular parties to have presented a claim in agency proceedings, in effect require exhaustion of remedies.

When is exhaustion not required? Issue exhaustion is generally understood to be subject to several exceptions. In theory, it should be easy to tell what these exceptions are. Judicially required exhaustion may be excused on several established grounds, as described below. And statutory and regulatory exhaustion requirements ought to be subject to whatever exceptions their text, properly construed, permit.⁵⁸ Indeed, many (though not all) exhaustion statutes contain residual exceptions where, for instance, “reasonable grounds” or “extraordinary circumstances” exist to excuse exhaustion⁵⁹—clauses that have sometimes been

⁵¹ *Simmons v. ICC*, 716 F.2d 40, 41 (D.C. Cir. 1983).

⁵² 28 U.S.C. § 2344.

⁵³ *Simmons*, 716 F.2d at 42.

⁵⁴ 16 U.S.C. § 825l(a).

⁵⁵ *Id.* § 825l(b).

⁵⁶ *Shafer & Freeman Lakes*, 992 F.3d at 1088–89.

⁵⁷ *Id.* at 1088; see also 15 U.S.C. § 717r(b) (Natural Gas Act).

⁵⁸ *Ross*, 578 U.S. at 641 n.2.

⁵⁹ Compare, e.g., 29 U.S.C. § 160(e) (National Labor Relations Act) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the

read to incorporate standard judge-made exhaustion exceptions.⁶⁰ But more generally, as described above, courts have sometimes elided distinctions between the bases and specific requirements of different incarnations of the issue exhaustion rule and applied a common set of exceptions.⁶¹ The Supreme Court’s increasing emphasis on textualism may push courts toward greater care in this regard.⁶²

In general, though, “in the absence of a legal exhaustion requirement, the administrative-waiver doctrine does not represent an ironclad rule.”⁶³ Courts “may exercise [their] discretion to address an issue not exhausted before the agency.”⁶⁴ “[D]etermining whether to require administrative exhaustion is ‘intensely practical’ and turns on ‘both the nature of the claim presented and the characteristics of the particular administrative procedure provided.’”⁶⁵ Courts have excused exhaustion (usually, but not always, the judge-made variety) in the following circumstances, among others:

- Where the issue could not have been presented to the agency,⁶⁶ for instance because the final, litigated rule was not a logical outgrowth of

failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”), and 29 U.S.C. § 210(a) (Fair Labor Standards Act) (“No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do.”), with 42 U.S.C. § 5311(c)(2) (Housing and Community Development Act) (“No objection to the action of the Secretary shall be considered by the court unless such objection has been urged before the Secretary.”).

⁶⁰ See *Washington Ass’n for Television and Children*, 712 F.2d at 682 n.6; *Ross*, 578 U.S. at 641 n.2 (“[A]n exhaustion requirement . . . might be best read to give judges the leeway to create exceptions or to itself incorporate standard administrative-law exceptions. The question in all cases is one of statutory construction, which must be resolved using ordinary interpretive techniques.” (citations omitted)).

⁶¹ See *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016) (listing various court-recognized exceptions to 47 U.S.C. § 405(a)’s otherwise unadorned requirement that the agency be “afforded [an] opportunity to pass” on all “questions of law or fact”); Lubbers, *supra* n.8, at 124 (Professor Funk’s description of this dynamic).

⁶² See *Ross*, 578 U.S. at 641 n.2.

⁶³ *Sandoz Inc. v. Becerra*, 57 F.4th 272, 278 (D.C. Cir. 2023) (internal quotation marks omitted) (quoting *Advocates*, 429 F.3d at 1148).

⁶⁴ *Id.* (internal quotation marks omitted) (quoting *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1337 (D.C. Cir. 1983)).

⁶⁵ *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)).

⁶⁶ *Petroleum Comms., Inc.*, 22 F.3d at 1170.

the proposal issued for comment⁶⁷ or because of an intervening change in the law.⁶⁸

- Where exhaustion would be futile, for instance because the agency is “powerless to grant the relief requested” (as in the case of a structural constitutional objection to the agency, but note the different approaches explored above)⁶⁹ or where the agency has “made clear” its position.⁷⁰
- Where an agency has acted “patently in excess” of its authority.⁷¹
- Where an argument is so obvious that an agency “must consider [it] *sua sponte*”⁷² or where the agency otherwise was on notice that it would have to consider a particular point.⁷³ In this vein, the D.C. Circuit has said that an agency “retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule and therefore . . . must justify” such an “assumption even if no one objects to it during the comment period.”⁷⁴
- Where a legal argument is beyond the agency’s “areas of technical expertise”⁷⁵ or “does not require the development of a factual record.”⁷⁶

⁶⁷ See Lubbers, *supra* n.8, at 152–53.

