Future Of Issue Exhaustion In Agency Rulemaking Challenges

By **David Ogden, Kevin Lamb and Joseph Meyer** (October 20, 2021)

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Participants in administrative proceedings are routinely cautioned to raise, or "exhaust," all issues with the agency to avoid being barred from later raising those issues in court. But whether a court will require issue exhaustion as a prerequisite to judicial review is often hard to predict.

The U.S. Supreme Court's April decision in Carr v. Saul[1] — which held that applicants for disability benefits could raise certain challenges to the denial of their applications for the first time in court — helps clarify when the doctrine of administrative issue exhaustion applies.

The impact of that decision, however, remains to be seen in one context of special significance to regulated parties: agency rulemaking.

In the months since the decision was issued, parties have cited Carr to address issue exhaustion in a variety of administrative contexts, including rulemaking.

In a fully briefed U.S. Court of Appeals for the Tenth Circuit case in Northern New Mexico Stockman's Association v. U.S. Fish & Wildlife Service, for example, challengers to a rulemaking designating a critical habitat under the Endangered Species Act have relied on Carr to argue that the appeals court should decide issues the district court deemed administratively waived.[2]

That court and others are poised to consider Carr's impact on the availability of judicial review in such cases in the coming weeks and months.[3]

Sims' Framework

Carr cements a two-decade-old framework for analyzing when parties must raise issues with administrative agencies before courts will hear and decide those issues. The Supreme Court first articulated that framework in 2000 in another disability-benefits case, Sims v. Apfel.[4]

The Social Security Administration in Sims took the position that forcing all issues to be raised with the agency is a necessary counterpart of exhausting administrative remedies.

The court disagreed, explaining that whether judicial review of agency action should be limited to the specific issues a party presented to the agency is a different question from whether the party was required, prior to filing suit, to avail itself of a particular avenue for review within the agency.

Sims thus articulated — and Carr reinforces — a separate, two-step inquiry for requiring administrative issue exhaustion.

First, the court must determine whether any statute or regulation requires all issues to be raised with the agency. If none does, the court must then examine the degree to which the

particular administrative proceeding is analogous to "normal adversarial litigation," in which parties are expected to fully develop all issues.[5]

Although Sims and Carr involved different stages of SSA proceedings, and not a rulemaking, the Supreme Court held in both cases that parties were permitted to raise new issues in court partly because a specific administrative proceeding was not sufficiently adversarial to expect that all issues would be presented to the agency first.

In Carr, that reasoning was backstopped by the court's further conclusion that the specific issue there — whether the agency's administrative law judges were constitutionally appointed — was not one that those same judges were well-equipped to decide or empowered to remedy.

Judicial Disregard of Sims in the Rulemaking Context

Though not directly at issue in either Sims or Carr, rulemaking would seem to be the paradigm of a nonadversarial administrative proceeding. Yet 21 years later, Sims has had little impact on how courts approach the scope of judicial review in challenges to agency rules.

In Sims' immediate wake, some lower courts, including the influential U.S. Court of Appeals for the D.C. Circuit, ignored the decision altogether in rulemaking cases.[6] And when those courts later acknowledged Sims, they held that it applied only to "issue exhaustion" in agency adjudications, not to "issue waiver" in agency rulemakings.[7]

But even outside the rulemaking context, courts have not uniformly adhered to Sims' teachings.[8]

What explains courts' neglect of Sims, especially in this context? And is there reason to believe Carr will find a broader reception?

One explanation for Sims' limited impact is the fractured nature of the decision. The court in Sims held 5-4 that claimants are not required to raise issues before the SSA's Appeals Council to preserve those issues for judicial review. But only a four-justice plurality based that holding on the nonadversarial nature of Appeals Council proceedings.

Justice Sandra Day O'Connor, who supplied the fifth vote, focused instead on the lack of notice to claimants that all issues had to be presented to the Appeals Council.

