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"Manifest" Destiny?: How Some Courts Have Fallaciously Come to Require A Greater Showing of Congressional Intent for Jurisdictional Exhaustion Than They Require for Preemption

Colin Miller
University of South Carolina - Columbia, mille933@law.sc.edu

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> What is enough to suggest a congressional intent to defer the maturing of a federal cause of action is not enough to suggest a congressional intent to override state law. We have repeatedly said that federal law pre-empts state law in traditional fields of state regulation only when "that was the clear and manifest purpose of Congress."[1]
>
> But, under well established principles, a statute or other congressional enactment creates an independent duty to exhaust only when it contains "'sweeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim."[2]

I. INTRODUCTION

Congress engages in preemption pursuant to the Constitution's Supremacy Clause when it enacts federal legislation that supersedes existing state and local laws in a particular field and proscribes any future state and local regulation of that field. Because preemption repeals state and local legislative authority over areas of the law traditionally reserved to the states, courts have understandably required that potentially preemptive legislation evince "clear and

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* Assistant Professor of Law, The John Marshall Law School.

1. Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Co., 489 U.S. 561, 589 (1989) (Scalia, J., concurring in part and concurring in the judgment) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

2. Elk v. United States, 70 Fed. Cl. 405, 407 (Fed. Cl. 2006) (quoting Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1248 (D.C. Cir. 2004) (quoting Weinberger v. Salfi, 422 U.S. 749, 757 (1975))).

manifest" congressional intent to supersede state and local legislation.[3]

Conversely, when Congress, pursuant to its Article III powers, includes a jurisdictional exhaustion requirement in a statute, it merely defers rather than supersedes federal court jurisdiction. Courts have created the doctrine of prudential or administrative exhaustion, which is the requirement that potential litigants exhaust available administrative remedies before they can bring suit in federal court.[4] Because this requirement is prudential, federal courts can still, in certain circumstances, hear claims brought before a litigant exhausts her administrative remedies, such as when she can prove agency bias.

By statute, however, Congress can include a jurisdictional or statutory exhaustion requirement. Such a requiremenr makes the exhaustion of administrative remedies a jurisdictional prerequisite to bringing suit in federal court. When a congressional statute mandates jurisdictional exhaustion, federal courts are completely without jurisdiction to hear cases covered by the statute until potential litigants first exhaust all available adminisrrative remedies.

This being the case, Justice Scalia's "sweeping and direct" requirement is intuitive.[5] The Supreme Court rightfully requires a clearer expression of congressional intent in the preemption context than it requires in the jurisdictional exhaustion context; preemption abrogates srate and local regulation of a field, while jurisdictional exhaustion merely delays federal court jurisdiction.

Thus, to the exrent that Justice Scalia is correct, courts applying his analysis are placing too heavy a burden on Congress in the jurisdictional exhaustion context, unless "sweeping and direct" language would not satisfy the "clear and manifest" purpose test for preemption. This Article addresses recent decisions which hold that exhaustion requirements are jurisdictional only when Congress includes "sweeping and direct" language in statutory enactments. Ir argues that these courts are improperly citing Supreme Court precedent, and, to an extent, applying the preemption test to jurisdictional exhaustion. Furthermore, these courts are actually requiring a greater showing of congressional intent in the

3. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).

4. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).

5. *Coit*, 489 U.S. at 589.

jurisdictional exhaustion context than in the preemption context. While courts have allowed Congress to displace state and local authority through both express and implied preemption, some courts are applying the "sweeping and direct" language test to allow only "express" jurisdictional exhaustion.

These decisions are rroubling for a few reasons. First, through imposing this new test, these courts have created an environment where Congress is unsure what degree of congressional intent it musr express in a statute to make it jurisdictionally exhaustive. Second, the circuit splits that have been created by these decisions are confusing to potential litigants and constitute a strain on judicial economy.

Parts II and III consider the differences between the exhaustion and preemption doctrines and argue that the excerpted portion of Justice Scalia's concurring opinion is correct: courts should be less demanding of Congress in the jurisdictional exhaustion context than they are in the preemption context.

Part IV analyzes *Weinberger v. Salfi*,[6] the Supreme Court case that explicitly created the prudential/jurisdictional exhaustion dichotomy and introduced the phrase "sweeping and direct" language into the judicial lexicon. Part V explains that although the Supreme Court and other federal courts have consistently ignored this phrase since *Salfi*, courts began applying it again in the wake of the Prison Litigation Reform Act (PLRA), although these courts did not appear to be treating "sweeping and direct" language as the sine qua non for jurisdictional exhaustion. Part V then explains how, in the wake of the Supreme Court's landmark decision in *Darby v. Cisneros*,[7] circuit splits began to form as some courts applied the "sweeping and direct language" test to other exhaustion requirements and treating it as the sine qua non for jurisdictional exhaustion, while other courts continued to look at factors such as a srature's structure and legislative history in determining whether it is jurisdictional or prudential.

Part VI argues that courts applying the "sweeping and direct" language test in post-PLRA cases are in fact requiring a greater showing of congressional intent in the jurisdictional exhaustion context than in the preemption context. It argues thar in doing so,

6. 422 U.S. 749 (1975).
7. 509 U.S. 137 (1993).

these courts have flatly contradicted Supreme Court precedent, resulting in circuit splits, which are confusing to Congress, the courts, and potential litigants. The Article concludes by claiming that courts should abolish the "sweeping and direct" language test and resume applying Supreme Court precedent that analyzes exhaustion requirements and determines whether they are prudential or jurisdictional based not only on their language but also upon other factors such as structure and legislative history.

II. THE PREEMPTION DOCTRINE

A. Express and Implied Preemption

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.[8]

Based on the Supremacy Clause of the United States Constitution,[9] courts have held that Congress may enact legislation that preempts state and local regulation over matters historically covered by the state's police powers.[10] Because a finding of preemption abrogates the ability of states and localities to exercise their traditional powers, courts "start with the assumption that the historic . . . powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[11]

Because courts "'begin with the language employed by Congress

8. U.S. CONST. art. VI, cl. 2.

9. *Id.*

10. *See* Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1121–22 (11th Cir. 2004) (discussing the preemption doctrine).

11. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 449 (2005). *Rice* was the first Supreme Court case to use the phrase "clear and manifest" in the preemption context. Previously, the Court had used the phrase in a variety of other contexts. Most notably, the Court previously held on several occasions that when two acts cover the same subject, the latter impliedly repeals the former only if the intention of the legislature to repeal was clear and manifest. *See, e.g.*, United States v. Borden Co., 308 U.S. 188, 198 (1939).

and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose,'"[12] they must first consider whether the enactment of a congressional statute was an act of express preemption, i.e., "an explicit statutory command that state law be displaced."[13] There is no single test that courts use to determine whether a statute expressly preempts state law, but courts have used certain catch phrases in finding statutory provisions to be expressly preemptive.[14] For instance, the Employee Retirement Income Security Act of 1974 (ERISA) states that "[e]xcept as provided in subsection (b) . . . [certain subchapters of the Act] shall supersede any and all State laws insofar as they may now or hereaftet relate to any employee benefit plan."[15] In finding that 29 U.S.C. § 1144(a) "pre-empts all state laws 'insofar as they . . . relate to any employee benefit plan,'" the Court has held that "the breadth of [that provision's] preemptive reach is apparent from [its] language" because the statute "has [a] broad scope . . . and an expansive sweep;" it is also "broadly worded, . . . deliberately expansive, . . . and conspicuous for its breadth."[16]

Some courts have found the Copyright Act to be expressly preemptive based upon similar grounds.[17] The Copyright Act states:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.[18]

12. FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990) (citing Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).

13. Ting v. AT&T, 319 F.3d 1126, 1135 (9th Cir. 2003).

14. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383–84 (1992).

15. 29 U.S.C. § 1144(a).

16. *Morales*, 504 U.S. at 383–84 (quotations and citations omitted) (quoting 29 U.S.C. §1144(a)); *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47–48 (1987) (noting the "expansive sweep" of § 514(a) [now 29 U.S.C. § 1144(a)]).

17. *See* Kane v. Nace Int'l, 117 F. Supp. 2d 592, 597 (S.D. Tex. 2000) (holding that §301(a) of the Copyright Act is expressly preemptive).