⁶⁸ *Old Ben Coal Co. v. Dep’t of Lab.*, 62 F.3d 1003, 1006 (7th Cir. 1995); *Springsteen-Abbott*, 989 F.3d at 9.

⁶⁹ *Carr*, 593 U.S. at 93.

⁷⁰ *Petroleum Comms., Inc.*, 22 F.3d at 1170; *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, No. 09-240, 2010 WL 3431761, at *18 (E.D. Pa. 2010); *Portland Cement Ass’n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011).

⁷¹ *Petroleum Comms., Inc.*, 22 F.3d at 1170.

⁷² *Advocates*, 429 F.3d at 1150; *Oklahoma Dep’t of Env’t. Quality v. EPA*, 740 F.3d 185, 192 (D.C. Cir. 2014).

⁷³ *EME Homer City Gen., LLP v. EPA*, 696 F.3d 7, 24 n.18 (D.C. Cir. 2012).

⁷⁴ *Natural Res. Def. Council v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014).

⁷⁵ *Carr*, 593 U.S. at 92.

⁷⁶ *R.R. Yardmasters*, 721 F.2d at 1338.

The variety and number of these exceptions suggests that courts are frequently eager to excuse judge-made issue exhaustion requirements, rendering the doctrine indeterminate.

Are there circuit splits on issue exhaustion in rulemaking? The circuits to have addressed the question have generally indicated that issue exhaustion is required with respect to challenges to notice-and-comment rules (often, of course, subject to exceptions).⁷⁷ One exception is the Federal Circuit, which has not adopted or rejected the judge-made issue exhaustion rule in the rulemaking context.⁷⁸ The Fifth Circuit at one point rejected the doctrine’s application to rulemaking,⁷⁹ but has since seemingly reversed itself.⁸⁰ The Sixth Circuit has said that the question of issue exhaustion “implicates the rulemaking/adjudication dichotomy pervasive in administrative law” and cautioned that “[t]he waiver rule should not be applied freely in both areas.”⁸¹ And while that court recognized that “[t]here are cases . . . that fall on the rulemaking side of the rulemaking/adjudication dichotomy for certain purposes holding that a party challenging a rule can waive an issue by not making a comment on point during the comment period,” it somewhat cryptically added that “all of these cases nonetheless contain some characteristics of adjudications, and should not be applied broadly.”⁸² Otherwise, we are not aware of differences among the circuits in the application of the issue exhaustion doctrine to rulemaking that would be particularly relevant to commenters.

⁷⁷ See, e.g., *Advocates*, 429 F.3d at 1149–51; *Universal Health Servs. Inc. v. Thompson*, 363 F.3d 1013, 1020–21 (9th Cir. 2004); *Center for Biological Diversity v. EPA*, 75 F.4th 174, 183 (3d Cir. 2023); *Mayor of Baltimore v. Azar*, 973 F.3d 258, 290 (4th Cir. 2020); *New Mexico Health Connections v. HHS*, 946 F.3d 1138, 1165 n.25 (10th Cir. 2019).

⁷⁸ *Metro. Area EMS Auth. v. Secretary of Veterans Affairs*, 122 F.4th 1339, 1344 (Fed. Cir. 2024).

⁷⁹ *City of Seabrook v. EPA*, 659 F.2d 1349, 1360–61 (5th Cir. 1981) (“The rule urged by EPA would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the Federal Register, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated.”).

⁸⁰ *BCCA Appeal Grp. v. U.S. E.P.A.*, 355 F.3d 817, 829 n.10 (5th Cir. 2003)

⁸¹ *Citizens Coal Council v. EPA*, 447 F.3d 879, 904 n.25 (6th Cir. 2006).

⁸² *Id.*

III. STRATEGIC CONSIDERATIONS

Notwithstanding confusion about the source, scope, and application of the issue exhaustion doctrine, there are a few relatively clear takeaways for those seeking to preserve challenges to rules.