As a result, although five justices, including Justice O'Connor, subscribed to Sims' articulation of the general principles governing administrative issue exhaustion, some lower courts and commentators, as well as the U.S. Department of Justice itself, characterized Sims' holding as essentially "limited to its facts."[9]

In Carr, however, eight justices unequivocally endorsed Sims' fundamental premise that

> the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.[10]

Only Justice Stephen Breyer viewed the nonadversarial nature of an agency proceeding as generally irrelevant to whether issue exhaustion should be required.[11]

But again, like Sims, Carr did not involve a challenge to a rulemaking. Carr's more recent — and more unequivocal — pronouncements on issue exhaustion may therefore still encounter lower court resistance in the rulemaking context, where, as noted, courts have discounted Sims and continued to enforce a pre-Sims waiver rule that forecloses challenges to regulations based on issues not raised before the agency.[12]

The incongruous result is that courts routinely require issue exhaustion for rulemakings, even though rulemakings are inherently less adversarial than the adjudicatory proceedings at issue in Sims and Carr.

In at least one case, Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Administration, the D.C. Circuit in 2005 forthrightly acknowledged this incongruity, finding any distinction between issue exhaustion for agency adjudications and issue waiver for agency rulemakings "illusive, to say the least."[13]

Doctrinal and Policy Arguments

Courts' reluctance to apply Sims' two-part framework to rulemakings does not follow, at least not obviously, from the reasoning in Sims.

To be sure, the Supreme Court has applied that framework only twice — to different stages of SSA adjudications — but the framework is not limited by its terms to one type of proceeding any more than it is limited to one agency.

The first inquiry into whether issue exhaustion is required by statute or agency regulation applies equally to rulemakings.

For example, the Clean Air Act limits challenges to U.S. Environmental Protection Agency rules to objections "raised with reasonable specificity during the period for public comment."[14]

And the second inquiry into the nature of the administrative proceedings would appear to encompass whether the proceeding is an adjudication or rulemaking.

The fact that rulemaking proceedings are less adversarial is a reason not to require issue exhaustion under Sims and Carr — not a reason to disregard the general principles articulated in those cases.

There are other reasons issue exhaustion may be less appropriate in rule challenges.

For example, although regulated industries likely have sufficient financial incentives and resources to monitor notices of proposed rulemaking in the Federal Register, the broader public does not. And by encouraging commenters to include every potential argument, issue exhaustion increases the costs of public participation and overloads agencies with peripheral issues to which they must nevertheless respond.

Some courts and scholars have offered the flipside — that there would be less robust public comment without issue exhaustion — as a justification for requiring it.[15]

Other doctrines, however, arguably create similar incentives for interested parties to submit issues and evidence relevant to a proposed regulation.

In particular, challenges to the substantive reasonableness of agency actions are limited to

the contemporaneous record before the agency.[16] Parties will therefore still need to shape the administrative record to pave the way for later claims that the agency unreasonably ignored the evidence or issues before it.

Moreover, nonexhaustion doctrines are less blunt instruments to incentivize parties to provide critical information. The contemporaneous-record limitation prevents retrospective second-guessing based on new evidence or nonobvious concerns that were never shared with the agency.

But it does not foreclose less record-dependent arguments, such as purely legal challenges to the agency's lack of statutory authority to promulgate a particular rule.

And whereas a formal issue-exhaustion requirement bars rule challenges from being heard, applying the contemporaneous-record limitation to reject those challenges results in a merits determination that the agency acted lawfully — an outcome that is more consistent with the long-standing policy embraced by courts in other contexts favoring the resolution of cases on the merits, rather than penalizing a party's default.[17]

Finally, although failure to raise an issue during the rulemaking may be held to waive that issue for purposes of a preenforcement challenge, courts have long recognized that parties are free to raise new and different arguments if and when the agency enforces the rule.[18]

That is cold comfort, however, in cases where the penalties for noncompliance are so steep that, practically speaking, the choice for regulated parties is between challenging the rule before it takes effect and complying.

