

JURISDICTION, EXHAUSTION OF ADMINISTRATIVE REMEDIES, AND CONSTITUTIONAL CLAIMS

PETER A. DEVLIN*

The doctrine of exhaustion of administrative remedies says that a person challenging an agency decision must first pursue the agency’s available remedies before seeking judicial review. It was created by courts in order to promote an efficient justice system and autonomous administrative state. Congress has since written exhaustion requirements into many statutes to ensure and guide its application. Consequently, a court interpreting one of these statutory versions must first decide whether it is a jurisdictional rule or not. The fallout from this decision is the topic of this Note. By definition, jurisdictional rules are rigid: Courts may not create exceptions to them, parties may not waive or forfeit them, and they will loom over the proceedings from start to finish. Faced with a jurisdictional exhaustion requirement, courts have had to choose between diluting the concept of jurisdiction and allowing injustice. In this Note, I look for a way out of this tradeoff. I argue that statutory exhaustion requirements are neither jurisdictional nor non-judicial rules, but rather mandatory rules with a particular set of effects on courts and parties. Courts, for example, may not apply equitable exceptions to statutory exhaustion requirements, but agencies may waive or forfeit them. I define this “mandatory” exhaustion by looking to case law, jurisdiction theory, constitutional structure, and the purposes of exhaustion. I also develop an exception for constitutional claims that arise outside of an agency’s proceedings. This exception helps avoid the threat to separation of powers that requiring exhaustion for such claims would create. As a result, if courts used mandatory exhaustion then they would be empowered to avoid injustice without creating a conceptual mess. Commentators have suggested that exhaustion requirements might be mandatory in nature, and the Second Circuit has treated them as such. But neither has provided much guidance on what that means. I try to fill in that gap by developing a descriptive and normative case for categorizing them as mandatory rules.

INTRODUCTION	1235
I. THE STAKES OF MAKING AN EXHAUSTION REQUIREMENT JURISDICTIONAL	1239
A. <i>The Judicial Origins of Exhaustion</i>	1240
B. <i>Exhaustion Codified in Statute</i>	1242
C. <i>Jurisdictional Requirements</i>	1243
II. THE TRADEOFF BETWEEN CONCEPTUAL COHERENCE AND JUSTICE	1246
A. <i>When Courts Dilute the Concept of Jurisdiction</i>	1247

* Copyright © 2018 by Peter A. Devlin. J.D., 2018, New York University School of Law; B.A., 2012, Cornell University. I am especially grateful to Judge Robert Katzmann and Professor Helen Hershkoff for their invaluable input on this Note. Special thanks as well to Adam Winer, Morgan McCollum, Jake Karr, and the rest of the staff of the *New York University Law Review* for their advice, assistance, and contributions.

B. <i>When Courts Allow Injustice</i>	1251
C. <i>Seeking a Resolution in Case Law and Theory</i>	1252
III. THE ADVANTAGES OF MANDATORY EXHAUSTION	1257
A. <i>Effects Reconciled with the Purposes of Exhaustion</i> .	1257
B. <i>An Exception for Constitutional Claims</i>	1262
C. <i>The Tradeoff Resolved</i>	1267
CONCLUSION	1270

INTRODUCTION

A ten-year-old child faces removal from the United States. English is her third language. Although she cannot afford an attorney to guide her through the maze of immigration law and procedure, she might have a constitutional right to one. In a class action lawsuit against the United States, *J.E.F.M. v. Lynch*, a certified class of unrepresented children asked a federal district court to decide this question.¹ But the result was inconclusive. The Ninth Circuit reversed the district court's favorable decision, holding that the children had not exhausted their administrative remedies as required by the Immigration and Nationality Act (INA).² This means that children must defend themselves, alone, in an adversarial trial before an immigration judge, then before the Board of Immigration Appeals, and lastly petition a federal court of appeals for review, thereby always skipping the district court.³

These children thus face an inequitable “Catch-22.”⁴ In order for the Ninth Circuit to review the children's constitutional claim, the children must develop a record on this issue in the immigration courts. Without an attorney, developing this record will be difficult, and the court of appeals, as “a court of review, not first view,”⁵ will be of little assistance. Even with an attorney, they may then lose standing, and the immigration judge will nonetheless lack the expertise to develop an adequate record by applying and interpreting the right constitutional law.⁶

¹ *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119, 1123 (W.D. Wash. 2015), *aff'd in part, rev'd in part sub nom. J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).

² *J.E.F.M.*, 837 F.3d at 1038.

³ 8 U.S.C. § 1252(a)(9), (d) (2012).

⁴ See *J.E.F.M.*, 837 F.3d at 1035 (discussing the children's argument that the result created a “Catch-22”).

⁵ *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014).

⁶ A plaintiff must have suffered an injury from not having access to counsel in order to have standing to claim a right to counsel. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (holding that a plaintiff must show injury in fact, causation, and redressability to satisfy Article III's standing requirement). If the plaintiff had an attorney, then the plaintiff has suffered no injury from lacking one.

This Note is about who gets to decide whether parties must exhaust their administrative remedies and when they get to make that decision. I take up broader questions about the nature of exhaustion requirements to empower courts with the doctrinal tools that will let them avoid the inequities of the children's Catch-22. I ultimately advocate that courts should always have discretion to waive an exhaustion requirement when certain constitutional claims are at stake.

The Ninth Circuit reached its decision by holding that the exhaustion requirement is a jurisdictional rule and that the question of a right to an attorney falls within its scope; thus no exceptions may apply regardless of the potential for injustice.⁷ Jurisdictional rules, by definition, govern “a court’s adjudicatory authority,” circumscribing its ability to exercise power over a claim at all.⁸ They come with a set of tough effects: Courts may not create exceptions to jurisdictional defects, and parties may not waive or forfeit them.⁹ What is more, any party may raise such defects at any time,¹⁰ courts have an obligation to raise defects *sua sponte*, and late-discovered defects can void any judgment on the merits.¹¹

Evidently, if the INA’s exhaustion requirement had not been jurisdictional, then the court may have been able to find an exception, because non-jurisdictional rules do not carry these same effects.¹² But given the current doctrine for determining the jurisdictional status (“jurisdictionality”) of such preconditions to judicial review, the court

⁷ *J.E.F.M.*, 837 F.3d at 1038.

⁸ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).

⁹ See Jessica Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 McGEORGE L. REV. 635, 650 n.53 (2014) (providing an overview of the consequences of subject-matter jurisdiction’s no-waiver rule).

¹⁰ See *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (allowing plaintiff to challenge jurisdiction on appeal).

¹¹ See *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011) (discussing the consequences of whether a “procedural rule is ‘jurisdictional’”); *Bowles v. Russell*, 551 U.S. 205, 216–17 (2007) (Souter, J., dissenting) (discussing the stakes for habeas corpus exhaustion); Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on “Jurisdictional” Exhaustion Grounds: How Federal Courts Require That Allegations Be Presented to an Agency Without the Resources to Consider Them*, 21 GEO. MASON U. C.R.L.J. 213, 215–16 (2011) (discussing the consequences of turning exhaustion of Title VII remedies into a jurisdictional requirement).

¹² See *infra* notes 50–56 and accompanying text (discussing instances in which courts have found exceptions to statutory exhaustion by interpreting the exhaustion requirement as non-jurisdictional).

had little choice but to find that it was jurisdictional.¹³ In fact, *J.E.F.M.* is illustrative of a broader dilemma courts face when a party has not fulfilled a jurisdictional exhaustion requirement—apply the jurisdictional rule faithfully but allow injustice, or create exceptions that avoid injustice but dilute the concept of jurisdiction. The Ninth Circuit chose the former.

To begin unraveling this dilemma, I first give background in Part I on the exhaustion doctrine’s judicial origins, its purposes, and the emergence of its statutory sibling. An exhaustion requirement can either be judicially or statutorily created. And a statutory exhaustion requirement can be a jurisdictional rule or not, leaving us with three potential “exhaustions”: judicial, non-judicial statutory, and jurisdictional statutory. To distinguish between non-judicial and jurisdictional statutory requirements, the Court uses a clear statement rule. The rule itself is simple (even though applying it often is not). A requirement is jurisdictional only if the statute unambiguously states that it is so.¹⁴ But the rule fuels a false dichotomy between “jurisdictional” and “non-judicial” statutory requirements.

In Part II, I uncover this false dichotomy by first revealing how courts in fact treat statutory exhaustion requirements more flexibly than the clear statement rule would allow. I then also offer support for this flexibility from jurisdiction theory. I lastly use this flexibility to introduce a solution to the tradeoff between injustice and conceptual coherence. To avoid injustice, which I define as applying exhaustion when it would harm the plaintiff without serving exhaustion’s purposes, some courts have taken an approach that does not fit into the binary categories of “jurisdictional” and “non-judicial.” Instead of using these categories, I argue that courts should simply characterize statutory exhaustion requirements as mandatory rules as the Second Circuit has done.¹⁵

In Part III, I develop this solution, the case for it, and an exception for constitutional claims. Generally, mandatory exhaustion is any statutory directive that one “shall” or “must” exhaust administrative remedies before seeking relief in court. But more importantly, it has a specific set of effects. To preview, mandatory exhaustion precludes

¹³ See *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (citing *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007)) (describing why the INA’s exhaustion requirement is jurisdictional).

¹⁴ See *infra* notes 66–70 and accompanying text (explaining how courts turn procedural conditions into jurisdictional requirements using the “clear statement” rule).

¹⁵ Your first reaction might be that I am complicating the doctrine by adding a new category of exhaustion. But my solution has fewer categories. Whereas previously there were three exhaustions, my solution has only two: judicial and mandatory statutory. And courts will elide a complex inquiry into jurisdictionality altogether.

equitable exceptions but allows for agency waiver; exhaustion failures are affirmative defenses that can be forfeited; courts cannot raise defects *sua sponte*; exhaustion issues do not have to precede merits arguments; and constitutional claims made external to an agency's proceedings may be exempted.¹⁶ Mandatory exhaustion has several advantages. First, it finds support in how courts have already interpreted exceptions to statutory requirements.¹⁷ Second, it is based on modern developments in jurisdiction theory—I embrace Scott Dodson's theory that hybrid jurisdictional rules, such as mandatory rules, can mix and match different effects.¹⁸ Third, mandatory exhaustion improves the doctrine by guiding, simplifying, and justifying the application of exceptions.¹⁹ I conclude by showing how mandatory exhaustion empowers courts to avoid the injustice of *J.E.F.M.*'s Catch-22 without sacrificing conceptual coherence.

I focus on exhaustion requirements as compared to other procedural preconditions because exhaustion is unique.²⁰ An exhaustion requirement channels claimants into an alternative adjudicatory forum within the executive branch. It often relies on agency action that looks a lot like Article III “judicial power”—finding facts, applying facts to law, and rendering a judgment. And it began as a judicially created doctrine.²¹ Together, these raise unique separation of powers concerns.²²

Commentators have discussed exhaustion within broader questions about jurisdiction theory and suggested that exhaustion might be

¹⁶ See *infra* Sections III.A–B.

¹⁷ See *infra* Section II.A; *infra* notes 139–40 and accompanying text.

¹⁸ See Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1463–65 (2011) [hereinafter Dodson, *Hybridizing*] (providing examples of “hybridized” rules that give courts the flexibility to assert jurisdiction over certain cases); Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 6–7 (2008) [hereinafter Dodson, *Mandatory*] (arguing that mandatory rules are waivable, like non-judicial rules, but not subject to equitable exceptions, like jurisdictional rules, using habeas exhaustion as an example); see also Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 622, 629–30 (2017) [hereinafter Dodson, *Effects*] (developing a theory of “[d]ecoupling a doctrine’s effects from its jurisdictional character”).

¹⁹ For an example of the effects applied to *J.E.F.M.*, see *infra* Section III.C.