18. 17 U.S.C. § 301(a).

Similarly, in *Cipollone v. Liggett Group, Inc.*, the Supreme Court was presented, *inter alia*, with the issue of whether the Federal Cigarette Labeling Advertising Act and its successor, the Public Health Cigarette Smoking Act of 1969, expressly preempted state law claims against tobacco companies for failure to warn consumers about the dangers of cigarettes.[19] The tobacco companies claimed that these Acts expressly preempted any state statutes requiring warnings more informative than the Surgeon General's warning, while the plaintiffs claimed that under federal law, states were allowed the leeway to require more informative warnings.[20]

The Supreme Court found, based upon its narrow wording and modest legislative history, that the Federal Cigarette Labeling Advertising Act was not expressly preemptive of state law claims for failure to warn.[21] In contrast, the Court found that the Public Health Cigarerte Smoking Act of 1969 expressly preempted state law claims because the Act's language "sweeps broadly," despite the fact that portions of its legislative history suggested that it was not meant to preempt state law claims.[22]

If a court finds that a congressional statute is not expressly preemptive because it does not explicitly displace state law,[23] it can still find that the statute was an exercise of implied preemption by Congress.[24] Although there is some dispute over the details,[25] most courts hold that there are two types of implied preemption: field

19. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

20. *Id.* at 524–25.

21. *Id.* at 518–20.

22. *Id.* at 521–22.

23. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances.").

24. *See* Horn v. Thoratec Corp., 376 F.3d 163, 184–85 (3rd Cir. 2004) ("Because I would find no express preemption here, I would reach TCI's implied preemption argument . . ."). It should be noted, however, that even when Congress includes an express preemption clause in a statute, courts can still find that the statute was an exercise of implied preemption. *See* Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).

25. *See, e.g.*, *Crosby*, 530 U.S. at 372 n.6 (noting that "the categories of preemption are not 'rigidly distinct'" and citing some authorities holding, for instance, that "'field pre-emption may be understood as a species of conflict pre-emption'") (quoting English v. Gen. Elec. Corp., 496 U.S. 72, 79–80 n.5 (1990)); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 137 n.109 (1999) (stating that ERISA is an example of field preemption).

preemption and conflict preemption.[26] Congress engages in field preemption when it enacts legislation that "so thoroughly 'occupies a legislative field' as to make it reasonable to infer that Congress left no room for the states to act."[27] For instance, the Supreme Court used the pervasiveness analysis to find that there was field preemption of state sedition laws in *Pennsylvania v. Nelson*.[28] The Court considered Congress's numerous statutes relating to acts of sedition and found that "[t]aken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it."[29]

An example of field preemption based on a dominating federal interest can be found in *Howard v. Uniroyal, Inc.*[30] *Uniroyal* dealt with section 503 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 793.[31] Subpart (a) of section 793 requires certain federal contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals."[32] Subpart (b), meanwhile, provides that an aggrieved "handicapped individual" may file an administrative complaint with the Department of Labor to enforce the provision.[33]

In *Uniroyal*, the Eleventh Circuit addressed the question of whether "section 503 pre-empt[ed] a qualified handicapped individual's claim under state law as a third party beneficiary of the affirmative action clause contained in contracts between his employer and the federal government . . . ."[34] When considering whether the federal interests involved dominated the relevant state interests,[35] the court found "that the federal interest expressed by section 503 lies at least in the interest of the federal government in determining with

26. Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 667–68 (9th Cir. 2003) ("Field preemption and conflict preemption are both forms of implied preemption.").

27. Hoagland v. Town of Clear Lake, 415 F.3d 693, 696 (7th Cir. 2005) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)).

28. 350 U.S. 497 (1956).

29. *Id.* at 504.

30. 719 F.2d 1552 (1983).

31. *See id.* at 1553–54.

32. *Id.* at 1553–54 & 1554 n.1 (quoting 29 U.S.C. § 793(a) (1982)). The statute requires that contracts exceeding $2500 include a provision to that effect.

33. *Id.* (quoting § 793(b)).

34. *Id.* at 1555.

35. *See id.* at 1560–61.

whom and on what conditions it will contract."[36] The Eleventh Circuit also found that "Congress has expressed an interest in section 503 in promoting a 'consistent, uniform and effective Federal approach' to breaches of the government's contracts with private contractors."[37] The court then noted the plaintiff's countervailing contention "that any interest of the federal government [was] far outweighed by the magnitude of the state's traditional interest in preserving the sanctity of contracts and binding parties to the terms of their agreements."[38]

Additionally, "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute."[39] Conflict preemption exists "where compliance with both federal and state regulations is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[40] Conflict preemption has been found in cases ranging from administrative orders[41] to statutory sanctions.[42]

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36. *Id.* at 1560.

37. *Id.*

38. *Id.* The Eleventh Circuit, however, found that "[t]he concern . . . that the affirmative action clause in federal contractor's agreements be enforced mirrors that of the federal enforcement scheme of section 503(b) and its implementing regulations." *Id.* Because the state interest in enforcing the clause was "no greater than the federal interest," and because of the other federal interests outlined above, the Eleventh Circuit held that section 503 preempted a qualified handicapped individual's claim under state law based upon the dominating federal interest. *Id.* at 1560–61.

39. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

40. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (citations omitted).

41. United States v. City and County of Denver, 100 F.3d 1509 (10th Cir. 1996). This case is an example of conflict preemption by physical impossibility. In *City and County of Denver*, the Environmental Protection Agency (EPA) had issued a remedial order pursuant to CERCLA (42 U.S.C. § 9606(a)) that required a chemical company to perform "on-site solidification of contaminated soils." *Id.* at 1511. In response, the City of Denver "issued a cease and desist order . . . based on asserted violations of Denver zoning ordinances, which prohibit[ed] the maintenance of hazardous waste in areas zoned for industrial use." *Id.* at 1512. The court found that the case involved conflict preemption because the company could not "comply with both Denver's zoning ordinance and the EPA's remedial order." *Id.* The court also found that the zoning ordinance stood "as an obstacle to the objectives of CERCLA, whose purpose is to effect the expeditious and permanent cleanup of hazardous waste sites, and to allow the EPA the flexibility needed to address site-specific problems." *Id.*

42. *See, e.g.*, *Crosby*, 530 U.S. at 363. This case is an example of conflict preemption where state law was an obstacle to the fulfillment of congressional objectives. In *Crosby*, Massachusetts "adopted 'An Act Regulating State Contracts with Companies Doing Business

In determining whether Congress has impliedly preempted state and local laws through field or conflict preemption, "courts have unhesitatingly given weight to the purpose, structure, and legislative history of the statute" at issue.[43] Before proceeding to a discussion of exhaustion, it is important to address an alternate preemption test and the courts' use of the term "sweep[ing]" in the preemption context.

B. "Positively Required by Direct Enactment"

As noted, courts deciding whether a congressional statute expressly or impliedly preempted state and local law usually consider whether there was a "clear and manifest purpose" to supersede these laws.[44] In the domestic relations context, however, courts have sometimes used an alternate phraseology, holding that congressional preemption must be "'positively required by direct enactment' that state law be pre-empted."[45] Interestingly, the Supreme Court actually applied this phrasing of the test before considering the "clear and manifest purpose" of Congress. In 1904, the Supreme Court found that the collection of alimony and child support was not preempted by the Bankruptcy Act of 1898, stating that "[u]nless positively required by direct enactment the courts should not presume a design upon the part of Congress[,] in relieving the unfortunate debtor[,] to make the law a means of avoiding enforcement of the obligation . . . to support his wife and to maintain and educate his children."[46]

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with or in Burma (Myanmar).'" *Id.* at 366–67. Three months later, Congress passed a statute which imposed both mandatory and conditional sanctions on Burma, which would be imposed at the discretion of the President. *Id.* at 368. The Court noted that the purpose of this congressional statute was to "place[] the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit." *Id.* at 375–76. Because the Massachusetts Act might have required the imposition of sanctions in situations where the President would have stayed his hand, the Court found that the Congressional Act impliedly preempted the Massachusetts Act because it might have circumscribed the President's broad discretion and thus served as an obstacle to the fulfillment of congressional objectives. *See id.* at 376.

43. Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1101 (D.C. Cir. 1996) (construing Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 606 (1996) and other cases).

44. *See supra* note 11 and accompanying text.

45. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).

46. *Wetmore*, 196 U.S. at 77.

It does not appear that courts intended for there to be a substantive difference between these two phraseologies or that the "clear and manifest" purpose test was supposed to replace the "positively required by direct enactment" test. In fact, one court stated that there could be no preemption "unless 'positively required by direct enactment,' or, in other words, 'unless that was the clear and manifest purpose of Congress.'"[47] Other courts have cited to both phraseologies in the same paragraph of an opinion.[48] Furthermore, even courts not using the alternate phraseology have frequently found statutes to be preemptive based on "direct" language. For instance, in *Anweiler v. American Electric Power Service Corp.*, the Northern District of Indiana found that "ERISA's basic preemption rule . . . is direct and broad."[49]

C. "Sweep[ing]"

The Supreme Court has also found statutes to be preemptive based upon a finding that they "sweep broadly" or have an "expansive sweep."[50] Other courts have intermingled the "clear and manifest" purpose test with the word "sweep[ing]," such as the District Court for the Western District of Virginia.[51] There, the court stated: "Because of the broad language chosen by Congress, I find it to be 'clear and manifest' that Congress inrended [the provision] to have sweeping application, including areas in which states traditionally enjoyed exclusive regulatory power."[52]

Even outside the preemption context, courts have frequently found clear and/or manifest congressional intent based upon "sweeping" language in statutory enactments. For instance, in *People of Puerto Rico v. Shell Co.*, the Supreme Court found that based on "the sweeping character of the congressional grant of power contained in the Foraker Act and the Organic Act of 1917, the

47. Stone v. Stone, 450 F. Supp. 919, 925 (N.D. Cal. 1978) (citation omitted) (quoting *Wetmore*, 196 U.S. at 77 and Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978)).

48. *See, e.g.*, Cartledge v. Miller, 457 F. Supp. 1146, 1154–55 (S.D.N.Y. 1978).

49. Anweiler v. American Electric Power Service Corp., 836 F. Supp. 576, 584 (N.D. Ind. 1992), *aff'd*, 3 F.3d 986 (7th. Cir. 1993).

50. *See supra* notes 16, 22, and accompanying text.

51. City of Bristol v. Early, 145 F. Supp. 2d 741, 747–48 (W.D. Va. 2001) (finding that a provision of the Telecommunications Act of 1996 had preemptive effect).

52. *Id.*

general purpose of Congress to confer power upon the government of Puerto Rico to legislate in respect of all local matters is made manifest."[53]

III. THE EXHAUSTION DOCTRINE

Exhaustion is a doctrine under which potential litigants must exhaust available administrative remedies before bringing suit in federal court. There are two types of exhaustion requirements: prudential exhaustion requirements and jurisdictional exhaustion requirements. Under prudential exhaustion requirements, courts refuse to hear lawsuits until a potential litigant has exhausted available administrative remedies, unless the court finds good cause. When Congress includes a jurisdictional exhaustion requirement, the exhaustion of administrative remedies is a requirement for jurisdiction in federal court.

A. Prudential Exhaustion

Myers v. Bethlehem Shipbuilding Corp.[54] is "the seminal decision on the exhaustion doctrine . . . ."[55] *Myers* stated the basic rule of prudential (or administrative) exhaustion: "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[56] Courts have found that they should stay their hands in such situations "because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency."[57] With regard to the first purpose, courts require exhaustion because it respects Congress's delegation of authority to the agency and allows the agency to "correct its own mistakes . . . before it is haled into federal court."[58] Exhaustion is also grounded in the recognition of the possibility that "frequent and deliberate flouting of administrative processes could weaken the

53. People of Puerto Rico v. Shell Co., 302 U.S. 253, 263 (1937).

54. 303 U.S. 41 (1938).

55. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 155 (1998). According to Duffy, the decision was "seminal" in more than one way; it essentially, without precedential support, applied a doctrine previously used only in suits in equity to proceedings at law. *See id.*

56. *Myers*, 303 U.S. at 50–51.

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

58. *Id.*

effectiveness of an agency by encouraging people to ignore its procedures."[59] With regard to the second purpose, requiring exhaustion can allow cases to be mooted when agencies correct earlier mistakes through their own appeal and review processes.[60] Additionally, the requirement of exhaustion conserves judicial resources because it allows the agency "to compile a record which is adequate for judicial review."[61]

Because this form of exhaustion is prudential, courts can deem certain administrative remedies waived and proceed to hear a litigant's claim.[62] When the court deems prudential exhaustion requirements waived, it may hear the claim pursuant to 28 U.S.C. § 1331.[63] The Supreme Court's decision in *McCarthy v. Madigan* laid out the primary circumstances under which courts may waive prudential exhaustion:

> [W]hen (1) requiring exhaustion would "occasion undue prejudice to subsequent assertion of a court action"; (2) the administrative remedy is inadequate because the agency cannot give effective relief, *e.g.*, (a) "it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute"; (b) the challenge is to "the adequacy of the agency procedure itself"; or (c) the agency "lack[s] authority to grant the type of relief requested"; or (3) the agency is biased or has predetermined the issue (also known as "futility").[64]

Some courts have recognized other circumstances under which courts may waive prudential exhaustion requirements, such as when "'the claim is collateral to a demand for benefits,' or . . . 'plaintiffs would suffer irreparable harm if required to exhaust their administrative remedies.'"[65]

59. McKart v. United States, 395 U.S. 185, 195 (1969).

60. *See* Parisi v. Davidson, 405 U.S. 34, 37 (1972).

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

62. *See, e.g.*, Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 24 (2002) ("[A] court can deem them waived in certain circumstances . . . .").

63. Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1248 n.3 (D.C. Cir. 2004).

64. Bastek v. Fed. Crop Ins. Corp., 145 F.3d 90, 94 n.4 (2d Cir. 1998) (quoting McCarthy v. Madigan, 503 U.S. 140, 146–48 (1992)).

65. *Id.* (quoting Abbey v. Sullivan, 978 F.2d 37, 44 (2d Cir. 1992)).

B. Jurisdictional Exhaustion

Exhaustion, however, is not solely the province of the courts. By statute, Congress can also require that potential litigants exhaust all available administrative remedies as part of its Article III "power to control the jurisdiction of the federal courts."[66] Under this doctrine of "jurisdictional exhaustion," Congress can provide greater protection ro administrative agency authority as well as judicial efficiency by making exhaustion a jurisdictional prerequisite for bringing suit.[67] When jurisdictional exhaustion applies, a federal court has jurisdiction only under "the relevant provision for review of th[e] agency's action" and not under 28 U.S.C. § 1331.[68]

An example of jurisdictional exhaustion can be found in 28 U.S.C. § 2675(a) of the Federal Tort Claims Act (FTCA).[69] This provision states in part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency and sent by certified or registered mail.[70]

According to several courts, such as the District Court for the Southern District of Mississippi, "[t]his requirement of administrative exhaustion is a jurisdictional prerequisite to suit."[71]

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66. *Avocados Plus*, 370 F.3d at 1247.

67. *See, e.g.*, Bentley v. Glickman, 234 B.R. 12, 19 (N.D.N.Y. 1999) (construing *Bastek*, 145 F.3d 90, 94–95) ("[W]here exhaustion is explicitly required by statute, the courts may make no exceptions for such circumstances as where 'the agency is biased or has predetermined the issue (also known as 'futility') . . . .'").

68. *Avocados Plus*, 370 F.3d at 1248 n.3.

69. *But see* Palay v. United States, 349 F.3d 418, 424 (7th Cir. 2003) ("More recently, however, we have questioned whether the exhaustion requirement and the statutory exceptions to the FTCA truly are jurisdictional in nature.").

70. 28 U.S.C. § 2675(a) (2000).