Pay attention to the source of the issue exhaustion requirement. As explained, the source of the issue exhaustion requirement varies, and with it, the issue exhaustion requirements applicable in a particular case. In the past, courts have sometimes shown a willingness to elide those distinctions and apply an undifferentiated form of issue exhaustion. Commenters and prospective litigants should not count on that fluid approach continuing — especially if issue exhaustion is litigated in challenges to high-profile agency rules bound for appellate and Supreme Court review. Commenters interested in issue preservation should therefore identify the exhaustion requirement applicable to the agency action on which they are commenting and adhere to its strictures, as identified by statute or articulated by courts, as appropriate.

The bar to exhaust an issue is low. A commenter can generally exhaust an issue simply by giving an agency a fair opportunity to address it. It should generally be enough for exhaustion purposes if a commenter outlines an objection to a rule with modest elaboration sufficient to “flag” it for agency decisionmakers, subject to the requirements of specific exhaustion statutes. Of course, drafting a comment comprehensively addressing the issues with a proposal is not a costless proposition, especially for litigants and advocates with particularly limited resources. But the generally low barrier of issue exhaustion might tip the analysis in favor of drafting issue-preservation comments (at least where an exception to issue exhaustion would not seem to apply). In particular, entities that both comment and litigate might consider issue-spotting at the notice of proposed rulemaking stage and filing a brief comment raising issues identified, rather than waiting for a rule to be finalized to assess its legality.

Often, one commenter can exhaust an issue for all litigants — as can an agency. Except where a statute provides otherwise, one commenter raising an issue — or the agency considering it of its own accord — is sufficient for exhaustion. Aligned litigants and commenters might consider coordinating or dividing up the work of

commenting to ensure that issues are adequately exhausted across rules without inefficient duplication of labor. But as noted above, some statutory regimes have different requirements, including that a litigant have itself exhausted an issue it seeks to press in court.

There are ancillary benefits to going deeper. Issue preservation does not require detailed or lengthy comments. But preserving an issue is not the only reason an entity might wish to file an adverse comment on a notice of proposed rulemaking. Agencies are required by law to respond to important comments,⁸³ and those contemporaneous responses might bind their litigation positions.⁸⁴ As such, commenters can attempt to lock agencies to a particular position on a legal or factual question, restricting their flexibility in subsequent litigation. But to achieve this goal, commenters might need to flesh out their arguments in somewhat greater depth than would be required for exhaustion. The D.C. Circuit has expressly recognized that “it is one thing to preserve a point for judicial review and quite another to raise the issue with sufficient force to require an agency to formally respond.”⁸⁵

IV. UNCERTAINTY ABOUT ISSUE EXHAUSTION FOR RULES

This Issue Brief has not yet engaged with an important question about which there is serious doubt: whether, absent a statutory requirement, courts have any basis to require issue exhaustion in the notice-and-comment rulemaking context. We have left the question to the end because it remains “black-letter administrative law that absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue,”⁸⁶ which is

⁸³ See *Ohio*, 603 U.S. at 293–94.

⁸⁴ *SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943).

⁸⁵ *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000); see generally *Governing for Impact, Arbitrary and Capricious Challenges* (May 2025).

⁸⁶ *Advocates*, 429 U.S. at 1149 (internal quotation marks omitted).

what practitioners need to know. But we nevertheless briefly sketch out the uncertainty.

In *Sims v. Apfel*, a plurality of the Supreme Court explored the issue exhaustion doctrine in the context of a challenge to the denial of Social Security disability benefits. It noted that issue exhaustion is often required by statute and regulation but sometimes, even absent a positive-law basis, courts impose an exhaustion requirement.⁸⁷ “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,” the Court explained.⁸⁸ As such,

the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest. Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker.⁸⁹

In *Sims*, the Court concluded that judge-made issue exhaustion did not apply to the proceedings of the Social Security Appeals Counsel, an adjudicative body that operated in “an informal, nonadversary manner” and that “d[id] not depend much, if at all, on claimants to identify issues for review.”⁹⁰ In *Carr*, a majority of the Court adopted the *Sims* plurality’s operative principle: “courts must take care not to reflexively assimilate the relation of administrative bodies and the courts to the relationship between lower and upper courts.”⁹¹ “The critical feature that distinguishes adversarial proceedings from inquisitorial ones is whether claimants bear the responsibility to develop issues for adjudicators’ consideration.”⁹² This would seem to cast doubt on the legal viability of judge-made issue exhaustion

⁸⁷ 530 U.S. at 108.