²⁰ For example, other kinds of procedural preconditions, or “claim[s]-processing” rules, might impose time limits to file suit or appeal. *Bowles v. Russell*, 551 U.S. 205, 218 (2007) (Souter, J., dissenting); see also *Shweika v. DHS*, 723 F.3d 710, 716 (6th Cir. 2013) (noting that exhaustion requirements are a species of claims-processing rules).

²¹ See *infra* Section I.A.

²² See *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997) (“[Courts] should look to the exhaustion rule’s goals of preserving the separation of powers between the branches of the government and conserving judicial resources.”); *infra* notes 185–97 and accompanying text.

mandatory in nature.²³ Others have written on exhaustion requirements in particular statutes.²⁴ But none have “tr[ie]d to attach the right set of effects to [exhaustion].”²⁵ This Note seeks to fill that gap. Taking up Dodson’s project, it is the first to attach the right set of effects, especially with respect to constitutional claims, and develop a descriptive and normative case for the mandatory categorization using the tradeoff between conceptual coherence and justice.

I

THE STAKES OF MAKING AN EXHAUSTION REQUIREMENT JURISDICTIONAL

Exhaustion doctrine requires someone challenging an agency decision to pursue “all administrative remedies before seeking judicial review.”²⁶ The steps necessary to exhaust all remedies are specific to the statutory scheme. For instance, to sue an agency to release documents requested under the Freedom of Information Act (FOIA), you must first submit a request, receive an acknowledgment, pay a fee, then receive an initial determination or delay notification within

²³ See Jessica Berch, *Waiving Jurisdiction*, 36 PACE L. REV. 853, 901–02 (2016) (arguing that exhaustion would benefit from a waiver exception); Dodson, *Effects*, *supra* note 18, at 644 (“Whether exhaustion is required depends upon the rigidity of any statutory requirement and the presence of discretionary factors, including the likely delay, the adequacy of the other forum, and the potential futility of relief in the other forum.”); Dodson, *Hybridizing*, *supra* note 18, at 1463–65 (categorizing exhaustion as an “antecedent nonjurisdictional event[] that link[s] directly to jurisdictional questions”); Erin Morrow Hawley, *The Supreme Court’s Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2089–94 (2015) (arguing that the jurisdictionality inquiry needs to return to focus on Congress’s intent).

²⁴ See Macfarlane, *supra* note 11, at 240 (arguing against a jurisdictional presentment requirement as part of exhaustion for Title VII employment discrimination claims); Colin Miller, “Manifest” *Destiny?: How Some Courts Have Fallaciously Come to Require a Greater Showing of Congressional Intent for Jurisdictional Exhaustion Than They Require for Preemption*, 2008 BYU L. REV. 169, 190–203 (comparing the standard for preemption against the standard for jurisdictionalizing exhaustion in the Prison Litigation Reform Act (PLRA), the Department of Agriculture Reorganization Act of 1994, and other statutes); Brian E. Neuffer & Deborah A. Ostvig, *Declaratory Judgment Before Exhausting Administrative Remedies Under Illinois Law*, 33 N. ILL. U. L. REV. 145, 148–50 (2012) (discussing how to use Illinois’s declaratory judgment statute as an exception to exhaustion); Ron A. Ghatan, Note, *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1288–93 (2011) (arguing for application of exhaustion to some claims under the Alien Tort Statute); Matt Hall, Note, *The Role of the Exhaustion and Ripeness Doctrines in Reasonable Accommodation Denial Suits Under the Fair Housing Amendments Act*, 24 BYU J. PUB. L. 347, 356–64 (2010) (evaluating the scope of the Fair Housing Amendment Act’s exhaustion requirement).

²⁵ Dodson, *Effects*, *supra* note 18, at 646.

²⁶ 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION § 8398, Westlaw (database updated Apr. 2018).

twenty days (assuming you made no request for expedited processing), appeal within sixty days, and then receive an appeal decision within twenty days.²⁷

The directive to complete these steps before going to federal court has two possible sources: statutory²⁸ or, if absent from a statute, the court's own judicial discretion subject to its own exceptions. Congress codifies exhaustion in the shadow of its judicial sibling, leading to similarities across doctrines.²⁹ But there is a key difference—when faced with the statutory version, a court will first examine whether failing to exhaust remedies prevents the court from exercising jurisdiction in the first place.³⁰

In this Part, I explain the policies behind judicial exhaustion and outline its exceptions. I then discuss the emergence of statutory exhaustion requirements and how they borrow purposes and exceptions from judicial exhaustion. Lastly, I outline the stakes of a jurisdictional rule and the approach courts use to determine a requirement's jurisdictionality.

A. *The Judicial Origins of Exhaustion*

If Congress does not include an exhaustion requirement in its statute, then courts still have discretion to impose one. Indeed, this is how exhaustion began.³¹ Even though the court has jurisdiction, and a “virtually unflagging obligation” to exercise it,³² the court may still dismiss a plaintiff's claims and send him or her back to the agency to exhaust available remedies before seeking relief from federal court.³³

²⁷ U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROCEDURAL REQUIREMENTS 32–36, 71–74 (2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf>.

²⁸ The Immigration and Nationality Act's (INA) exhaustion requirement, for example, states: “A court may review a final order of removal only if the alien has exhausted all administrative remedies to the alien as of right.” 8 U.S.C. § 1252(d)(1) (2012).

²⁹ See *infra* Section I.B.

³⁰ See, e.g., *Hull v. IRS*, 656 F.3d 1174, 1181 (10th Cir. 2011) (holding that the Freedom of Information Act's (FOIA) exhaustion requirement is non-jurisdictional); *Bennett v. Fed. Mine Safety & Health Review Comm'n*, 12 F. App'x 492, 495 (9th Cir. 2001) (citing *United States v. Steele (In re Steele)*, 799 F.2d 461, 465 (9th Cir. 1986)) (holding that FOIA's exhaustion requirement is jurisdictional).

³¹ See *McKart v. United States*, 395 U.S. 185, 193–95 (1969) (discussing judicially created exhaustion). Courts sometimes use the terms “prudential” or “common law” exhaustion. I use only “judicial” exhaustion in this Note.

³² *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976).

³³ *McKart*, 395 U.S. at 193; see, e.g., *Cavalier Tel., LLC v. Va. Elec. & Power Co.*, 303 F.3d 316, 323 (4th Cir. 2002) (requiring exhaustion after balancing federal courts' obligation to exercise jurisdiction against the institutional interests favoring exhaustion). *But cf. Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 94 (2d Cir. 1998) (“With regard to cases governed by the Administrative Procedure Act . . . the Supreme Court has instructed that if Congress has not enacted an explicit exhaustion requirement, courts may not exercise

There are two main purposes behind the judicially created doctrine.³⁴ First, it seeks to protect administrative agency authority and autonomy.³⁵ This authority is based on judicial deference to the congressional delegation that agencies, not the courts, should have primary responsibility over the programs they administer.³⁶ Thus exhaustion is especially apropos when the agency's discretionary power or special expertise is at stake.³⁷ The doctrine helps give agencies a chance to correct their mistakes, for example through an internal appeals process, and discourages people from avoiding the agency's procedures.³⁸

Second, exhaustion promotes judicial efficiency.³⁹ If an agency can correct its own errors, then there is no need for litigation.⁴⁰ Requiring exhaustion might also provide the court with a more useful record. The factual record may be more comprehensive and the agency would have had a chance to offer its expertise.⁴¹

The exceptions to judicial exhaustion come from *McCarthy v. Madigan*'s test balancing the interests of the individual "in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."⁴² *McCarthy* identified several occasions when individual interests would outweigh institutional interests, creating equitable exceptions to the general exhaustion rule: (1) Requiring exhaustion would "occasion undue prejudice to subsequent assertion of a court action[;]"⁴³ (2) The agency's power to provide effective relief is questionable, either because "it lacks institutional competence to resolve [a] particular type of issue presented, such as the constitutionality of a statute," or "the challenge is to the adequacy of the agency procedure itself," or the agency "lack[s] authority to grant the type of relief requested[;]"⁴⁴ (3) The agency is biased or has predetermined the issue such that exhaustion

their judicial discretion to impose one." (citing *Darby v. Cisneros*, 509 U.S. 137, 153–54 (1993))).

³⁴ *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (citing *McKart*, 395 U.S. at 194).

³⁸ *Id.* (citing *McKart*, 395 U.S. at 195).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 145–46.

⁴² *Id.* at 146.

⁴³ *Id.* at 146–47.

⁴⁴ *Id.* at 147–48.

would be futile.⁴⁵ These exceptions end up guiding how courts think about exhaustion in all settings, even when Congress has written the exhaustion requirement into an administrative statutory scheme.

B. Exhaustion Codified in Statute

Congress can also codify an exhaustion requirement. For example, a statute might authorize judicial review after a “final decision of the Secretary made after a hearing.”⁴⁶ Or it may say “[no] action shall be brought . . . until such administrative remedies as are available have been exhausted.”⁴⁷ Or it may set out the conditions for deeming remedies exhausted.⁴⁸

Despite this codification, the general purposes behind statutory exhaustion requirements remain the same as those articulated for judicial exhaustion: (1) to protect agency autonomy, and (2) to promote judicial efficiency.⁴⁹ (This overlap will be important to my arguments in Part III because we can use these purposes to determine the effects that statutory exhaustion requirements ought to have.) Courts have likewise read *McCarthy*'s equitable exceptions into statutory requirements.⁵⁰ They have also added new exceptions. For instance, courts have waived exhaustion if “the claim is *collateral* to a demand for benefits,” such as some constitutional claims, or if “plaintiffs would suffer irreparable harm if required to exhaust.”⁵¹ These new exceptions are nonetheless traceable to the concerns driving *McCarthy*'s equitable exceptions. The first reflects the exception for

⁴⁵ *Id.*; see also Frank Sullivan, Jr., *Selected Developments in Indiana Administrative Law (1989–2012)*, 46 IND. L. REV. 1269, 1271–78 (2013) (discussing futility and constitutional claim exceptions to exhaustion doctrine in Indiana administrative law).

⁴⁶ *Hoye v. Sullivan*, 985 F.2d 990, 991 (9th Cir. 1992) (quoting *Califano v. Sanders*, 430 U.S. 99, 108 (1977)).

⁴⁷ 42 U.S.C. § 1997e(a) (2012).

⁴⁸ See, e.g., 5 U.S.C. § 552(a)(6)(C)(i) (2012) (“Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.”).

⁴⁹ See *Weinberger v. Salfi*, 422 U.S. 749, 765–66 (1975) (“Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.”).

⁵⁰ See, e.g., *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606 (5th Cir. 2007) (quoting *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 477 (1997)) (conflating judicially created exhaustion with the PLRA's codified version and looking for the same exceptions); *In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986) (holding that FOIA's exhaustion requirement is jurisdictional, but adding the “futility exception”).

⁵¹ *Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 94 n.4 (2d Cir. 1998) (emphasis added) (quoting *Abbey v. Sullivan*, 978 F.2d 37, 44 (2d Cir. 1992)). The collateral exception is first found in *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976).

when an agency lacks power to provide effective relief, and the second reflects the concern of causing undue prejudice by requiring exhaustion.⁵²

When courts read in equitable exceptions, it raises the question why Congress would have codified the exhaustion requirement at all. What does the codification add or subtract? For one, codification may clarify the precise steps a claimant must take to exhaust remedies.⁵³ Codification may also express a congressional intent to jurisdictionalize exhaustion.⁵⁴ Perhaps, then, *any* codification of exhaustion is meant to jurisdictionalize it and thereby preclude exceptions. However, attributing such a blunt intent to Congress would be absurd and runs up against the fact that many statutory exhaustion requirements are not jurisdictional.⁵⁵ Interpreting a statutory exhaustion requirement is a more nuanced question of *which exceptions ought to apply*. Courts try to answer this question in part through regular statutory interpretation and in part by figuring out whether it is jurisdictional—if it is, then it goes to the court’s power and no exceptions may apply.⁵⁶ But, as I will discuss in Part II, courts act more flexibly than this binary analysis would allow.