Indeed, to avoid the very situation in which delaying judicial review would effectively insulate an invalid regulation from challenge, the Supreme Court has long applied a presumption of preenforcement access to court "absent a statutory bar or some other unusual circumstance," as articulated in its 1967 Abbott Labs. v. Gardner decision.[19]

Carr and the Future of Issue Exhaustion in Challenges to Agency Regulations

Carr erases any doubt that Sims' framework is binding. But because lower courts may continue to treat that framework as applicable only in the adjudicatory context, regulated parties who fail to raise issues during an agency's rulemaking will continue to risk forfeiting those issues for judicial review.

Issue exhaustion in rulemakings, however, has not been without exceptions.

Although courts have generally declined to relieve parties from issue exhaustion based on the nonadversarial nature of rulemaking proceedings, they have recognized in the rulemaking context, as in the adjudicatory context, exceptions based on the nature of the unexhausted issue.[20] Carr itself reaffirms, for example, "the well-established exceptions for constitutional and futile claims."[21]

But the application of these exceptions in challenges to agency regulations remains inconsistent and uncertain.[22]

Recognizing this uncertainty, the Administrative Conference of the U.S. in 2015 attempted to bring greater clarity to issue exhaustion in the rulemaking context by adopting a list of factors courts should examine, including whether the issue is constitutional or would have been futile to raise during the rulemaking.[23]

To date, six years later, no court has cited that list of factors.

In contrast, as noted, challengers to agency rulemakings, like the appellants in the Northern New Mexico Stockman's case, have wasted no time in citing Carr to argue that administrative rulemaking's nonadversarial nature renders issue exhaustion inappropriate in this context unless required by statute or regulation.[24]

The same arguments, however, were also made — unsuccessfully — in the wake of Sims.[25]

Lower courts will decide these questions in the near future. But in the absence of authoritative guidance from the Supreme Court about how Sims and Carr apply to preenforcement challenges to agency rules, those courts will likely continue to find unexhausted issues waived, with ad hoc exceptions.

Regulated parties would therefore be well advised to preserve issues for judicial review at the comment stage.

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Disclosure: While serving as assistant attorney general for the DOJ's Civil Division, Ogden represented the SSA in Sims v. Apfel, cited in this article. Ogden was also a public member of the Administrative Conference of the U.S. at the time of its adoption of the October 2015 statement cited in this article, and he continues to serve as a senior fellow at the agency.

[1] Carr v. Saul, 141 S. Ct. 1352 (2021).

[2] Appellants' Brief 41-42, Northern New Mexico Stockman's Association v. United States Fish & Wildlife Service, No. 21-2019, 2021 WL 3556175 (10th Cir. Aug. 2, 2021).

[3] See also, e.g., Amicus Brief of American Indian Law Scholars 15, Slockish v. Federal Highway Administration, No. 21-35220, 2021 WL 2005392 (9th Cir. May 10, 2021) (citing Carr to argue that issue exhaustion was not required in agency consultation with tribal government). Oral argument in this appeal has been set for November 16, 2021.

[4] Sims v. Apfel, 530 U.S. 103 (2000).

[5] Id. at 109.

[6] See Appalachian Power Co. v. EPA, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (finding arguments not raised during rulemakings waived, with no mention of Sims); Exxon Mobil Corporation v. EPA, 217 F.3d 1246, 1249 (9th Cir. 2000) (same).

[7] See National Mining Association v. Department of Labor, 292 F.3d 849, 874 (D.C. Cir. 2002) ("Sims is … inapplicable, for it addresses issue exhaustion, not issue waiver."); Universal Health Services, Inc. v. Thompson, 363 F.3d 1013, 1020 (9th Cir. 2004) ("The Court's decision [in Sims] turned on the unique nature of Social Security benefit proceedings and offers no guidance relevant to rulemaking.").