71. Williamson v. U.S. Dep't of Agric., 635 F. Supp. 114, 116 (S.D. Miss. 1986), *aff'd*, 815 F.2d 368 (5th Cir. 1987).

C. Preemption vs. Exhaustion

Because preemption abrogates state and local regulation of a field while jurisdictional exhaustion merely delays federal court jurisdiction in cases where a litigant can show a justifiable reason for failure to exhaust available administrative remedies, courts should require a greater showing of congressional intent for jurisdictional exhaustion. Courts are reluctant to find that a congressional enactment was intended to preempt state and local law, because such a finding completely forecloses states and localities from regulating areas historically covered by state powers.[72] Preemption implicates stare sovereignty[73] and removes state regulation over fields that they "traditionally occupied."[74] Conversely, jurisdictional exhaustion requirements cause relatively minimal interference with federal court jurisdiction. Pursuant to the doctrine of prudential exhaustion, courts can already require potential litigants to exhaust available administrative remedies before bringing suit, although they can waive this requirement under limited exceptions.[75] Jurisdictional exhaustion merely eliminates these exceptions.[76] The distinction between prudential and jurisdictional exhaustion, however, is not relevant in most instances, because courts rarely waive prudential exhaustion requirements.[77]

A comparison of the two doctrines reveals the correctness of Justice Scalia's concurrence.[78] Through preemption, Congress disrupts a status quo under which states and localities frequently and historically regulated a field, invalidates any existing laws in that field, and precludes states and localities from ever regulating that field again.[79] Conversely, through jurisdictional exhaustion, Congress merely eliminates the exceptions to the courts' prudential exhaustion requirement and compels federal courts to delay hearing a suit in the

72. *See* Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 828 (1st Cir. 1992) ("[A]ny preemption provision must be construed cautiously and with due regard for state sovereignty.").

73. *See id.*

74. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

75. *See supra* notes 62–65 and accompanying text.

76. *See, e.g.*, Wilson v. MVM, Inc., 475 F.3d 166, 174 (3d Cir. 2007).

77. *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995) ("Such exceptions, whether based on futility or other grounds, would be rare indeed.").

78. *See supra* note 1 and accompanying text.

79. *See supra* note 11 and accompanying text.

rare case in which the court would have waived exhaustion.[80]

A brief discussion of *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*[81] helps to explain this comparison further. In *Coit*, the majority used an exhaustion analysis to determine, *inter alia*, that Congress did not intend to require potential litigants to exhaust their available administrative remedies prior to bringing suit in state court.[82] Justice Scalia concurred in part and in the judgment, but did not join the portion of the majority's decision applying the exhaustion analysis, stating that "[t]his case is not about exhaustion; it is about pre-emption."[83] He agreed with the majority that there was no exhaustion in the case before the Court, but argued that a finding of congressional intent to require exhaustion would have delayed the assertion of *state* claims, while exhaustion usually only delays the assertion of *federal* claims.[84] More importantly, unlike the usual jurisdictional exhaustion case, "exhaustion" as applied by the majority would not merely have suspended rights and excluded jurisdiction; instead, state law claims whose statute of limitations expired during the administrative process would have been extinguished and not merely delayed, an outcome/decision effectively preempting state law.[85]

Because he viewed this potential result as preemptive rather than jurisdictionally exhaustive, Justice Scalia argued that courts require a greater showing of congressional intent for preemption—a "clear and manifest purpose"—than for jurisdictional exhaustion.[86] In other words, under Justice Scalia's view the courts require a greater showing of congressional intent to extinguish a claim than they do to merely delay a claim. This comparison lays the groundwork for considering *Weinberger v. Salfi*,[87] the case that explicitly created the prudential/jurisdictional dichotomy and introduced the "sweeping

80. For instance, suits under 42 U.S.C. § 1983 do not require exhaustion. *See* Patsy v. Bd. of Regents, 457 U.S. 496, 500–01 (1982).

81. 489 U.S. 561 (1989).

82. *Id.* at 579–85 (based on an analysis of 12 U.S.C. §§ 1464(d)(6) and 1729(d)).

83. *Id.* at 588 (Scalia, J., concurring in part and in the judgment).

84. *Id.*

85. *Id.* at 589–90. The majority disagreed with this conclusion, but a further analysis of this dispute is beyond the scope of this Article. *Id.* at 585 (majority opinion).

86. *Id.* at 589 (Scalia, J., concurring in part and in the judgment) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (quotations omitted).

87. 422 U.S. 749 (1975).

and direct" language into exhaustion doctrine jurisprudence.[88]

IV. *WEINBERGER V. SALFI*

In *Salfi v. Weinberger*, the Northern District of California considered a "challenge [to] the constitutionality of two sections of the Social Security Act under which plaintiffs were denied benefits as surviving spouse and child of a deceased wage earner."[89] The court denied the defendants' claim that the plaintiffs failed to exhaust their administrative remedies, finding that "exhaustion in this case [was] futile and therefore [was] not a prerequisite for bringing the action."[90] It found no facts in dispute, no need for agency expertise, and no incorrect statutory interpretation; the only question was whether the two sections violated the Constitution, making judicial review proper under 28 U.S.C. § 1331.[91]

The defendants claimed that the plaintiffs' lawsuit was barred for failure to exhaust administrative remedies. Specifically, the defendants claimed that the plaintiffs failed to exhaust a provision of the Act—42 U.S.C. § 405(h)—which stated that:

> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.[92]

The court found that Congress intended the provision "to do no more than codify the doctrine requiring exhaustion of administrative remedies," and held the statute "inapplicable" to support the defendants' argument because the court found that exhaustion of

88. Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1249 (D.C. Cir. 2004) (describing *Weinberger v. Salfi* as the first case "distinguishing non-jurisdictional and jurisdictional exhaustion").

89. Salfi v. Weinberger, 373 F. Supp. 961, 963 (N.D. Cal. 1974), *rev'd*, 422 U.S. 749 (1975).

90. *Id.* at 964.

91. 42 U.S.C. § 405(h) (2000).

92. *Id.*

administrative remedies would be futile.[93]

On the defendants' appeal, the Supreme Court found that the trial court's interpretation was "entirely too narrow."[94] The Supreme Court further noted that the fact that "the third sentence of § 405(h) is more than a codified requirement of administrative exhaustion," describing it as "sweeping and direct" and noting that "[the provision] states that no action shall be brought under § 1331."[95] The Court, however, did not look solely at the plain meaning of the third sentence, but instead considered its interplay with § 405(g) and the rest of § 405(h). The Court first found that "if the third sentence is construed to be nothing more than a requirement of administrative exhaustion, it would be superfluous."[96] The Court considered the first two sentences of § 405(h), which state:

> The findings of and decisions of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.[97]

The Court found that this language already required administrative exhaustion, so the third sentence would be cumulative unless the Court read it to "bar[] district court federal-question jurisdiction."[98]

The Court then considered the interplay between § 405(h) and § 405(g),[99] and found that "the latter section prescribe[d] typical requirements for review of matters before an administrative agency, including administrative exhaustion."[100] The Court thus held that § 405(g) allowed potential litigants to bring suit under that section after exhausting the available administrative remedies, while § 405(h) foreclosed "review of decisions of the Secretary save as provided . . . in § 405(g)."[101] Consequently, the Court found that exhaustion of

93. *Weinberger*, 373 F. Supp. at 964.
94. Weinberger v. Salfi, 422 U.S. 749, 757 (1975).
95. *Id.*
96. *Id.*
97. 42 U.S.C. § 405(h) (2000).
98. *Salfi*, 422 U.S. at 756.
99. 42 U.S.C. § 405(g) (2000).
100. *Salfi*, 422 U.S. at 757–58.
101. *Id.* at 757.

administrative remedies was a jurisdictional prerequisite for judicial review and proceeded to consider whether the plaintiffs had exhausted their administrative remedies under § 405(g).[102]

In finding that § 405(h) was jurisdictionally exhaustive, the Court in *Salfi* found that § 405(h) was more than a codified requirement of administrative exhaustion and that it contained "sweeping and direct" language. It thus seems apparent that to find jurisdictional exhaustion, a court must find, whether through the words, intent, or structure of a statute, something more than a mere codification of the traditional requirement of administrative exhaustion. The question then becomes whether the Court intended "sweeping and direct" language to be a necessary (or merely a sufficient) condition to finding jurisdictional exhaustion.