C. Jurisdictional Requirements

For procedural preconditions like exhaustion, the decision whether they are jurisdictional or not has profound systemic and individual consequences. A jurisdictional label is supposed to force courts to apply the full bundle of jurisdictional effects: No equitable exceptions apply, parties may not waive or forfeit them, defects may be raised at any time and *sua sponte* by the court, and late-discovered defects void earlier judgments.⁵⁷ A jurisdictional exhaustion requirement therefore would not be waivable nor subject to any of the equitable exceptions articulated in *McCarthy*.⁵⁸ A jurisdictional defect is an easier, non-fact-based defense for an agency to make, and fewer

⁵² See *Eldridge*, 424 U.S. at 330–31 (considering that “cases may arise where a claimant’s interest in having a particular issue resolved promptly is so great that deference to the agency’s judgment is inappropriate” and thus recognizing collaterality and hardship exceptions to exhaustion for the case at hand).

⁵³ See, e.g., *Taylor v. Appleton*, 30 F.3d 1365, 1368 (11th Cir. 1994) (“FOIA provides for two different types of exhaustion, actual and constructive.”).

⁵⁴ See, e.g., *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1068 (6th Cir. 2014) (finding in several environmental statutes a jurisdictional bar to suit because the statutes channel suits to the Department of Labor and appellate courts).

⁵⁵ See *infra* Section II.A.

⁵⁶ See *supra* note 8 and accompanying text.

⁵⁷ See *supra* notes 9–11 and accompanying text for a catalogue of these effects.

⁵⁸ See Macfarlane, *supra* note 11, at 249–52 (discussing the consequences of turning exhaustion of Title VII remedies into a jurisdictional requirement).

decisions are likely to reach the merits with a jurisdictional exhaustion requirement.⁵⁹ A jurisdictional requirement can also unfairly prejudice parties and lead to a tremendous waste of resources from dismissals years into litigation.⁶⁰ For example, if the Department of Health and Human Services notifies a claimant for social security benefits that he or she has been denied benefits, but sends this notification late such that the claimant appeals late, exceeding the agency's statute of limitations, that claimant will be barred and cannot bring a case into federal court to toll the statute if the court lacks jurisdiction.⁶¹

Moreover, if exhaustion is jurisdictional, then the court must first establish whether the claimant has exhausted his or her remedies before addressing the merits. Since this can be a complex inquiry,⁶² preventing a court from deciding on other, simpler grounds before completing that inquiry can waste judicial resources.⁶³

By contrast, if exhaustion is non-jurisdictional, then a court can dispose of cases without having to analyze difficult exhaustion questions.⁶⁴ Moreover, the flexibility of a non-jurisdictional exhaustion

⁵⁹ *Id.*

⁶⁰ Macfarlane, *supra* note 11, at 250–52.

⁶¹ Compare *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–34 (2008) (holding that the statute of limitations for filing suit in the Court of Federal Claims is jurisdictional and so cannot be waived by the government and must be raised *sua sponte* by the court), with *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (holding that the time bar of the Federal Tort Claims Act (FTCA) is not jurisdictional despite its emphatic, mandatory language because “Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it,” and was therefore subject to equitable estoppel).

⁶² See *Woodford v. Ngo*, 548 U.S. 81, 93–103 (2006) (reversing the Ninth Circuit's holding that a prisoner did not need to exhaust state remedies when none were available after a complex analysis of the PLRA's exhaustion requirement).

⁶³ Cf. *Boos v. Runyon*, 201 F.3d 178, 181–82 (2d Cir. 2000) (“Were we to find that the requirement of exhaustion of administrative remedies was jurisdictional, we might well have to decide whether Boos had exhausted her remedies before we could move on to consider the alternative basis for the district court's judgment . . .”). This question in part depends on the doctrine of jurisdictional sequencing, which allows courts to reach non-merits questions before subject-matter jurisdiction. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007) (holding that courts can dismiss on forum non conveniens grounds before any jurisdictional inquiry); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999) (holding that a court may dismiss a case for lack of personal jurisdiction prior to considering its subject-matter jurisdiction); Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1105–16 (2013) (analyzing the key jurisdictional-sequencing cases).

⁶⁴ See, e.g., *Douglas v. Donovan*, 559 F.3d 549, 556 & n.4 (D.C. Cir. 2009) (reaching the merits of summary judgment without having to decide a non-jurisdictional exhaustion issue).

requirement can facilitate the development of the law by letting a court reach the merits even when there is an exhaustion problem.⁶⁵

Given these stakes, the Supreme Court over the past decade has tried to unify questions of when a procedural rule is jurisdictional, heeding its own admonition to avoid “drive-by jurisdictional rulings.”⁶⁶ In *Arbaugh v. Y & H Corp.*, the Court emphasized that Congress can turn a procedural precondition into a jurisdictional rule with a “clear []” indication that it wants it to be.⁶⁷ To determine whether there has been a clear statement, courts consider the text (is it labeled jurisdictional?); the placement of the rule (in a jurisdictional section?); the overall statutory scheme and system; past rulings; and context (such as historical treatment).⁶⁸ Over the past decade, the Court has cemented its use of clear statement rules to decide when procedural preconditions, like exhaustion, are jurisdictional.⁶⁹ But, for exhaustion in particular, the clear statement approach began decades earlier with *Weinberger v. Salfi*.⁷⁰

I have reached two main conclusions in this Part. First, courts have not been willing to attribute to Congress a blunt intent to make all statutory exhaustion requirements jurisdictional. They instead interpret statutory exhaustion requirements in light of their original purposes and exceptions and whether Congress has spoken with a clear statement. Second, in the absence of such a bright-line rule, this

⁶⁵ See, e.g., *Wilbur v. CIA*, 355 F.3d 675, 676 (D.C. Cir. 2004) (holding that the court had sufficient grounds to dismiss for exhaustion but deciding instead the CIA’s motion for summary judgment); *Sanchez-Alaniz v. Fed. Bureau of Prisons*, No. 13-1812, 2016 U.S. Dist. LEXIS 39790, at *12–13 (D.D.C. Mar. 25, 2016) (holding that exhaustion is non-jurisdictional and, despite failure to exhaust “[i]n these circumstances, the Court will resolve the matter on the merits and deny defendant’s motion on this claim”).

⁶⁶ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998).

⁶⁷ 546 U.S. 500, 515 (2006) (holding that the numerosity requirement in Title VII was non-jurisdictional). More recently, in *Henderson ex rel. Henderson v. Shinseki*, the Court held that the “deadline for filing a notice of appeal with the Veterans Court does not have jurisdictional attributes” because there was no “clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag.” 562 U.S. 428, 441 (2011).

⁶⁸ See, e.g., *Henderson*, 562 U.S. at 438–41; *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015).

⁶⁹ See *Kwai Fun Wong*, 135 S. Ct. at 1632 (applying the clear statement rule to an FTCA time bar requirement). The courts of appeals have followed suit. See, e.g., *Doak v. Johnson*, 798 F.3d 1096, 1104 (D.C. Cir. 2015) (holding that administrative exhaustion in the Rehabilitation Act is not jurisdictional); *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 822 (6th Cir. 2015) (holding that an exhaustion requirement of 7 U.S.C. § 6912(e) (2012) is non-jurisdictional); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 870–71 (9th Cir. 2011) (finding that the Individuals with Disabilities Education Act’s (IDEA) exhaustion requirement is not jurisdictional), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

⁷⁰ 422 U.S. 749, 757 (1975); see *infra* notes 75–76 and accompanying text; *infra* Section II.C.

interpretive exercise has high stakes: Turning a statutory requirement into a jurisdictional rule would impose tough consequences on parties and courts' discretion to apply exceptions. Next, I will examine how courts have been forced to either dilute what it means to label a requirement jurisdictional or allow unjust results.

II

THE TRADEOFF BETWEEN CONCEPTUAL COHERENCE AND JUSTICE

Several tensions exist in how courts treat exhaustion requirements across statutes. Using the jurisdictional and non-jurisdictional categories, courts have still applied exceptions to *jurisdictional* exhaustion. This is inconsistent with the established orthodoxy about the rigid effects of jurisdictional rules.⁷¹ Still other courts do not treat exhaustion as a jurisdictional question at all.

The exceptions courts apply vary without a rationale for that variation. The statutory exceptions are sometimes identical to the judicial exceptions. Courts have also combined judicial exceptions with constitutional concerns to form an exception, not yet well-defined, called collateral claims—claims that are in some way independent of the main claim for relief before an agency.⁷² The motivation—fair and just outcomes—to sneak exceptions into jurisdictional requirements is noble. But it also leaves the doctrine in a conceptual mess. On the other hand, choosing to preserve the integrity of jurisdictional rules can come at the cost of allowing injustice.

These categorizations and exceptions blur the line between jurisdictional and non-jurisdictional requirements, demanding a unifying theory and consistent rationale. In this next Part, I document examples of the many ways that courts have interpreted exhaustion requirements. After evaluating these different “exhaustions,” and the tradeoff between conceptual coherence and justice, I will argue in Part III that statutory exhaustion requirements ought to be considered mandatory rules—a category already applied by some courts and scholars.

⁷¹ Compare *supra* Section I.C (noting the rigidity of jurisdictional requirements), with *infra* Section II.A (discussing the various exceptions courts have made for jurisdictional exhaustion).

⁷² See *infra* notes 170–73 and accompanying text (describing various formulations of the collateral claims exception).

A. When Courts Dilute the Concept of Jurisdiction

While courts purport to categorize statutory exhaustion requirements along a jurisdictional versus non-jurisdictional binary, the reality is more nuanced, as courts have handled exhaustion requirements in five different ways: jurisdictional with exceptions, non-jurisdictional with exceptions, mandatory without exceptions, and mandatory with exceptions, as well as the traditional way—jurisdictional without exceptions. I will provide examples of each, and ultimately argue that utilizing the mandatory classification offers the best path out of this conceptual mess.

The Social Security Act's (SSA) exhaustion requirement, as interpreted in *Weinberger v. Salfi*, is an instance of a jurisdictional requirement with exceptions, and is the benchmark against which the jurisdictionality of other statutory exhaustion requirements is most often compared.⁷³ The Court reasoned that the SSA's statutory language was so "sweeping and direct" as to be jurisdictional.⁷⁴ Lower courts then picked up that language, making it a clear statement rule for determining the jurisdictionality of exhaustion requirements.⁷⁵ At the same time, *Salfi* and its progeny applied exceptions to exhaustion requirements they deemed jurisdictional, departing from the baseline assumption that jurisdictional rules may not have exceptions.

Salfi was a class action dispute over the constitutionality of an SSA provision imposing certain requirements on widows and children before they could receive the social security benefits of the deceased father.⁷⁶ The text of the SSA foreclosed federal-question jurisdiction and channeled all jurisdictional inquiries through an "Exhaustion of Remedies" provision.⁷⁷ According to this provision, a claimant may seek judicial review only after receiving a "final decision of the Secretary made after a hearing."⁷⁸ The Court held that "'final decision' is a statutorily specified jurisdictional prerequisite," but is "not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 [conferring arising-under jurisdiction] and 1332 [diversity jurisdiction]."⁷⁹

⁷³ 422 U.S. 749 (1975).

⁷⁴ *Salfi*, 422 U.S. at 757 (citing 42 U.S.C. § 405(h) (1970)).

⁷⁵ See Miller, *supra* note 24, at 197–201 (detailing the adoption of "sweeping and direct" as the standard).

⁷⁶ *Salfi*, 422 U.S. at 754–55.

⁷⁷ *Id.* at 756–65.