[8] Compare, e.g., Vaught v. Scottsdale Healthcare Corporation Health Plan, 546 F.3d 620, 629-633 (9th Cir. 2008) (applying Sims' framework to administrative claims proceedings under ERISA), with Jacobs v. Xerox Corporation Long Term Disability Income Plan, 356 F. Supp. 2d 877, 892 (N.D. Ill. 2005) (Sims "deals only with Social Security Appeals" and "does not purport to speak to ERISA cases").

[9] Gov't Reply 8 n.7, Brackeen v. Zinke, No. 4:17-cv-868 (N.D. Tex. May 25, 2018), Dkt. 115; see also, e.g., Davis v. Saul, 963 F.3d 790, 793 (8th Cir. 2020) ("Although [Sims] said that the reasons for requiring exhaustion are much weaker in a non-adversarial proceeding than in an adversarial proceeding, … the case ultimately was decided on narrower grounds."), rev'd, 141 S. Ct. 1352; Carr v. Commissioner, SSA, 961 F.3d 1267, 1275 (10th Cir. 2020) (same), rev'd, 141 S. Ct. 1352; Ronald M. Levin, Making Sense of Issue Exhaustion in Rulemaking, 70 Admin. L. Rev. 177, 208 (2018) ("[T]he range of proceedings that fall within the holding of Sims is probably quite narrow."); William Funk, Exhaustion of Administrative Remedies—New Dimensions Since Darby, 18 Pace Envtl. L. Rev. 1, 15 (2000) ("Outside the Social Security context, it is unlikely that [Sims] has any force.").

[10] 141 S. Ct. at 1358 (quoting Sims, 530 U.S. at 109).

[11] Id. at 1363 (Breyer, J., concurring).

[12] See supra notes 6 and 7.

[13] Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Administration, 429 F.3d 1136, 1150 (D.C. Cir. 2005).

[14] 42 U.S.C. §7607(d)(7)(B).

[15] See, e.g., Koretoff v. Vilsack, 707 F.3d 394, 401 (D.C. Cir. 2013) ("[Waiver] further increases the potential benefits of the notice-and-comment process itself."); Levin, supra note 9, at 189 ("[R]ulemaking paradigmatically contemplates that the agency depends on commenters to offer information and insights that it would not have discerned on its own.").

[16] Camp v. Pitts, 411 U.S. 138, 142 (1973) ("In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

[17] See, e.g., In re Semcrude, L.P., 728 F.3d 314, 326 (3d Cir. 2013) ("[F]ederal courts should hear and decide on the merits cases properly before them."); Jefferson Amusement Co. v. FCC, 226 F.2d 277, 280 (D.C. Cir. 1955) ("[D]oubts should be resolved in favor of disposition of cases on their merits rather than by default.").

[18] Koretoff, 707 F.3d at 399 (citing Murphy Exploration & Production Co. v. Department of

Interior, 270 F.3d 957, 958 (D.C. Cir. 2001)).

[19] See Abbott Laboratories v. Gardner, 387 U.S. 136, 153 (1967).

[20] For a broader catalogue of exceptions, see Jeffrey S. Lubbers, Fail to Comment at Your Own Risk: Does Issue Exhaustion Have A Place in Judicial Review of Rules?, 70 Admin. L. Rev. 109, 149-155 (2018).

[21] 141 S. Ct. at 1363 (Breyer, J., concurring).

[22] Compare Comite De Apoyo A Los Trabajadores Agricolas v. Solis, No. 2:09-cv-240, 2010 WL 3431761, at *18 (E.D. Pa. Aug. 30, 2010) (recognizing futility exception), with Nebraska v. EPA, 331 F.3d 995, 997 (D.C. Cir. 2003) (rejecting exception for constitutional issues).

[23] Adoption of Statement, 80 Fed. Reg. 60,611 (Oct. 7, 2015); see also Lubbers, supra note 20, at 170-176.

[24] Appellants' Brief, supra note 2, at 42.

[25] See, e.g., Advocates for Highway & Auto Safety, 429 F.3d at 1149 (noting petitioner's "not unreasonable" argument that "[r]ulemakings are classic examples of non-adversarial administrative proceedings").