V. THE MODERN JURISDICTIONAL EXHAUSTION TEST

A. Supreme Court Cases

In the thirty-two years since the Court decided *Salfi*, the Court has decided several exhaustion cases[103] and cited *Salfi* on numerous occasions,[104] yet it has not once quoted the phrase "sweeping and direct." The Supreme Court has made it clear on several occasions that the determination of whether a statute contains a jurisdictional exhaustion requirement depends not only on a statute's language, but also on its legislative history and structure.

For instance, in *Zipes v. Trans World Airlines, Inc.*, the Supreme Court decided the question of whether, under Title VII, the filing of a complaint with the EEOC is a jurisdictional or prudential requirement; in other words, whether it is subject to waiver by the court.[105] The Seventh Circuit had found that such a timely filing was

102. *Id.* at 766–67. The Court considered other arguments related to § 405(h), none of which are relevant to the present case. *Id.* at 757–64. The Court's holding regarding § 405(g) was convoluted and has spawned a complicated analysis of when courts have jurisdiction under this section. *See, e.g.*, Tataranowicz v. Sullivan, 959 F.2d 268, 274 (D.C. Cir. 1992). This analysis, however, is also beyond the scope of this Article.

103. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438 (1997).

104. A Westlaw search reveals that the Supreme Court has cited *Salfi* on forty-seven occasions, with the most recent citation being in *Day v. McDonough*, 547 U.S. 198, 217 (2006), *reh'g denied*, 127 S. Ct. 1394 (2007).

105. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392 (1982) *rev'd* on other grounds, Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

a jurisdictional prerequisite based on a consideration of "the statutory language, the absence of any indication to the contrary in the legislative history, and references in several [Supreme Court] cases to the ninety-day filing requirement as 'jurisdictional.'"[106] The Supreme Court then reversed the lower court's opinion, not solely based upon the statutory language, but also based upon "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of [prior Supreme Court cases]."[107] The Supreme Court's consideration of the exhaustion issue was expansive; indeed, the Court even considered the statute's subsequent legislative history before reaching a conclusion.[108]

B. Federal Court Cases

Similarly, in the thirty-two years after *Salfi*, federal circuit and district courts showed a similar indifference to the phrase "sweeping and direct." With two exceptions, these courts cited to this phrase in Social Security Act cases dealing with the specifics of § 405(g) and § 405(h) and in cases arising under the Medicare Act (which incorporates § 405(h)).[109] In these cases, the courts were not applying the phrase as a test to determine whether exhaustion requirements were prudential or jurisdictional; instead, they merely cited in passing to *Salfi*'s holding that § 405(h)'s language was "sweeping and direct" before addressing other issues.[110] Indeed, in the same manner that the Supreme Court's opinion in *Zipes* is representative of how the Supreme Court handled exhaustion issues post-*Salfi*, the aforementioned Seventh Circuit opinion in *Zipes* was represenrative of how most other federal courts handled issues post-*Salfi*. They considered not only the plain language of exhaustion requirements in statutes, but also other factors, such as the statute's legislative history, its structure, and other precedent.[111]

The first exception to the federal courts' failure to cite to *Salfi*'s "sweeping and direct" language came the same year that the Court

106. *Id.* at 392–93.

107. *Id.* at 393.

108. *Id.* at 394.

109. Aristocrat S., Inc. v. Mathews, 420 F. Supp. 23, 26 (D.D.C. 1976).

110. *E.g.*, Cervoni v. Sec'y of Health, Educ., & Welfare, 581 F.2d 1010, 1015 (1st Cir. 1978) (quoting Weinberger v. Salfi, 422 U.S. 749, 757 (1975)).

111. *See supra* notes 105–06 and accompanying text.

handed down *Salfi*. In *Perry v. United States*, the Court of Claims found that a provision of the Renegotiation Act of 1951 was jurisdictionally exhaustive.[112] The provision stated that regulations or decisions of the Renegotiation Board "shall not be reviewed or redetermined by the Court of Claims or by any other court or agency."[113] The court cited to *Salfi* and held that "the statute in the present case prohibits in equally 'sweeping and direcr' language a review or redetermination by the Court of Claims."[114] Because the Court of Claims merely held that the language before it was equally sweeping and direct, it did not have reason to address whether such language was a necessary or merely a sufficient condition for jurisdictional exhaustion and whether less sweeping and direct language and/or a different legislative history ot structure could have created jurisdictional exhaustion. The absence of any reference to the phrase in subsequent Federal Circuit precedenr indicates that the Court of Claims was not creating a new test to decide preemption cases.[115]

Before considering the second exception, the D.C. Circuit's 1984 decision in *I.A.M. National Pension Fund Benefit Plan C v. Stockton TRI Industries*[116] must be considered. In *Stockton TRI Industries*, the appellant, a national pension fund, brought an action in the United States District Court for the District of Columbia "to collecr withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)."[117] The district court, *inter alia*, declined to refer the dispute to arbitration, and one of the issues on appeal was whether this decision was improper because of the MPPAA's jurisdictional exhaustion requiremenr, which mandated arbitration before an action in federal court could be brought.[118]

The MPPAA states that "any dispute between an employer and the plan sponsor . . . concerning a determination made under sections 1381 through 1399 of this title shall be resolved through

112. Perry v. United States, 527 F.2d 629, 635 (Ct. Cl. 1975).

113. *Id.* at 633–34.

114. *Id.* at 635.

115. The Court of Appeals for the Federal Circuit is the successor to the Court of Claims. *See* Commercial Cas. Ins. Co. v. United States, 71 Fed. Cl. 104, 109 (Fed. Cl. 2006).

116. 727 F.2d 1204 (D.C. Cir. 1984).

117. *Id.* at 1205.

118. *See id.* at 1207.

arbitration."[119] The Court of Appeals concluded that 29 U.S.C. § 1401 was not jurisdictionally exhaustive.[120] This result in and of itself was unremarkable and consistent with the decisions of other federal circuit courts.[121] In reaching this conclusion, however, the court constructively revived a passage that had gone relatively unused for almost twenty years. While the court did not specifically cite to the phrase "sweeping and direct" in *Salfi*, it clearly relied upon this language in coming to the conclusion that "[o]nly when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision, as in the Social Security Act at issue in *Salfi*, has the Supreme Court held that exhaustion is a jurisdictional prerequisite."[122] The court then noted that "*Salfi* . . . provided 'strong evidence that Congress knows how to withdraw jurisdiction expressly when that is its purpose.'"[123]

The second exception to the general failure to cite to *Salfi*'s "sweeping and direct" language came from the Fifth Circuit Court of Appeals twelve years later in *Central States Southeast and Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc.*[124] There, the question before the court was whether arbitration under the MPPAA was a jurisdictional prerequisite to district court jurisdiction.[125] The court cited to *Salfi*'s "sweeping and direct" language and then found that the statute before ir "contain[ed] no language similarly indicating a congressional intent to vest original jurisdiction exclusively in the arbitral tribunal."[126] Unsurprisingly, after citing *Salfi*, the next case that the Fifth Circuit cited in support of its position was *Stockton TRI Industries*, and, specifically, its holding that a statute's exhaustion requirement must contain "clear, unequivocal terms" in order for it to be jurisdictionally exhaustive.[127]

119. *Id.* at 1207 (quoting 29 U.S.C. § 1401).

120. *Id.* at 1207–08.

121. *See id.*

122. *See id.* at 1208.

123. *Id.* at 1209 (quoting Gulf Oil Corp. v. U.S. Dep't of Energy, 663 F.2d 296, 308 n.75 (D.C. Cir. 1981)).

124. 826 F.2d 320 (5th Cir. 1987).

125. *Id.* at 325.

126. *Id.* at 327.

127. *See id.* at 328 (citing I.A.M. Nat'l Pension Fund Benefit Plan C. v. Stockton TRI Indus., 727 F.2d 1204, 1208 (D.C. Cir. 1984)).

The court, however, proceeded to consider the Act's "scant legislative history" as well as "other administrative schemes in which Congress . . . mandated arbitration," but it found no congressional intent to make exhaustion jurisdictional.[128] Thus, while in 1987 the Fifth Circuit cited *Salfi*'s "sweeping and direct" language test, it seemed open to the possibility that a statute lacking such language could create jurisdictional exhaustion, based upon factors such as legislative history and similar congressional enactments.