⁷⁸ *Id.* at 763–65 (quoting 42 U.S.C. § 405(g) (1970)).

⁷⁹ *Id.* at 766. After *Salfi*, the Court still referred to "final decision" as a jurisdictional prerequisite but labeled its two elements differently: the "nonwaivable jurisdictional element [presentment]" and the "waivable element [exhaustion]." *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976).

This distinction with classical jurisdictional requirements began to dilute the concept of jurisdiction, loosening it up for categories not traditionally recognized. The exhaustion requirement was somehow less than “purely” jurisdictional.⁸⁰ The Secretary, as respondent, could waive the exhaustion requirement, but plaintiffs who had not presented their claims were jurisdictionally barred with no possibility of waiver or other exceptions.⁸¹ Although plaintiffs who had presented their claims had not gone through all internal review procedures, the statutory scheme left the Secretary discretion to define “final decision” and set out the requirements for exhaustion to “serve his own interests in effective and efficient administration.”⁸² The Secretary, and not the Court, had power to find that any further hearings or procedures would be futile and waive the requirement.⁸³ This flexible treatment of the SSA’s requirement helps explain why later decisions have described the exhaustion requirement as non-judicial despite the Court’s labelling of it as jurisdictional.⁸⁴

A year later, the Court continued this trend, creating another exception to the SSA’s jurisdictional exhaustion prerequisite. Plaintiffs in *Mathews v. Eldridge* challenged the constitutionality of an agency procedure that terminated disability benefits without a hearing.⁸⁵ The plaintiffs had not completed all the internal review procedures, and the Secretary declined to waive the exhaustion requirement. The Court nonetheless held that it did not have to defer to the Secretary’s judgment not to waive exhaustion when the constitutional claim is “collateral” to the benefits claim and the claimant would suffer irreparable harm if she could not obtain immediate relief.⁸⁶ The Court justified the collaterality exception on the grounds that “cases may arise where a claimant’s interest in having a particular issue resolved promptly is so great that deference to the agency’s judgment is inappropriate.”⁸⁷ Later cases have likewise affirmed *Eldridge*’s

⁸⁰ *Eldridge*, 424 U.S. at 328.

⁸¹ *Salfi*, 422 U.S. at 764 (“[C]entral to the requisite grant of subject-matter jurisdiction—the statute empowers district courts to review a particular type of decision by the Secretary, that type being those which are ‘final’ and ‘made after a hearing.’”).

⁸² *Id.* at 766.

⁸³ *See id.* (“[Exhaustion] may not be dispensed with merely by a judicial conclusion of futility . . .”).

⁸⁴ *See, e.g., Escalera v. Comm’r of Soc. Sec.*, 457 F. App’x 4, 5 n.1 (2d Cir. 2011) (“Although the district court based its dismissal on a lack of subject matter jurisdiction, the failure to exhaust is a waivable (i.e., non-judicial) requirement . . .”).

⁸⁵ 424 U.S. at 323.

⁸⁶ *Id.* at 330.

⁸⁷ *Id.* Some lower courts have expanded this exception beyond constitutional claims. *See, e.g., Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997) (applying collaterality to a complaint alleging Administrative Procedure Act and other statutory violations).

finding of a collaterality exception to exhaustion and *Salfi's* determination that the Secretary has discretion to waive exhaustion.⁸⁸

When it comes to the Individuals with Disabilities Education Act (IDEA),⁸⁹ courts are so confused by the statute's exhaustion requirement that they ignore the issue and apply exceptions even before knowing its jurisdictionality. The result is either limbo or non-jurisdictional exhaustion with exceptions. Despite the Supreme Court's recent ruling on the scope of the IDEA's exhaustion requirement,⁹⁰ a circuit conflict over its jurisdictionality persists.⁹¹ The Eighth Circuit, while remaining agnostic as to whether the requirement is jurisdictional, nonetheless outlined "three exceptions" that track *McCarthy's* exceptions.⁹² The Tenth Circuit likewise refused to rule on whether the requirement was jurisdictional and applied a futility exception.⁹³ If jurisdictional requirements preclude such exceptions, then these courts should not have been able to read them in without first determining whether the requirement was jurisdictional. Similarly, the Eleventh Circuit got the order of operations wrong. It reverse-engineered its way to a conclusion that the requirement was non-jurisdictional: Since the exceptions of futility and inadequacy of remedies applied, it reasoned, then the requirement must be non-jurisdictional.⁹⁴ This reasoning begs the question of the requirement's jurisdictionality.

The courts of appeals have applied additional quasi-jurisdictional categories to the exhaustion requirement in the Federal Crop

⁸⁸ See, e.g., *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 24 (2000) (summarizing the doctrine); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667 (1986) (holding that where section 405(h) would preclude all judicial review rather than just channel it through section 405(g), the presumption of reviewability of agency action would apply); *Heckler v. Ringer*, 466 U.S. 602, 618–19 (1984) (holding that plaintiffs did not exhaust their remedies, their claim was not collateral, and the Secretary did not waive the exhaustion requirement).

⁸⁹ 20 U.S.C. §§ 1400–1482 (2012).

⁹⁰ In *Fry v. Napoleon Community Schools*, the Court analyzed how claims under the Americans with Disabilities Act and the Rehabilitation Act for those with disabilities overlap with the exhaustion requirements of the IDEA. 137 S. Ct. 743, 752–54 (2017).

⁹¹ See *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775, 784–85 (10th Cir. 2013) (cataloguing the circuit split regarding whether exhaustion is jurisdictional under the IDEA).

⁹² *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944, 946 n.2, 950 (8th Cir. 2017) (“(1) [F]utility, (2) ‘inability of the administrative remedies to provide adequate relief,’ and (3) ‘the establishment of an agency policy or practice of general applicability that is contrary to law.’” (quoting *J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 594 (8th Cir. 2013))).

⁹³ *Muskrat*, 715 F.3d at 786.

⁹⁴ *N.B. v. Alachua Cty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996). Had the Tenth Circuit followed this reasoning in *Muskrat*, then, it would have concluded the requirement was non-jurisdictional.

Insurance Act (FCIA). Here, we see mandatory exhaustion with and without exceptions in addition to non-jurisdictional exhaustion. The FCIA's requirement states: "Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law"95 The Fifth, Eighth, Ninth, and D.C. Circuits agree that the FCIA's exhaustion requirement is non-jurisdictional and subject to exceptions.⁹⁶ The Second Circuit, on the other hand, did not even draw a distinction between jurisdictional and non-jurisdictional exhaustion, and instead held that the provision is, simply, "mandatory."⁹⁷ This means that courts may not create any exceptions to a codified exhaustion requirement, but the requirement still falls short of imposing all the tough effects of a jurisdictional rule.⁹⁸ The Tenth Circuit tacitly agreed with the Second Circuit while also acknowledging that "several circuits have extended these [judicially created *McCarthy*] exceptions to § 6912(e)."⁹⁹ These different treatments of the FCIA's exhaustion requirement—non-jurisdictional, mandatory with no exceptions, and mandatory with exceptions—begin to expand our options beyond a binary jurisdictional-or-not approach.

The decisions in this Section all highlight the varied and inconsistent ways in which courts treat the jurisdictionality of exhaustion requirements. This Section has discussed four of the five examples: jurisdictional with exceptions, non-jurisdictional with exceptions, mandatory without exceptions, and mandatory with exceptions.¹⁰⁰ Next, I revisit my opening example of the INA's catch-22, considered by the Ninth Circuit in *J.E.F.M. v. Lynch*, to show how treating an exhaustion requirement as jurisdictional *without* exceptions, as the concept demands, can result in injustice. In Section II.C, I argue that courts should adopt the Second Circuit's simple mandatory-rule approach. Then in Part III, I develop my own definition of mandatory exhaustion that can shape the doctrine and elaborate on the Second Circuit's sparse guidance—which conflicts with the Tenth Circuit's—on what this mandatory categorization means.

⁹⁵ 7 U.S.C. § 6912(e) (2012).

⁹⁶ *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606 (5th Cir. 2007); *Munsell v. Dep't of Agric.*, 509 F.3d 572, 580–81 (D.C. Cir. 2007); *Ace Prop. & Cas. Ins. Corp. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 999–1000 (8th Cir. 2006); *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 980 (9th Cir. 2002).

⁹⁷ *Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 94–95 (2d Cir. 1998).

⁹⁸ *Id.* at 94.

⁹⁹ *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 432 (10th Cir. 2011).

¹⁰⁰ Other examples of courts diluting the concept of jurisdiction abound, but I will stop here. See, e.g., *In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986) (holding that FOIA's exhaustion requirement is jurisdictional while still applying the "futility exception").

B. When Courts Allow Injustice

When courts take seriously an exhaustion requirement's jurisdictional label, they may preserve conceptual coherence, but at the cost of inhibiting parties' rights without furthering institutional interests. The INA contains one of the strongest exhaustion requirements, but the focus on its jurisdictionality has led to unnecessary and unjust results.

The INA has a "zipper clause"¹⁰¹ that consolidates and channels all review of removal proceedings to the courts of appeals.¹⁰² Any legal or factual issue arising from any removal-related activity is reviewable only through the Petition for Review (PFR) process.¹⁰³ Under this process, to exhaust one's remedies against removal one must first adjudicate them before an immigration judge in an adversarial proceeding, appeal to the Board of Immigration Appeals, receive a final decision, and then file a PFR with a federal circuit court.¹⁰⁴

In *J.E.F.M.*, class action plaintiffs before the Ninth Circuit argued that minors facing removal without an attorney would not be able to navigate the full PFR process in order to bring the claim to an appellate court, and even if they did, the record would be too incomplete to allow for meaningful review.¹⁰⁵ Plaintiffs argued that foreclosing judicial review of right-to-counsel due process claims in the district court would bar all judicial review of their claims, and therefore, the constitutional collateral claims exception in the FCIA and SSA cases should apply.¹⁰⁶ Although the Ninth Circuit recognized that a claim could be collateral in the simple sense that it is outside the scope of the exhaustion requirement, the court held that the right-to-counsel claims were not in fact collateral; rather, they were entwined with the removal process.¹⁰⁷

The First Circuit, in a similar suit, likewise reached the conclusion that right-to-counsel claims are not collateral to removal proceedings.¹⁰⁸ The court did read "the words 'arising from' in section

¹⁰¹ *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016).

¹⁰² 8 U.S.C. § 1252(a)(5), (b)(9), (d) (2012).

¹⁰³ See *J.E.F.M.*, 837 F.3d at 1031 (noting its "breathtaking" scope and "vise-like" grip (quoting *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007))).

¹⁰⁴ See AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: HOW TO FILE A PETITION FOR REVIEW (Nov. 2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf.

¹⁰⁵ 837 F.3d at 1035.

¹⁰⁶ *Id.* at 1031–32, 1036; see also *supra* notes 73–88, 95–99 and accompanying text (discussing the constitutional collateral claims exception in FCIA and SSA cases).

¹⁰⁷ *J.E.F.M.*, 837 F.3d at 1035.

¹⁰⁸ *Aguilar*, 510 F.3d at 13–14.