⁸⁸ *Id.* at 108–09.

⁸⁹ *Id.* at 109–10 (internal quotation marks omitted).

⁹⁰ *Id.* at 112.

⁹¹ 593 U.S. at 88–89 (internal quotation marks and alterations omitted).

⁹² *Id.* at 89.

requirements in rulemaking. Rulemaking is nonadversarial. Indeed, it would seem to follow *a fortiori* from *Sims*, where an informal adjudication was held not to be sufficiently adversarial for issue exhaustion, that rulemaking does not give rise to an issue exhaustion requirement.

But, for the moment at least, courts have shrugged their shoulders at the *Sims* analysis and continued to apply issue exhaustion in the rulemaking context. The D.C. Circuit went so far as to characterize as “not unreasonable” the contention that where “there appears to be no statute or regulation compelling exhaustion in advance of judicial review, and no argument has been made analogizing the agency’s rulemaking to adjudication,” courts should not impose an exhaustion requirement.⁹³ But the court went on to cite, and adhere to, a slew of post-*Sims* circuit decisions requiring exhaustion in rulemaking.⁹⁴ It reasoned that issue exhaustion was generally required with respect to rulemakings for two reasons. First, “the role of the court is to determine whether the agency’s decision is arbitrary and capricious for want of reasoned decisionmaking. Therefore, it is unsurprising that parties rarely are allowed to seek ‘review’ of a substantive claim that has never even been presented to the agency for its consideration.”⁹⁵ Second, “simple fairness.”⁹⁶ For its part, the Ninth Circuit has said that *Sims* “turned on the unique nature of Social Security benefit proceedings and offers no guidance relevant to rulemaking.”⁹⁷ The Supreme Court may, one day, weigh in on the question of issue exhaustion in rulemaking.

⁹³ *Advocates*, 429 F.3d at 1149.

⁹⁴ *Id.* at 1149–50.

⁹⁵ *Id.* at 1150 (citation omitted).

⁹⁶ *Id.* (quoting *L.A. Tucker Truck Lines*, 344 U.S. at 37).

⁹⁷ *Universal Health Servs. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004).

V. CONCLUSION

In many cases, the doctrine of issue exhaustion presents a barrier for litigants challenging agency rules in federal court. Frequently, though, that barrier will be low. Commenters and litigants can work together to preserve key legal and factual issues for judicial review.

The information in this document is provided for informational purposes only and does not contain legal advice, legal opinions, or any other form of advice regarding any specific facts or circumstances and does not create or constitute an attorney-client relationship. You should contact an attorney to obtain advice with respect to any particular legal matter and should not act upon any such information without seeking qualified legal counsel on your specific needs.

APPENDIX

Summary of Selected Exhaustion Requirements

Source	Text	Exceptions*	Level of detail required	Who must exhaust?
Judge-made rule		Various	Flagging	Any commenter or agency <i>sua sponte</i>
Clean Air Act (EPA) 42 U.S.C. § 7607(d)(7)(B)	Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.	None specified	Reasonable specificity	Not specified
National Labor Relations Act (NLRB) 29 U.S.C. § 160(e)	No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.	Extraordinary circumstances for failure to exhaust	Not specified	Not specified
Securities Act of 1934 (SEC) 15 U.S.C. § 78y(c)(1)	No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.	Reasonable grounds for failure to exhaust	Not specified	Not specified

Securities Exchange Act of 1934 (SEC) 15 U.S.C. § 77i(a)	No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission.	None specified	Not specified	Not specified
Federal Power Act (FERC) 16 U.S.C. § 825l(b)	No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so.	Reasonable grounds for failure to exhaust	Not specified	Petitioner
Housing and Community Development Act (HUD) 42 U.S.C. § 5311(c)(2)	No objection to the action of the Secretary shall be considered by the court unless such objection has been urged before the Secretary.	None specified	Not specified	Not specified

* As explained, some courts engraft standard exceptions to exhaustion onto statutory exhaustion requirements, see *NTCH, Inc. v. FCC*, 841 F.3d 397, 408 (D.C. Cir. 2016), but that approach may be increasingly disfavored, see *Ross v. Blake*, 578 U.S. 632, 641 n.2 (2016).