C. Prison Litigation Reform Act

After 1987, courts ignored *Salfi*'s "sweeping and direct" language for another ten years, a position which changed in the wake of the Prison Litigation Reform Act. In *McCarthy v. Madigan*,[129] the Supreme Court considered the effect of a provision that addressed the applicability of administrative remedies to prisoners seeking to bring suit in federal court.[130] This provisiou stated that prisoners could seek "such plain, speedy, and effective administrative remedies as are available" when "the court believe[d] that such a requirement [was] appropriate and in the interests of justice."[131] The Courr found that this provision did not require exhaustion of administrative remedies in all cases.[132] Because courts have recognized no prudential exhaustion requirement on 42 U.S.C. § 1983 claims,[133] this meant that there was no exhaustion requirement for § 1983 claims.

In response, Congress passed the PLRA, which was intended ro "decrease the number of inmate suits by deterring inmates from filing frivolous claims . . . [and] ease the federal judiciary's stranglehold on state prison sysrems."[134] Under the amended § 1997e(a), "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility

128. *Id.* at 327–28.

129. 503 U.S. 140 (1992).

130. 42 U.S.C. § 1997e(a)(1) (1988) (amended by Pub. L. No. 104-134, §101, 110 Stat. 1321, 1371 (1996)).

131. *Id.*

132. *See Madigan*, 503 U.S. at 150.

133. *See* Patsy v. Bd. of Regents, 457 U.S. 496, 500–01 (1982).

134. Kathryn F. Taylor, Note, *The Prison Litigation Reform Act's Administrative Exhaustion Requirement: Closing the Money Damages Loophole*, 78 WASH. U. L.Q. 955, 961 (2000).

until such administrative remedies as are available are exhausted."[135] Although circuits are sharply divided over the effect of this provision,[136] they unanimously agreed that this provision was not an exercise of jurisdictional exhaustion by Congress,[137] and the Supreme Court agreed.[138]

The Sixth Circuit came to this conclusion in 1997, and became the first court since *T.I.M.E.-DC, Inc.* to cite *Salfi*'s "sweeping and direct" language. In *Wright v. Morris*, the Sixth Circuit found that *Salfi* held that § 405(h)'s exhaustion requirement was jurisdictional because it contained "sweeping and direct" language and concluded that "[s]ection 1997e(a), in contrast, contains neither the sweeping and direct language of § 405(h) nor that statute's explicit bar to district court jurisdiction."[139] This was enough to conclude that § 1997e(a) did not contain a jurisdictional exhaustion requirement.

Thereafter, the majority of courts surprisingly began applying language from *Salfi*, then a twenty-two- (now thirty-two-) year-old case which had been cited substantively on less than a handful of occasions. In the wake of the Sixth Circuit's *Morris* opinion, the First,[140] Second,[141] Fifth,[142] Eighth,[143] Ninth,[144] Tenth,[145] and D.C.[146] Circuits, as well as district courts in the Fourth[147] and Seventh[148] Circuits, all cited to *Salfi*'s "sweeping and direct" language in finding that § 1997e(a) did not contain a jurisdictional exhaustion requirement.

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135. 42 U.S.C. § 1997e(a) (2000).

136. *See, e.g.*, Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1209 & n.3 (10th Cir. 2003) (noting that many circuits construe § 1997e(a) exhaustion as an affirmative defense, but disagreeing with those circuits).

137. *See id.* at 1208 ("Every federal appellate court faced with the issue has concluded that the § 1997e(a) exhaustion requirement is not a jurisdictional bar.").

138. *See* Johnson v. California, 543 U.S. 499, 528 n.1 (2005) (Thomas, J., dissenting) ("The majority thus assumes that statutorily mandated exhaustion [under § 1997e(a)] is not jurisdictional, and that California has waived the issue by failing to raise it.").

139. Wright v. Morris, 111 F.3d 414, 420–21 (6th Cir. 1997).

140. Casanova v. Dubois, 289 F.3d 142, 146 (1st Cir. 2002).

141. Richardson v. Goord, 347 F.3d 431, 434 (2d Cir. 2003).

142. Underwood v. Wilson, 151 F.3d 292, 294–95 (5th Cir. 1998).

143. Chelette v. Harris, 229 F.3d 684, 687–88 (8th Cir. 2000).

144. Rumbles v. Hill, 182 F.3d 1064, 1067–68 (9th Cir. 1999).

145. Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1208 (10th Cir. 2003).

146. Ali v. District of Columbia, 278 F.3d 1, 5–6 (D.C. Cir. 2002).

147. Johnson v. True, 125 F. Supp. 2d 186, 188 (W.D. Va. 2000).

148. Harris v. Mugarrab, 1998 WL 246450, at *2 (N.D. Ill. May 1, 1998).

The Eighth Circuit's decision in *Chelette v. Harris* is typical of this line of cases. There, the Eighth Circuit noted that the Supreme Court "distinguished between provisions that merely codify the requirement that administrative remedies must be exhausted and those that impose jurisdictional requirements."[149] The court then noted that "[t]he latter must contain 'sweeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim."[150] The Eighth Circuit found the language of § 1997e(a) to be neither sweeping nor direct; it quoted *Salfi* to hold that it was a mere codification of the traditional requirement of administrative exhaustion that "'only those actions shall be brought in which administrative remedies have been exhausted.'"[151] According to the court, to hold otherwise would have been to "collapse the Supreme Court's distinction between jurisdictional prerequisites and mere codifications of administrative exhaustion requirements."[152]

Nonetheless, despite citing *Salfi*'s alleged requirement of "sweeping and direct" language, the Eighth Circuit proceeded to consider the overall structure of the PLRA. Specifically, the court considered § 1997e(c)(2) of the PLRA, which states:

> In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.[153]

The Eighth Circuit found this power—to hear and dismiss prisoners' claims on their merits, even in the absence of exhaustion of administrative remedies—precluded a finding that exhaustion was a jurisdictional prerequisite to federal suits brought under the PLRA.[154] The courts' consideration of both the structure of the

149. Chelette v. Harris, 229 F.3d 684, 687 (8th Cir. 2000).

150. *Id.* (quoting Weinberger v. Salfi, 422 U.S. 749, 757 (1975)).

151. *Id.* (quoting *Weinberger*, 422 U.S. at 757).

152. *Id.*

153. 42 U.S.C. § 1997e(c)(2) (2000).

154. *See Harris*, 229 F.3d at 687 ("Because the existence of jurisdiction is a prerequisite to the evaluation and dismissal of a claim on its merits, it follows that that jurisdiction is not divested by the failure to exhaust administrative remedies.").

PLRA and the interplay of its provisions made it uncertain whether "sweeping and direct" language was the sine qua non for jurisdictional exhaustion or whether courts would find jurisdictional exhaustion requirements in statutes without such language (but with structures or legislative histories implicating a jurisdictional exhaustion requirement). Indeed, based upon the paucity of citations to *Salfi*'s "sweeping and direct" language prior to the PLRA cases, it was uncertain whether courts would again ignore this language in post-PLRA cases or whether they would begin applying it to other preemption cases. These questions would be answered in the wake of the Supreme Court's landmark decision in *Darby v. Cisneros*.[155]

D. Darby v. Cisneros, *the Administrative Procedures Act, and the Department of Agriculture Reorganization Act of 1994*

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.[156]

In cases where the Administrative Procedures Act (APA) is applicable, the doctrine of finality determines when potential plaintiffs are allowed to bring suit in federal court.[157] Until *Darby v. Cisneros*, most courts either allowed the imposition of additional prudential exhaustion requirements or ignored this section of the APA altogether.[158] This all changed with *Cisneros*, which held that the APA's doctrine of finality applied only in APA cases; Congress and agencies had the power to impose additional exhaustion requirements, but this was beyond the scope of the courts' authority.[159]

Because *Cisneros* precluded prudential exhaustion in APA cases, Congress began adding additional exhaustion provisions to statutes

155. 509 U.S. 137 (1993).

156. 5 U.S.C. § 704 (1966).

157. *See* Cobell v. Babbitt, 91 F. Supp. 2d 1, 35–36 (D.D.C. 1999), *aff'd*, Cobell v. Norton 240 F.3d 1081 (D.C. Cir. 2001).