1252(b)(9) to exclude claims that are independent of, or wholly collateral to, the removal process. Among others, claims that cannot effectively be handled through the available administrative process fall within that purview.”¹⁰⁹ The court also acknowledged that collateral claims have been recognized as an exception to the exhaustion requirement, citing *Eldridge*.¹¹⁰ In particular, claims are collateral when requiring exhaustion would “foreclose all meaningful judicial review” and thereby cause irreparable injury.¹¹¹ This functional notion of collaterality differs from the Ninth Circuit’s more formal version, indicating a need to clarify the doctrine.¹¹² The First Circuit nonetheless held that right-to-counsel claims are not collateral.¹¹³

Injustice resulted because the decisions required exhaustion when it did not serve exhaustion’s purposes, and unrepresented children consequently lost the chance to assert a potential constitutional right. In fact, the courts did not even consider whether requiring exhaustion would promote judicial efficiency or protect agency autonomy. A quick inquiry suggests that piecemeal resolution of the right-to-counsel issue leaves many children without representation, leading to a greater chance of being deported.¹¹⁴ The Ninth Circuit admitted that a case-by-case, rather than class approach, will be much less efficient.¹¹⁵ What is more, constitutional rights are a question within the expertise of federal courts, not an immigration judge. These facts should have informed the courts’ analyses, but the exhaustion requirement’s jurisdictional label stood in the way.¹¹⁶ Fixing this injustice while preserving conceptual coherence in the doctrine requires rethinking the nature of exhaustion.

C. *Seeking a Resolution in Case Law and Theory*

The Court in *Salfi* applied a clear statement rule to determine when a statutory exhaustion requirement is jurisdictional. This fore-

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Id.* at 12 (citing *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976)).

¹¹¹ *Id.* (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994)).

¹¹² One result of my mandatory exhaustion solution is to provide this clarification. See *infra* Section III.B (revising the exception for constitutional claims).

¹¹³ *Aguilar*, 510 F.3d at 14–15.

¹¹⁴ See *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1040 (9th Cir. 2016) (McKeown, J., concurring) (discussing the harms and challenges facing unrepresented children in removal proceedings); Brief for National Immigration Justice Center et al. as Amici Curiae Supporting Plaintiffs-Appellees, *J.E.F.M. v. Lynch*, 876 F.3d 1026 (9th Cir. 2016) (No. 15-35738), 2016 WL 1136771 (providing data that unrepresented children are far more likely to be ordered removed than are represented children).

¹¹⁵ *J.E.F.M.*, 837 F.3d at 1038.

¹¹⁶ See *infra* notes 180–96 and accompanying text (tying the collaterality exception to institutional competence and constitutional avoidance).

shadowed the Court's future doctrinal move to wrangle its jurisdiction doctrine more generally with a clear statement rule. This has not, however, lent itself to reasoned and consistent decisionmaking in the exhaustion context. Courts should abandon the rule and, more importantly, the binary jurisdictional-or-not framework implicit within it.

Traditionally, clear statement rules are judicial demands that Congress speak clearly if it desires a certain policy—"to effect a result"—when that policy might disrupt a constitutional value.¹¹⁷ They are typically attached to a normative canon of construction and enforce either procedural or substantive values.¹¹⁸ For example, the constitutional avoidance canon requires a clear statement when a statutory interpretation might conflict with constitutional rights, like free exercise, free speech, due process, and equal protection, in order to sidestep that interpretation.¹¹⁹

Despite this traditional connection to constitutional values, the Court instead bases its clear statement rule for procedural preconditions on considerations of judicial economy and a wariness of the grave consequences attending a jurisdictional label.¹²⁰ It has not tied the rule, either for preconditions in general or exhaustion requirements in particular, to any constitutional values. This is surprising since clear statement rules lead courts to distort a statute beyond its most reasonable meaning.¹²¹ A stronger justification than judicial economy—the time and expense of litigation and potential waste of resources when the court finds a jurisdictional defect late in the game—would seem necessary.¹²² Erin Hawley has argued that clear statement rules for jurisdictional requirements are neither democracy-enhancing nor protective of a constitutional value; thus, considerations of judicial economy alone cannot justify the departure from a court's faithful agency to congressional intent or the upsetting of separation of powers.¹²³ Congress has the power to control courts' jurisdic-

¹¹⁷ John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406–07 (2010).

¹¹⁸ See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992). Procedural values include access, political speech, and the structures of lawmaking and law execution. *Id.* at 598. Substantive values include personal rights, separation of powers, and federalism. *Id.* at 598–99.

¹¹⁹ *Id.* at 599; Manning, *supra* note 117, at 407.

¹²⁰ See Hawley, *supra* note 23, at 2066–67 (cataloguing the Court's justifications for the clear statement rule).

¹²¹ *Id.* at 2074.

¹²² See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 508 (2006) (describing the trial court's unwillingness to waste judicial resources in allowing a new pleading on a jurisdictional issue); Hawley, *supra* note 23, at 2066–67.

¹²³ Hawley, *supra* note 23, at 2031.

tion, and since clear statement rules interfere with this power, the need to tie it to a competing constitutional value is great.¹²⁴ Hawley thus urges courts to abandon the clear statement rule altogether.¹²⁵ The inquiry should simply be: What was Congress's intent?¹²⁶

But that solution does not solve the tradeoff between justice and coherence in the concept of jurisdiction. This tradeoff is a product of the binary approach to the jurisdictionality question, which obfuscates the more important inquiry: What is the scope of an exhaustion requirement, and what are its exceptions? Replacing one method for determining jurisdictionality with another does not change that underlying binary feature. The motivation behind the clear statement rule—concerns about judicial economy and wariness of how jurisdictional rules limit the court—nonetheless points to another possible option: deciding *ex ante* what exceptions are appropriate for a statutory exhaustion requirement with these concerns and exhaustion's purposes in mind.

Jurisdiction theory supports this option. Scholars have both lauded and criticized the Court's attempts to bring discipline to jurisdiction doctrine using a clear statement rule.¹²⁷ To save jurisdiction from a doctrinal and conceptual quagmire, they have argued for

¹²⁴ *Id.* at 2070–71. This need is underscored by the fact that drafters themselves do not even take into account the use of clear statement rules. See ROBERT A. KATZMANN, *JUDGING STATUTES* 53 (2014).

¹²⁵ Hawley, *supra* note 23, at 2089.

¹²⁶ *Id.* at 2094.

¹²⁷ See, e.g., Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 3–5 (2011) (welcoming the Court's push for more clarity in jurisdictional boundaries but admitting this push has pitfalls); Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings"*, 105 NW. U. L. REV. 947, 953–54 (2011) (welcoming the more "absolute line between jurisdiction and merits" but criticizing the Court's line-drawing choices). The scholarly debate extends beyond the context of jurisdiction to the general role of clear statement rules in enforcing the Constitution. See Manning, *supra* note 117, at 418–22, 427–28 (outlining the debate and presenting a new critique); see also Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1336 (2014) (arguing for discarding the presumption of judicial review of agency action, a kind of constitutional avoidance clear statement rule); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 114–15 (2008) (arguing that normative canons of construction and their attendant clear statement rules should be used in *Chevron* step two); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 42 (2008) (arguing that "the constitutional avoidance canon and other clear statement rules may help reviewing courts implement indirectly a regime that more closely approximates an ideal constitutional balancing test" by manipulating legislation enactment costs); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1609 (2000) (justifying application of the constitutional avoidance canon to preserve judicial review). See generally Eskridge & Frickey, *supra* note 118 (cataloguing normative canons).

tweaks and new frameworks.¹²⁸ Scott Dodson’s project on jurisdiction has culminated in a recent argument for decoupling the jurisdictional label from its effects; as property has a bundle of rights, jurisdiction has a bundle of effects that rules can mix and match¹²⁹: no equitable exceptions, no waiver or forfeiture, defects raised any time and sua sponte, and late-discovered defects void earlier judgments.¹³⁰ The belief that there is a binary choice between a jurisdictional label, which comes with all of these effects, and a non-jurisdictional label, which comes with none, is mistaken, even though courts tend not to acknowledge this outright.¹³¹ Mandatory rules offer a middle ground.¹³²

Courts have also recognized that the concept of jurisdiction is more flexible than the party line would suggest.¹³³ This recognition goes back to Justice Black’s dissent to a denial of writ of certiorari in

¹²⁸ See, e.g., Berch, *supra* note 23, at 901–02 (arguing that jurisdiction should be waivable in certain circumstances); Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 67–69 (2007) (arguing that labeling claims-processing rules as “jurisdictional” or “mandatory” leads to unacceptable inequities); Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 164, 167 (2008) (arguing that “the notion that jurisdictional time limits admit no leniency is simply a mistake”); Dodson, *Hybridizing*, *supra* note 18, at 1441, 1484 (arguing that rules can be “hybridized” with jurisdiction’s “bundle of consequences,” like precluding waiver); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 57–58, 72–75 (2008) (arguing that removal statutes are quasi-jurisdictional rules); Dodson, *Effects*, *supra* note 18, at 622, 637 (arguing that courts should “[d]ecoupl[e] a doctrine’s effects from its jurisdictional character” and that the nature of a jurisdictional rule is to “describe[] any boundary or bridge between forums”); Dodson, *Mandatory*, *supra* note 18, at 6 (arguing that jurisdictional and nonjurisdictional is a false dichotomy and that rules can have features of both); Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1469 (2006) (arguing that doctrines of jurisdiction are justified when they serve “the purpose of specifying who ought to decide an issue of law”).

¹²⁹ See Dodson, *Effects*, *supra* note 18, at 629–30. I do not adopt Dodson’s new definition of jurisdiction as delineation between forum choice, which would label exhaustion as “jurisdictional” regardless of what Congress or any court says. See *id.* at 637 (“[J]urisdiction is inherently descriptive of boundaries that separate or group forums. Neither Congress nor the courts can change this identity. Thus, it is not true, as the Supreme Court presumed, that Congress could make Title VII’s employee-numerosity requirement jurisdictional simply by calling it so. . . . Jurisdiction has its own definition.”). Even if I did adopt that definition, though, the more important question of what effects exhaustion has must still be answered, and my answer does not have to change.

¹³⁰ See *supra* notes 9–11 and accompanying text for the effects.

¹³¹ Dodson, *Mandatory*, *supra* note 18, at 6.

¹³² *Id.* at 9.

¹³³ See Berch, *supra* note 23, at 855 (“In *Wellness International Network, Ltd. v. Sharif*, the Court held that parties’ consent cures a court’s constitutional jurisdictional deficiency.” (citing *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015))); *supra* Sections II.A–B (discussing courts’ approaches to exhaustion as a jurisdictional rule, including their allowance of exceptions).

Teague v. Commissioner of Customs,¹³⁴ and before that to Justice Taney's fraud exceptions to jurisdictional requirements.¹³⁵ This flexibility is especially salient in the context of procedural preconditions like exhaustion, which do not "implicat[e] a court's subject-matter jurisdiction and therefore could lack some attributes of jurisdictionality even if subject-matter jurisdiction remains rigid and inviolate."¹³⁶ The reality that jurisdiction operates on a spectrum pries open space for a more nuanced, equitable, and coherent interpretation of exhaustion requirements.

Statutory exhaustion requirements—congressional directives that claimants "shall" or "must" exhaust their administrative remedies—are best conceived of as mandatory rules. This means that they have a particular set of effects, some which look jurisdictional and some which do not. Defining these effects is the project of Part III. But as an initial matter, the availability of this hybrid jurisdictional category is already evident in how courts have manipulated the exhaustion requirement, applying exceptions even when it is jurisdictional.¹³⁷ Indeed, the Court in *Eldridge* described the SSA's requirement as a less than pure jurisdictional requirement.¹³⁸

The Second Circuit has drawn a similar distinction between mandatory exhaustion and judicial exhaustion, rather than between jurisdictional and non-jurisdictional exhaustion:

Two kinds of exhaustion doctrine are currently applied by the courts, and the distinction between them is pivotal. Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them. Common law (or "judicial") exhaustion doctrine, in contrast, 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.¹³⁹

¹³⁴ 394 U.S. 977 (1969). Justice Black articulates why explicit designation of a rule as jurisdictional does not mean it must be applied with complete rigidity. *Id.* at 982. He "explicitly calls into question the assumption that just because the legislature says 'jurisdictional,' it means that there are absolutely no circumstances under which a court can budge." Lees, *supra* note 128, at 1476.

¹³⁵ For a discussion, see Hawley, *supra* note 23, at 2039.

¹³⁶ Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 Nw. U. L. REV. COLLOQUY 228, 229 (2008).

¹³⁷ See, e.g., *supra* Sections II.A–B. Exhaustion could be hybridized through either express statutory "incorporation" of equitable factors and discretion, or through "implied incorporation" of equitable considerations if the text is ambiguous and interpretive tools allow for it. Dodson, *Hybridizing*, *supra* note 18, at 1459–60.

¹³⁸ 424 U.S. 319, 328 (1976).

¹³⁹ *Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 94 (2d Cir. 1998).

The Second Circuit's conception of exhaustion requirements as mandatory falls somewhere between the traditional jurisdictional and non-jurisdictional labels.¹⁴⁰ This conception should become the standard across circuits. Courts need not waste time with questions of jurisdictionality. They can immediately move on to the "merits" of the statutory exhaustion requirement¹⁴¹: What is its scope? Did the claimant fail to exhaust his or her remedies? If so, does an exception apply?

III

THE ADVANTAGES OF MANDATORY EXHAUSTION

The claim that statutory exhaustion requirements are mandatory rules is a claim that they always have a certain set of effects that guide a court in what it can and cannot do when faced with an exhaustion requirement. By contrast, the current binary approach gives the illusion that the court is faced with an all-or-nothing option, masking the real interpretive inquiry of what effects a statutory provision has. First, I will make an argument for what effects should attach to mandatory exhaustion. The effects I propose are descriptively consistent with much case law and are grounded in jurisdiction theory and the policy rationales behind exhaustion. Second, de-jurisdictionalizing exhaustion requirements lets us fuse the exception for collateral constitutional claims with an established interpretive tool—constitutional avoidance—that guides its application and analysis. The result is to mitigate the tradeoff between conceptual coherence and justice. Courts should therefore categorize exhaustion requirements as mandatory with the effects I ascribe, skipping the inquiry into jurisdiction altogether.

A. *Effects Reconciled with the Purposes of Exhaustion*

Just as property has a bundle of rights, jurisdictional rules have a bundle of effects.¹⁴² Traditional jurisdictional rules prohibit waiver, forfeiture, and equitable exceptions; defects can be raised *sua sponte*; and satisfaction of the jurisdictional rule must precede an inquiry into the merits.¹⁴³ Yet, when exhaustion is deemed jurisdictional, we do

¹⁴⁰ Cf. Dodson, *Mandatory*, *supra* note 18, at 9 (arguing that mandatory rules are a middle ground between jurisdictional and non-jurisdictional rules).

¹⁴¹ This move is similar to the conceptual shift in *Lexmark International, Inc. v. Static Control Components, Inc.*, where the Court reoriented zone-of-interest doctrine from being a matter of prudential standing to a matter of statutory interpretation. 572 U.S. 118, 127–28 (2014).

¹⁴² Dodson, *Hybridizing*, *supra* note 18, at 1441.

¹⁴³ See *supra* notes 9–11 and accompanying text.

not always see these effects.¹⁴⁴ As a theoretical matter, the effects we give mandatory exhaustion depend upon its purposes.¹⁴⁵ Recall that these are agency autonomy and judicial efficiency.¹⁴⁶ The structural nature of these purposes means that they bear themselves out across different administrative schemes.¹⁴⁷ As a descriptive matter, the effects I attach resemble what courts are already doing, so the leap to mandatory exhaustion is not great. Indeed, the ambivalent case law evinces how deciding the jurisdictionality of a requirement has been a proxy for deciding what effects the requirement should have.¹⁴⁸

At the conclusion of this Section, we will have a list of the key effects of mandatory exhaustion and can compare them to the jurisdictional and judicial versions outlined in Part I:

TABLE 1. EFFECTS OF EXHAUSTION BY TYPE

	Mandatory	Jurisdictional	Judicial
Equitable exceptions	No*	No*	Yes
Court waiver	No	No	Yes
Agency waiver	Yes	No	Yes
Forfeitable affirmative defense	Yes	No	Yes
Merits may precede	Yes	No	Yes

* Exceptions like futility, undue hardship, and irreparable harm can still be found as matters of statutory interpretation; they just cannot be applied using the court's discretionary equitable powers.

As its first effect, mandatory exhaustion precludes judicially created equitable exceptions. This also means that courts cannot on their own waive the exhaustion requirement. Presumably Congress codifies exhaustion with the mandatory language “shall” to remove it from

¹⁴⁴ See *supra* Section II.A (outlining the ways in which courts apply exceptions to jurisdictional exhaustion requirements).

¹⁴⁵ See Dodson, *Effects*, *supra* note 18, at 645.

¹⁴⁶ See, e.g., Payne v. Peninsula Sch. Dist., 653 F.3d 863, 875–76 (9th Cir. 2011) (referencing exhaustion's two purposes of agency autonomy and judicial efficiency), *overruled on other grounds by* Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014); Bryant v. Rich, 530 F.3d 1368, 1374–76 (11th Cir. 2008) (same).

¹⁴⁷ See, e.g., Hidalgo v. FBI, 344 F.3d 1256, 1258–59 (D.C. Cir. 2003) (looking to the “purposes of exhaustion” and the “particular administrative scheme” to guide its analysis of the jurisdictionality of exhaustion); Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) (“In determining whether these exceptions apply, our inquiry is whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme.”).

¹⁴⁸ See *supra* Section II.A; cf. Neuffer & Ostvig, *supra* note 24 (describing a jurisdictional statutory exhaustion requirement with exceptions).

judicial discretion.¹⁴⁹ Otherwise there would be little point in codifying exhaustion other than to define the steps to exhaust remedies, but most statutes do not go so far. For instance, the channeling requirement in the SSA is meant to “assure[] the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying ‘ripeness’ and ‘exhaustion’ exceptions case by case.”¹⁵⁰ Congress found that occasional individual hardship resulting from removal of this judicial discretion is justified “[i]n the context of a massive, complex health and safety program such as Medicare.”¹⁵¹ Congress’s judgment is constitutional because its exhaustion mandate helps carry out the constitutional justification of agencies. Congress delegates authority to agencies because they have subject matter expertise and can process claims with speed and efficiency.¹⁵² Exhaustion thus is required so “agenc[ies] may function efficiently” and afford courts and parties the “benefit[s] of [their] experience and expertise.”¹⁵³ Without exhaustion requirements, individuals would be able to circumvent agencies, undermining this governmental design choice. Judges creating equitable exceptions would be just as offensive to that choice as individual circumvention. Exhaustion’s constitutional imprimatur is also evident in the Court’s due process decisions. Normally, the *Eldridge* factors alone guide a due process analysis, but in the context of exhaustion, the analysis “should not be made solely by mechanical application of the *Eldridge* factors, but should also be guided by the policies underlying the exhaustion requirement.”¹⁵⁴

Mandatory exhaustion nonetheless allows for exceptions grounded in the statute. While judicial exhaustion exceptions are a matter of equity (recall the *McCarthy* inquiry into when individual interests outweigh institutional interests), mandatory exhaustion exceptions are a matter of statutory interpretation.¹⁵⁵ Thus the particular contours of the exhaustion provision will vary from statute to statute, which is good because different administrative schemes have

¹⁴⁹ For example, the Court held that the PLRA strengthened the judicial exhaustion requirement by speaking in “mandatory” language, using the word “shall.” *Woodford v. Ngo*, 548 U.S. 81, 85, 87 (2006).

¹⁵⁰ *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000).

¹⁵¹ *Id.*

¹⁵² See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 442–44 (1987) (describing the institutional reform of the New Deal’s administrative state).

¹⁵³ *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

¹⁵⁴ *Bowen v. City of New York*, 476 U.S. 467, 484 (1986).

¹⁵⁵ *Cf. Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302–03 (9th Cir. 1992) (noting that the IDEA’s exhaustion requirement is flexible and determined by “the general purposes of exhaustion and the congressional intent behind the administrative scheme” (emphasis added)).

different needs.¹⁵⁶ The Supreme Court and the Tenth Circuit, for example, relied on legislative history to find various exceptions, such as futility, in the IDEA requirement.¹⁵⁷

Second, mandatory exhaustion lets agencies waive the requirement. If exhaustion promotes system-wide goals related to the administration of government, then the decision whether to exhaust should not be entrusted to individuals and so it should not be waivable by them; but if it caters to the adversarial system and individual interests, then it should be.¹⁵⁸ Exhaustion does both. It determines who gets to decide what and when in order to protect agency autonomy, a systemic value.¹⁵⁹ But it also serves as an agency defense in adversarial disputes with a claimant against the agency itself. How do we reconcile these? Simple. Since the agency is a party to the dispute, it can represent its own interests and thereby control when it does or does not need to protect its autonomy. An agency is also in a strong position to decide when its expertise and efficiency are *not* needed in a particular case, since it has the responsibility for administering its programs. The agency may thus waive exhaustion requirements without compromising the purposes behind exhaustion or the constitutional justification for agencies.¹⁶⁰

There are two main risks with granting an agency the power to waive its own exhaustion requirement. It is possible that allowing

¹⁵⁶ See *supra* note 137.

¹⁵⁷ See *Honig v. Doe*, 484 U.S. 305, 327 (1988) (“[P]arents may bypass the administrative process where exhaustion would be futile or inadequate.” (citing 121 CONG. REC. 37,416 (1975) (remarks of Sen. Williams))); *Ass’n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) (“[T]he IDEA’s legislative history contains a third exception to the exhaustion requirement where ‘an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law.’” (quoting H.R. REP. NO. 99-296, at 7 (1985))).

¹⁵⁸ See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1957–58 (2015) (Roberts, C.J., dissenting) (arguing that individual consent cannot cure threats to structural protections from assigning Article III judicial power to non-Article III courts); *Dodson, Hybridizing*, *supra* note 18, at 1481 (“Waivability, for example, is a product of catering to the adversary system, and there may be good reason not to cater so much to the adversary system on matters of jurisdiction.”); *Dodson, Effects*, *supra* note 18, at 645 (“[E]xhaustion . . . typically further[s] systemic goals like federalism, judicial competence, and docket control These justification differences perhaps suggest that the doctrines should have varied effects Perhaps the system-centric abstention or exhaustion doctrines, for example, should be less amenable to party waiver”).

¹⁵⁹ See *Dodson, Effects*, *supra* note 18, at 634–35 (defining “jurisdiction” as a “relational concept” that “determines forum in a multiform system” and identifying exhaustion as one such example); *cf. Lees*, *supra* note 128, at 1487–88 (discussing the difference between institutional interests of the judicial system, which jurisdictional rules generally serve, and the interests of parties).

¹⁶⁰ See, e.g., *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014) (describing failures to exhaust as waivable defects).

waiver will frustrate the other purpose behind exhaustion, judicial efficiency. Agencies might waive exhaustion even when there is a sparse record, but there is little incentive or evidence for this behavior. Moreover, courts still have ripeness doctrine to protect themselves against premature claims. Ripeness “is invoked to determine whether a dispute has yet matured to a point that warrants decision,”¹⁶¹ and a claim might not reach that point when it lacks the benefit of an administrative record from exhausted remedies.¹⁶² The ripeness tool also blunts a second possible objection. Courts may be resistant to cede control over what cases they hear to agencies. But they can retain significant control using ripeness doctrine. And furthermore, they have not ceded control to agencies because they never had control to cede in the first place since waivability is a matter of statutory interpretation.¹⁶³ Congress is its ultimate source, and Congress has power to shape how the courts exercise their jurisdiction.

Third, mandatory exhaustion is an affirmative defense that the agency may forfeit. Thus it should not be considered on a motion to dismiss.¹⁶⁴ This exception preserves judicial resources without undercutting agency authority and autonomy, serving both purposes of exhaustion.¹⁶⁵ In fact, the risk of wasted resources that attends a non-forfeitable jurisdictional requirement contradicts exhaustion’s second purpose of judicial efficiency.¹⁶⁶ This risk likewise demonstrates the

¹⁶¹ 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532 (3d ed.), Westlaw (database updated Apr. 2018).