158. *See Cisneros*, 509 U.S. at 138 (quoting 5 U.S.C. § 704).

159. *See id.*

where the APA applied.[160] One such provision was 7 U.S.C. § 6912(e), which, as part of the Department of Agriculture Reorganization Act of 1994, established an exhaustion requirement in cases where potential plaintiffs wanted to appeal decisions of the United States Department of Agriculture.[161]

1. The exhaustion requirement of Section 6912(e), as set forth in Gleichman v. United States Department of Agriculture

Before *Wright v. Morris* reintroduced the phrase "sweeping and direct" into the judicial lexicon, the First Circuit Court of Appeals held that § 6912(e) was a jurisdictional exhaustion requirement. In *Gleichman v. United States Department of Agriculture*, the plaintiffs claimed that the Department of Agriculture improperly suspended them from participating in government programs, including federal financial and non-financial assistance and benefits.[162] The Department of Agriculture thereafter moved to dismiss the claim on the ground that the plaintiffs failed to exhaust the available administrative remedies.[163]

The District Court in *Gleichman* found that § 6912(e) was jurisdictionally exhaustive because it was "hard to imagine more direct and explicit language requiring thar a plaintiff suing the Department of Agriculture . . . must first turn to any administrative avenues before bringing a lawsuit . . . ."[164] In coming to this decision, the court rejected three arguments set forth by the plaintiffs.

The plaintiffs first argued "that the language 'administrative appeal procedures,' whose exhaustion is required, is a term of art referring only to procedures within the 'National Appeals Division' of the Department, an appeals procedure that does not apply to the suspension and debarment procedures confronting the[]

160. *See* Gleichman v. U.S. Dep't of Agric., 896 F. Supp. 42, 44 (D. Me. 1995).

161. *See id.* Section 6912(e) provides: "Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring suit in a court of competent jurisdiction against — (1) the Secretary; (2) the Department; or (3) an agency, office, officer, or employee of the Department." 7 U.S.C. § 6912(e) (1994).

162. *See Gleichman*, 896 F. Supp. at 43.

163. *See id.*

164. *Id.* at 44.

plaintiffs."[165] The court rejected this argument based upon structural grounds, noting that "[t]he term 'administrative appeal procedures' is an all-encompassing generic term."[166]

> It appears in a subchapter of a title whose purpose 'is to provide the Secretary of Agriculture with the necessary authority to streamline and reorganize the Department of Agriculture to achieve greater efficiency, effectiveness, and economies in the organization and management of the programs and activities carried out by the Department.'[167]

The court determined that the term's location "suggest[ed] a wide-ranging effect."[168] The court noted that "[t]he section in which the exhaustion provision appears is the section dealing with the Secretary's authority to delegate various functions to his or her subordinates and is therefore a logical location for a provision requiring exhaustion of administrative appeals before the Secretary or Department is sued."[169]

The plaintiffs' second argument was that a few days after passing the Department of Agriculture Reorganization Act of 1994, Congress passed the Healthy Meals for Healthy Americans Act of 1994, which contained an exhaustion requirement that "applie[d] only to 'nonprocurement debarment proceeding[s].'"[170] The plaintiffs thus claimed that Congress could not have intended to include a general exhaustion requirement in the Department of Agriculture Reorganization Act of 1994 when, only a few days later, it included a much more limited exhaustion requirement in the Healthy Meals for Healthy Americans Act of 1994.[171] The court disagreed, finding that "[t]he only proper way to make sense of what Congress has done here is to employ the plain language of the statute as it passed, language that is all inclusive."[172]

The plaintiffs' third argument was that § 6912(e) was merely a prudential exhaustion requirement similar to other prudential

165. *Id.*
166. *Id.*
167. *Id.* (quoting 7 U.S.C. § 6901).
168. *Id.*
169. *Id.*
170. *Id.* (quoting 42 U.S.C. § 1769f(f) (1999)).
171. *Id.*
172. *Id.* at 44–45.

exhaustion requirements that courts have waived in certain circumstances.[173] The plaintiffs cited to, *inter alia*, the Individuals with Disabilities Education Act (IDEA) and Social Security Act cases where courts waived prudential exhaustion requirements and proceeded to hear claims from plaintiffs who had not exhausted their administrative remedies.[174] The court, however, rejected these comparisons for three reasons.

First, the court noted that both First Circuit and Supreme Court precedent had "taken pains to point out that the legislative history behind the IDEA [exhaustion] provision, 20 U.S.C. § 1415, makes clear that under that statute, exhaustion is not required where it would be futile."[175] Second, the court noted that both the IDEA and the Social Security Act exhaustion provisions state that judicial review is proscribed until after the relevant agency renders a final decision; they do not state that judicial review is proscribed until after plaintiffs exhaust the available administrative remedies.[176] Finally, the court pointed our that "neither the IDEA nor the Social Security Act contains the blunr prohibition against judicial review without exhaustion that is provided here."[177]

The First Circuit thus found not only that § 6912(e) mandated jurisdictional exhaustion, but also that it applied to a wide variety of appeals before the Department of Agriculture.[178] In coming to this conclusion, the First Circuit followed a process similar to the process followed by the Supreme Court in rhe wake of *Salfi*. As noted in post-*Salfi* cases such as *Zipes v. Trans World Airlines, Inc.*,[179] the Supreme Court has considered factors such as the plain language of a statute, the structure of the statute, the statute's legislative history, and prior precedent in determining whether exhaustion requirements are prudential or jurisdictional.[180] In *Gleichman*, the First Circuit similarly considered all of these factors before determining that §

173. *See id.* at 45.

174. *Id.*

175. *Id.*

176. *See id.*

177. *Id.*

178. *See id.*

179. 455 U.S. 385, 392 (1982) *rev'd* on other grounds, Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

180. *See supra* notes 105–08 and accompanying text.

6912(e) mandated jurisdictional exhaustion.[181]

In the immediate wake of *Gleichman*, the courts uniformly found, almost without exception,[182] that § 6912(e) mandated jurisdictional exhaustion, frequently relying on *Gleichman* for this conclusion. These courts included the Second Circuit,[183] the District of Minnesota,[184] the Southern District of Iowa,[185] the Northern District of Ohio,[186] the District of Utah,[187] and the Northern District of Mississippi.[188]

2. A departure from Gleichman

In 2002, the Ninth Circuit Court of Appeals disrupted this uniformity with its opinion in *McBride Cotton and Cattle Corp. v. Veneman*.[189] Presented with the question of whether § 6912(e) mandated jurisdictional exhaustion, the Ninth Circuit noted that:

> A statute that requires exhaustion of administrative remedies may limit the district court's subject matter jurisdiction if the exhaustion statute is 'more than a codified requirement of administrative exhaustion' and contains 'sweeping and direct' language that goes beyond a requirement that only exhausted claims [can] be brought.[190]

The administrative proceeding in question had relied on the Second Circuit's opinion in *Bastek* for the proposition thar § 6912(e)

181. *See supra* notes 162–78 and accompanying text.

182. Two unreported opinions found that §6912(e) did not contain a jurisdictional exhaustion requirement. *See* Farmers Alliance Mut. Ins. Co. v. Fed. Crop Ins. Corp., 2001 WL 30443, at *2 (D. Kan. 2001); Pringle v. United States, 1998 U.S. Dist. Lexis 19378, at *14–15 (E.D. Mich. 1998).

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

184. *In re* 2000 Sugar Beet Corp. Ins. Litigation, 228 F. Supp. 2d 999, 1003–04 (D. Minn. 2002).

185. Am. Growers Ins. Co. v. Fed. Crop Ins. Corp, 210 F. Supp. 2d 1088, 1092–93 (S.D. Iowa 2002).

186. Gilmer-Glenville, Ltd. v. Farmers Home Admin., 102 F. Supp. 2d 791, 794 (N.D. Ohio 2000).

187. Utah Shared Access Alliance v. Wagner, 98 F. Supp. 2d 1323, 1333 (D. Utah 2000).

188. Calhoun v. USDA Farm Service Agency, 920 F. Supp. 696, 701–02 (N.D. Miss. 1996).

189. 290 F.3d 973 (9th Cir. 2002).