¹⁶² See *Thompson v. U.S. Marine Corps*, 398 F. App’x 532, 535 (11th Cir. 2010) (per curiam) (“Exhaustion of administrative remedies is not a jurisdictional requirement, but ‘performs a function similar to the judicial doctrine of ripeness by postponing judicial review.’”) (quoting *Taylor v. Appleton*, 30 F.3d 1365, 1367 n.3 (11th Cir. 1994)); Hall, *supra* note 24, at 355–56 (arguing that a statutory exhaustion requirement implicates ripeness).

¹⁶³ See *supra* notes 150–51 and accompanying text.

¹⁶⁴ Generally, affirmative defenses are not properly raised by motions to dismiss. WRIGHT ET AL., *supra* note 161, § 1277. In particular, courts have held that exhaustion as an affirmative defense should not be raised by motions to dismiss. See, e.g., *Albino*, 747 F.3d at 1171 (holding that exhaustion should be decided on a summary judgment motion); *Mosely v. Bd. of Educ.*, 434 F.3d 527, 533 (7th Cir. 2006) (“[T]he earliest possible time to consider [exhaustion] would normally be after the answer has been filed . . .”). However, a few circuits—the Third, Fifth, and Sixth—do seem to allow this. WRIGHT ET AL., *supra* note 161, § 1277. Note, also, that when an exhaustion issue is decided on a summary judgment motion, it is not a ruling on the merits, and so does not have claim preclusive effect. *D’Amico v. CBS Corp.*, 297 F.3d 287, 294 (3d Cir. 2002).

¹⁶⁵ Cf. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) (observing that rigid jurisdictional rules may result in a waste of resources, especially because defects can be raised *sua sponte*).

¹⁶⁶ See *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 870–71 (9th Cir. 2011) (“If we were to hold that exhaustion was jurisdictional, the question of exhaustion *vel non* would haunt

importance of being able to address easy merits questions before complex exhaustion questions in order to promote efficient decision-making. The Ninth Circuit's description of the IDEA's exhaustion requirement captures this sentiment:

[T]he exhaustion requirement appears more flexible than a rigid jurisdictional limitation—questions about whether administrative proceedings would be futile, or whether dismissal of a suit would be consistent with the ‘general purposes’ of exhaustion, *are better addressed through a fact-specific assessment of the affirmative defense* than through an inquiry about whether the court has the power to decide the case at all.¹⁶⁷

The combination of effects outlined above differs both from judicial exhaustion and from the full platter offered with a jurisdictional rule. These effects are based on statutory interpretation, constitutional structures, and the case law. Settling on exceptions up front also has clarity benefits. It avoids the confusion caused by importing a unique exception that makes sense in one statutory context to another statutory context where it does not.¹⁶⁸ It also avoids the problems of the clear statement rule,¹⁶⁹ since that rule is no longer needed to determine jurisdictionality.

But before concluding this project, I will argue that mandatory exhaustion has one more crucial feature: a categorical exception for constitutional claims that do not arise during an agency proceeding. This feature is grounded in the structure of the Constitution, and provides additional normative force for adopting mandatory exhaustion because it helps resolve the tradeoff between conceptual coherence and justice.

B. An Exception for Constitutional Claims

Courts have applied a quasi-equitable exception for collateral constitutional claims to statutory exhaustion requirements.¹⁷⁰ The Court has offered little justification or analytical guidance on what

the entire proceeding, including any appeals.”), *overruled on other grounds by Albino*, 747 F.3d 1162.

¹⁶⁷ *Id.* (emphasis added); see also *Mosely*, 434 F.3d at 533 (applying a presumption that exhaustion is normally considered an affirmative defense rather than a jurisdictional requirement to the IDEA's exhaustion requirement). An additional example is that the PLRA's exhaustion requirement does not include exceptions, like a jurisdictional rule. See *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). Instead, it is an affirmative defense that a defendant must plead and prove, like a non-jurisdictional rule. See *Jones v. Bock*, 549 U.S. 199, 216 (2007).

¹⁶⁸ See *supra* notes 89–94 and accompanying text.

¹⁶⁹ See *supra* Section II.C for a summary of these problems.

¹⁷⁰ See *supra* notes 85–88 and accompanying text.

“collateral” means, and yet failing to be “collateral” has kept courts from applying the exception.¹⁷¹ There have been different formulations among the lower courts. For example, the exception could be that a court need not heed an exhaustion requirement when “the suit alleges a constitutional claim which is ‘(1) collateral to a substantive claim of entitlement, (2) colorable, and (3) one whose resolution would not serve the purposes of exhaustion.’”¹⁷² Or the exception could be for “claims that are independent of or collateral to the [agency proceeding].”¹⁷³ The first compares claims to the substantive claim that the agency is empowered to hear, and the second compares claims to the agency proceeding. But neither of these definitions offers a rationale or principled way to determine what claims are “collateral.”

To see why, it is helpful to distinguish between two kinds of constitutional claims. The first is a claim made external to the agency’s proceeding, such as against an agency policy or practice. For example, in *Falbo v. United States*, petitioner challenged an administrative scheme where courts could not review an agency’s selective service classifications which formed the basis of a criminal prosecution.¹⁷⁴ The second is a claim made internal to the agency’s proceeding. It arises within the proceeding itself as the individual moves through it. An example is *United States v. Mendoza-Lopez*, where respondents, also during a criminal prosecution, attacked their earlier deportation orders on due process grounds because they did not “fully understand the [deportation] proceedings” as they went through them.¹⁷⁵

It does not make sense to have an exception for the second kind of constitutional claims, because one must go through an agency’s proceedings for those claims to arise at all. These claims emerge from as-applied constitutional violations within a proceeding. They are adjudicated in a later attack on that particular proceeding *after the claimant has already exhausted her remedies*. Neither of the definitions of “collateral” offered above gives us a way to target the first kind of claims for an exception but not the second kind. If claims were just compared to the substantive claim of entitlement, then all constitutional claims would seem to be collateral.¹⁷⁶ This is too broad. If claims were com-

¹⁷¹ See *supra* notes 105–13 and accompanying text.

¹⁷² *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 980 (9th Cir. 2002) (quoting *Anderson v. Babbitt*, 230 F.3d 1158, 1163 (9th Cir. 2000) (internal quotation omitted)).

¹⁷³ *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016).

¹⁷⁴ 320 U.S. 549, 551 (1944).

¹⁷⁵ 481 U.S. 828, 832 (1987).

¹⁷⁶ This does not apply in the *Bivens* context, because the constitutional claim and the substantive claim of entitlement under the statute are identical. See *Bryant v. Rich*, 530

pared to the proceeding, it is unclear whether that means as-applied claims or facial claims against a policy or practice.

Instead, all constitutional claims of the first kind—claims arising outside an agency’s proceeding and beyond its power, typically facial challenges—should be considered collateral and exempt from exhaustion requirements. The intuitive force behind this exemption is simple: Why require exhaustion when there are no administrative remedies to exhaust?¹⁷⁷ I derive this exception from the purposes of exhaustion, separation of powers principles, and a familiar tool of statutory interpretation—the constitutional avoidance canon. It has a more stable rationale and provides more analytical guidance using well-established avoidance doctrine.¹⁷⁸ The canon tells courts to interpret a statute in a way that avoids constitutional concerns if that interpretation is reasonable.¹⁷⁹

Giving a special status to constitutional issues in exhaustion doctrine is not new. *McCarthy* recognized an exception to judicial exhaustion for issues outside of the agency’s power.¹⁸⁰ And the Court highlighted “the constitutionality of a statute” as a particular example.¹⁸¹ Lower courts have also recognized separation of powers as a key consideration in the decision whether to require exhaus-

F.3d 1368, 1374–76 (11th Cir. 2008) (holding that PLRA exhaustion of a *Bivens* claim is “nothing more than a precondition to an adjudication on the merits”).

¹⁷⁷ See *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 679 n.8 (1986) (“Respondents’ [statutory and constitutional] attack on the regulation here is not subject to such a requirement because there is no hearing, and thus no administrative remedy, to exhaust.”).

¹⁷⁸ Under the jurisdictional-or-not framework, an exception for constitutional claims would be problematic. If a statutory exhaustion requirement were jurisdictional, the separation of powers calculus changes because Congress has power to control the court’s jurisdiction. See *Hawley*, *supra* note 23, at 2070–71. That power would then compete with the court’s unique competence to hear constitutional claims, implicating two centuries of jurisdiction-stripping jurisprudence. See Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 68–89 (1981) (arguing that federal courts must have jurisdiction over constitutional claims). See generally *Patchak v. Zinke*, 138 S. Ct. 897 (2018) (discussing and applying this jurisprudence and underlying principles). It therefore becomes much harder to justify serving the court’s power to hear constitutional claims at the expense of Congress’s ability to control jurisdiction. But when exhaustion is a mandatory rule, it does not implicate this congressional power to control jurisdiction, and so there are no competing constitutional powers that prevent us from using constitutional avoidance to create a categorical exception.

¹⁷⁹ Constitutional avoidance has a few different forms. See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 574 (2012), for this modern articulation of the avoidance canon. See also Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1281–88 (2016) (describing the different forms).

¹⁸⁰ See *supra* notes 42–52 and accompanying text.

¹⁸¹ *McCarthy v. Madigan*, 503 U.S. 140, 147–48 (1992).

tion.¹⁸² An agency's lack of power to adjudicate constitutional issues stems in part from courts' exclusive competence to decide such issues.¹⁸³ In fact, one motivation behind courts' use of the collaterality exception is to avoid relinquishing constitutional issues that are beyond the agency's power and within the competence of the courts.¹⁸⁴ This motivation likewise underlies the constitutional avoidance canon and my categorical exception.

Courts may use constitutional avoidance to protect under-enforced separation of powers values.¹⁸⁵ Those values can be formal or functional. The formal value is that "our kind of government" does not assign judicial power to the executive branch, legislative power to the judicial branch, and so on.¹⁸⁶ The functional value is that power is dispersed among the branches so they check each other in order to protect individual liberty.¹⁸⁷ Both values are at risk when constitutional claims must weave their way through the administrative process before reaching their home in the courts. Although some rights may be adjudicated in other branches, like public rights,¹⁸⁸ the judiciary is the branch competent to hear constitutional claims.¹⁸⁹ And many constitutional claims will not be vindicated, such as those brought by pro se litigants or unrepresented children in deportation proceedings, if they must first maneuver an agency's proceedings because the agency will not be able to develop the right factual record.¹⁹⁰ In *McNary v.*

¹⁸² See, e.g., *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997) ("[Courts] should look to the exhaustion rule's goals of preserving the separation of powers between the branches of the government and conserving judicial resources.").

¹⁸³ 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.").

¹⁸⁴ See *Aguilar v. ICE*, 510 F.3d 1, 14 (1st Cir. 2007) (deeming petitioner's claims as not collateral because they can be, and frequently are, handled within the administrative process); Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 413–14 (1981) (suggesting that any limit on the court's ability to employ a non-delegation canon of statutory interpretation will impact the scope of agency power); cf. Sager, *supra* note 178, at 68–89 (arguing that federal courts must have jurisdiction over constitutional claims).

¹⁸⁵ Eskridge & Frickey, *supra* note 118, at 599, 604–05.

¹⁸⁶ See *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1179 (D.C. Cir. 1984) (Bork, J., concurring)), *abrogated on other grounds by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

¹⁸⁷ *Stern v. Marshall*, 564 U.S. 462, 483–84 (2011).

¹⁸⁸ See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 353–54 (7th ed. 2015) (defining public rights).

¹⁸⁹ See *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.").

¹⁹⁰ See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1868 (2015) (noting that exhaustion requirements can "bar legitimate constitutional complaints" beyond the agency's power).

Haitian Refugee Center, Inc., for example, claimants alleged unconstitutional practices by the Immigration and Naturalization Service, and the Court affirmed its jurisdiction to hear the claims because the agency's procedures would "not allow applicants to assemble adequate records."¹⁹¹ *Crowell v. Benson* went even further. The 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.¹⁹² Thus, as Justice Alito observed in his *Elgin v. Department of Treasury* dissent, the presumption in favor of exhaustion described in the previous Section must flip when the party presents a facial constitutional challenge.¹⁹³

It is evident that requiring exhaustion for constitutional claims would raise constitutional doubts grounded in separation of powers.¹⁹⁴ Thus, avoidance is available to exempt constitutional claims from exhaustion requirements in order to protect separation of powers values.¹⁹⁵ In further support of this, courts have used a presumption against congressional disruption of separation of powers to waive exhaustion requirements that preclude all judicial review.¹⁹⁶ There is also a long tradition of ensuring that violations of constitutional rights

¹⁹¹ 498 U.S. 479, 497 (1991).

¹⁹² 285 U.S. at 64.

¹⁹³ *Compare* *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 Board to have exclusive jurisdiction over claims like these."), with *supra* notes 152–53 and accompanying text (discussing the presumption in favor of exhaustion).

¹⁹⁴ See *Webster v. Doe*, 486 U.S. 592 (1988) (avoiding the question of whether Congress may strip courts of jurisdiction to review constitutional claims by interpreting a statutory review provision as allowing such claims, even though it read the same provision as barring review of nonconstitutional claims); FALLON ET AL., *supra* note 188, at 317 (discussing application of constitutional avoidance in *Felker v. Turpin*, 518 U.S. 651 (1996), to avoid a possibly unconstitutional removal of jurisdiction); Young, *supra* note 127, at 1609 (justifying application of the constitutional avoidance canon to preserve judicial review); cf. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies and Article III*, 101 HARV. L. REV. 915, 937–38 (1988) (explaining an objection to legislative courts based on a fear that Congress will attempt to channel Article III cases away from the judiciary to adjudicators less insulated from political pressure).

¹⁹⁵ Cf. *Boumediene v. Bush*, 553 U.S. 723, 743–46 (2008) (relying on separation of powers principles to limit Congress's power to control Article III jurisdiction); *Falbo v. United States*, 320 U.S. 549, 555 (1944) (Rutledge, J., concurring) ("Apart from some challenge upon constitutional grounds, I have no doubt that Congress could and did exclude judicial review of Selective Service orders like that in question.").

¹⁹⁶ See, e.g., *Council for Urological Interests v. Sebelius*, 668 F.3d 704, 712–13 (D.C. Cir. 2011) (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 21–23 (2000)) (invoking the presumption to look past an exhaustion requirement as applied to urologists challenging a new Medicare rule when only hospitals had an avenue to challenge the rule); *Aguilar v. ICE*, 510 F.3d 1, 19 (1st Cir. 2007) ("Holding that the district court lacked jurisdiction over these substantive due process claims . . . would contradict the presumption favoring judicial review of administrative actions.").

have effective remedies.¹⁹⁷ To clarify, my point is not that there is always an attack on separation of powers values. It is just that exhaustion requirements which leave no room for judicial discretion over constitutional claims create *enough* risk to these under-enforced values to justify a categorical exception.

Moreover, my exception preserves a legitimate and tailored role for the clear statement rule. As a version of constitutional avoidance, my exception would require a clear statement from Congress to require exhaustion of constitutional claims. Clear statement rules traditionally came from canons, like constitutional avoidance, protecting constitutional norms.¹⁹⁸ The Court nonetheless detached it and applied it to its jurisdictional-status analysis to serve as a prophylactic against the harsh consequences of a jurisdictional requirement.¹⁹⁹ But this was overinclusive and illegitimate.²⁰⁰ Limiting the clear statement rule to when constitutional rights are in fact at stake solves this problem. Mandatory exhaustion eliminates the need for a general clear statement rule used to determine jurisdictionality, and limits the rule's use to this retail application of constitutional avoidance.

C. *The Tradeoff Resolved*

My exception for constitutional claims helps protect the rights at stake in *J.E.F.M.'s Catch-22*.²⁰¹ Recall that the children's pattern-and-practice claim to a right to counsel in removal proceedings was dismissed for lack of jurisdiction, since they had not exhausted their administrative remedies. Assume now that the court had instead conceived of the INA's exhaustion requirement as a mandatory rule with the effects and exception outlined above. This would empower the court to hear the children's claim without sacrificing the conceptual coherence of the doctrine.

The INA implicates constitutional due process rights because of the severe deprivations of liberty imposed by detention and deportation. And there is little doubt federal courts have the superior competence to vindicate due process rights in immigration proceedings.²⁰²

¹⁹⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."); 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).

¹⁹⁸ See *supra* notes 117–19 and accompanying text.

¹⁹⁹ See *supra* note 120 and accompanying text.

²⁰⁰ See *supra* notes 121–26 and accompanying text.

²⁰¹ See *supra* notes 1–6 and accompanying text for the description of the *Catch-22*.

²⁰² See, e.g., *Kaczmarczyk v. INS*, 933 F.2d 588, 596 (7th Cir. 1991) (holding that due process requires that the Board of Immigration Appeals allow individuals an opportunity

The INA's exhaustion requirement and PFR process are uniquely broad, making it vulnerable to narrowing with constitutional avoidance. Its "zipper clause" channels all review of immigration proceedings into one action before the Court of Appeals.²⁰³ Claims that do not "arise from" removal proceedings are outside the clause's scope.²⁰⁴ Assuming the exhaustion requirement is just a mandatory rule, what steps would a court take when faced with a pattern-and-practice claim to a right to appointed counsel in removal proceedings like the one we saw in *J.E.F.M.*?

First, does the INA's exhaustion requirement contain a statutory exception? Unlikely, given that *J.E.F.M.* found there was no such exception.²⁰⁵ Second, has the agency waived or forfeited the requirement? In *J.E.F.M.*, at least, no. (But the court did acknowledge that the agency may want to waive the requirement in order to settle the issue once and for all, avoiding the effort of piecemeal litigation.)²⁰⁶ Third, may the court waive the requirement since the requirement itself is an as-applied due process violation? Possibly. Analyzing that issue, as with the others, is beyond the scope of this Note, but there is an argument to be made given the Court's decision in *Bowen*.²⁰⁷ Fourth, may the court affirm a judgment on the merits of the constitutional issue without addressing the exhaustion issue? Yes. In the alternative world of a mandatory-exhaustion case, the agency would not have been able to file its interlocutory appeal of the district court's jurisdictional ruling, the district court would then have reached the merits, and then on appeal the Ninth Circuit would have been free to affirm the district court's decision.²⁰⁸

Lastly, is the children's claim the kind of constitutional claim beyond an agency's power that warrants an exception? Most likely. The agency lacks competence to address this constitutional claim, so the only reason to require exhaustion would be to respect the policies underlying it—developing the right factual record, getting the benefit of agency expertise, and giving the agency a chance to correct its

to rebut administratively noticed facts). This competence over due process issues in immigration proceedings is really just an application of judicial review. See *supra* notes 189, 197 and accompanying text.

²⁰³ *INS v. St. Cyr*, 533 U.S. 289, 313 (2001).

²⁰⁴ *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016) (citing 8 U.S.C. § 1252(b)(9) (2012)).

²⁰⁵ *Id.* at 1034–35.

²⁰⁶ *Id.* at 1038.

²⁰⁷ See *supra* note 154 and accompanying text.

²⁰⁸ Cf. *Douglas v. Donovan*, 559 F.3d 549, 556 & n.4 (D.C. Cir. 2009) (reaching the merits of summary judgment without having to decide a non-jurisdictional exhaustion issue).

errors for the sake of efficiency. But the children are challenging the constitutionality of a generally applicable agency procedure to deport minors without representation, which pushes in the opposite direction.²⁰⁹ Requiring exhaustion might prevent the claim from ever properly reaching the courts. The *J.E.F.M.* court incorrectly compared the claims “to the removal process” to determine if they were collateral,²¹⁰ when it should instead have recognized the constitutional risks and, applying constitutional avoidance, waived the exhaustion requirement.

Had the court used mandatory exhaustion, the results of the case would be conceptually and doctrinally coherent and avoid the injustice of the children’s Catch-22. Since federal courts are more competent at vindicating individual due process claims, and the children were challenging the practices and policies of the INA, rather than their own particular substantive relief, a constitutional avoidance analysis of whether these claims are collateral would most likely exempt their suit from the INA’s mandatory exhaustion requirement.²¹¹

Should another pattern-and-practice constitutional claim emerge over the right to appointed counsel in a child’s removal proceedings, we may see a different result under mandatory exhaustion. While the Ninth Circuit has ruled in an individual lawsuit on the issue of a noncitizen child’s right to counsel, and held that the child before the court did not have such a right,²¹² it has previously admitted that a case-by-case rather than class action approach will be much less efficient in adjudicating these rights.²¹³ Other circuits, though, still have a chance to settle the issue for good.

²⁰⁹ Cf. *supra* notes 105–16 and accompanying text (explaining that the First and Ninth Circuits’ holdings requiring exhaustion in constitutional pattern-and-practice cases did not serve the purposes of exhaustion). My argument cabins dicta in *McNary v. Haitian Refugee Center, Inc.*, that gave Congress a roadmap for writing an exhaustion requirement that would cover pattern-and-practice claims. 498 U.S. 479, 494 (1991); see also *J.E.F.M.*, 837 F.3d at 1034–35. I place limits on Congress’s power to write an exhaustion requirement that would cover constitutional challenges to an agency’s practice and policy. Courts may still require exhaustion, but that is a decision within the courts’, not Congress’s, discretion.

²¹⁰ *J.E.F.M.*, 837 F.3d at 1032.

²¹¹ Cf. *McNary*, 498 U.S. at 492, 497 (holding that statutory restrictions on jurisdiction could not apply to “collateral challenges to unconstitutional practices and policies used by the agency in processing applications” in part because a court of appeals on review would “most likely not have an adequate record as to the pattern of INS’s allegedly unconstitutional practices” and “also would lack the factfinding and record-developing capabilities of a federal district court”).

²¹² *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1129 (9th Cir. 2018).

²¹³ *J.E.F.M.*, 837 F.3d at 1038.

CONCLUSION

Courts have been using jurisdiction and a clear statement rule as a proxy for interpreting the scope and exceptions of statutory exhaustion requirements, but this has been an unsound and blunt instrument. I have argued that treating all statutory exhaustion requirements as mandatory rules with a certain set of effects is grounded in jurisdiction theory, constitutional structure, and how courts have already interpreted these requirements. Adding normative force, mandatory exhaustion empowers courts to avoid injustice without making a conceptual mess of the doctrine.

Whatever label we bestow on statutory exhaustion requirements, an account of their effects still matters most. Agencies should be allowed to waive exhaustion requirements and courts should be able to affirm merits questions before potentially complex exhaustion questions. Mandatory exhaustion removes a court's equitable discretion, but traditional judicial exceptions, like futility, may still apply as a matter of statutory interpretation. Moreover, this approach redirects the collateral claims exception towards claims made external to the agency proceeding and beyond its competence. This test focuses and simplifies the analysis to an inquiry into an agency's competence and ties the exception to constitutional avoidance, a weathered tool of statutory interpretation. And although I focused on constitutional claims, it is possible that other classes of claims which are beyond an agency's competence satisfy this test, such as pattern-and-practice claims more generally. In the meantime, employing mandatory exhaustion would empower courts to preserve judicial resources, develop coherent doctrine, and prevent injustice while remaining faithful agents to Congress and the Constitution.