190. *Id.* at 978 (quoting Weinberger v. Salfi, 422 U.S. 749, 757 (1975)).

mandated jurisdictional exhaustion.[191] The Ninth Circuit proceeded to grossly oversimplify the Second Circuit's holding, claiming it was based upon the finding that § 6912(e) was jurisdictional because it was a statutory requirement that had not been "judicially-developed."[192]

The Ninth Circuit rejected this straw man argument, holding that its previous precedent supported the finding that "not all statutory exhaustion requirements are created equal."[193] The court concluded that § 6912(e) was prudential because "[o]nly statutory exhaustion requirements containing 'sweeping and direct' language deprive a federal court of jurisdiction [and §] 6912(e) contains no such language."[194] At no point did the court address the cornerstone arguments from *Gleichman*, which compare the structure of the Department of Agriculture Reorganization Act of 1994 (with its legislative history) against § 6912(e)'s prudential exhaustion requirements, thus revealing that the statute was intended to be a jurisdictional exhaustion requirement.[195] Instead, the Ninth Circuit focused solely on the plain language of § 6912(e), effectively making "sweeping and direct" language the sine qua non of jurisdictional exhaustion.[196]

After *McBride*, several other courts followed the Ninth Circuit's lead. In *Ace Property and Casualty Insurance Co. v. Federal Crop Insurance Corp.*, the Eighth Circuit cited to both *McBride*[197] and the "sweeping and direct" language test in finding that § 6912(e) was prudential,[198] thus reversing decisions from the Iowa and Minnesota district courts.[199] The District of North Dakora[200] and the Southern

191. *See id.* at 980.

192. *See id.* (quoting Basket v. Fed. Crop Ins. Corp., 145 F.3d 90, 94–95 (2d Cir. 1998)).

193. *Id.*

194. *Id.*

195. *See supra* notes 162–78 and accompanying text.

196. *See* McBride Cotton & Cattle Corp. v. Veneman, 290 F.3d 973, 980 (9th Cir. 2002).

197. *See id.*

198. Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp., 440 F.3d 992, 999 (8th Cir. 2006).

199. *In re* 2000 Sugar Beet Corp. Ins. Litig., 228 F. Supp. 2d 999, 1003–04 (D. Minn. 2002), *rev'd*, 440 F.3d 992 (8th Cir. 2006); Am. Growers Ins. Co. v. Fed. Crop Ins. Co., 210 F. Supp. 2d 1088, 1092–93 (S.D. Iowa 2002), *rev'd*, 440 F.3d 992 (8th Cir. 2006).

200. Kuster v. Veneman, 226 F. Supp. 2d 1190, 1198 (D.N.D. 2002).

District of Texas have likewise followed the Ninth Circuit.[201]

Since *McBride*, numerous other courts have also begun applying the "sweeping and direct" language test in a variety of contexts, frequently categorizing exhaustion requirements as prudential based primarily upon their lack of "sweeping and direct" language, without reference to factors such as structure or legislative history.[202] For instance, the Court of Federal Claims cited to the "sweeping and direct" language test, and found that compliance with the Sioux Treaty of April 29, 1868 was not a jurisdictional prerequisite to bringing an action under the Tucker Act.[203] Most significantly, in *Mercado Arocho v. United States*, the District Court for the District of Puerto Rico, applied the "sweeping and direct" language tesr to find that 26 U.S.C. § 7433(d)(1) did not contain a jurisdictional exhaustion requirement preventing federal courts from hearing taxpayer suits against the IRS.[204] This decision is especially noteworthy, considering that previous courts had unanimously found that 26 U.S.C. § 7433(d)(1) contained such a requirement.[205]

E. "Clear, Unequivocal Terms"

As noted in Section II.B., in the domestic relations context, some courts have recast the typical preemption requirement of clear and manifest congressional purpose as a requirement that Congress expressly commands that the state law be preempred.[206] There is no reason to believe that there are substantive differences between these two phraseologies, especially considering the fact that some courts have used both in the same sentence or paragraph of an opinion.[207]

Similarly, the District of Columbia Court of Appeals, relied upon the "sweeping and direct" language test to decide that "[o]nly when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has

201. Rain & Hail Ins. Serv., Inc. v. Fed. Crop Ins. Corp, 229 F. Supp. 2d 710, 714 (S.D. Tex. 2002).

202. *See, e.g.*, Elk v. United States, 70 Fed. Cl. 405, 407–08 (Fed. Cl. 2006).

203. *Id.*

204. Mercado Arocho v. United States, 455 F. Supp. 2d 15, 20–21 (D. P.R. 2006) (citing Lindsey v. United States, 448 F. Supp. 2d 37, 49–52 (D.D.C. 2006)).

205. *See, e.g.*, Porter v. Fox, 99 F.3d 271, 274 (8th Cir. 1996).

206. *See supra* notes 44–45 and accompanying text.

207. *See, e.g.*, Cartledge v. Miller, 457 F. Supp. 1146, 1154–55 (S.D.N.Y. 1978); *see supra* notes 44–45 and accompanying text.

come to a decision, as in the Social Security Act at issue in *Salfi*, has the Supreme Court held that exhaustion is a jurisdictional prerequisite."[208] Whereas previously this alternate language was used almost exclusively by courts within the D.C. Circuit,[209] other circuit and district courts have adopted the "clear, unequivocal terms" phraseology.[210]

As previously noted, in 1987 the Fifth Circuit applied this phraseology to find that the MPPAA was not jurisdictionally exhaustive.[211] In 1991, the Fourth Circuit similarly used the phraseology to arrive at the same conclusion.[212] In *Doe v. Oberweis Dairy*, a Title VII case, the Seventh Circuit noted in dicta that a statute must contain "cleat, unequivocal terms" to be jurisdictionally exhaustive.[213] The Eighth Circuit found that U.S.C. § 6912(e) was not a jurisdictional exhaustion requirement because it lacked "sweeping and direct" language, but also because it did not state in "clear, unequivocal terms" that exhaustion was a jurisdictional prerequisite to bringing suit in federal court.[214] The District Courts for both the Eastern District of Pennsylvania[215] and the District of Puerto Rico[216] have also used the "clear, unequivocal terms" test to determine whether statutes in a variety of contexts contain jurisdictional exhaustion requirements.

Taken rogether, the aforementioned cases again suggest that the courts have not likely intended for there to be substantive differences between the two tests. In fact, on numerous occasions courts have quoted the "sweeping and direct" language test within the same

208. *See* I.A.M. Nat'l Pension Fund Benefit Plan C. v. Stockton TRI Indus., 727 F.2d 1204, 1208 (D.C. Cir. 1984); *see also supra* note 127 and accompanying text.

209. *See, e.g.*, Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 99 n.12 (D.C. Cir. 1986) (citing Ilan-Gat Engineers, Ltd. v. Antigua Int'l Bank, 659 F.2d 234, 240 (D.C. Cir. 1981) (joinder)); *Stockton TRI Industries*, 727 F.2d at 1208.

210. *See, e.g.*, Central States Se. & Sw. Areas Pension Fund v. T.I.M.E.-DC, Inc., 826 F.2d 320, 328 (5th Cir. 1987).

211. *See id.*

212. *See* McDonald v. Centra, Inc., 946 F.2d 1059, 1063 (4th Cir. 1991) (quoting *Stockton TRI Industries*, 727 F.2d at 1208).

213. Doe v. Oberweis Dairy, 456 F.3d 704, 712 (7th Cir. 2006) (quoting *Stockton TRI Industries*, 727 F.2d at 1208).

214. Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp., 440 F.3d 992, 997 (8th Cir. 2006).

215. E.E.O.C. v. Guess?, Inc., 176 F. Supp. 2d 416, 422 (E.D. Pa. 2001).

216. Mercado Arocho v. United States, 455 F. Supp. 2d 15, 20 (D. P.R. 2006) (citing Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1248 (D.C. Cir. 2004)).

paragraph as the "clear, unequivocal terms" test.[217]

F. The Increasing Strictness of the Jurisdictional Exhaustion Analysis

The D.C. Court of Appeals decision in *Avocados Plus Inc. v. Veneman*,[218] which refers to both the "sweeping and direct" and "clear, unequivocal terms" tests,[219] illustrates how the test for finding an exhaustion requirement to be jurisdictional has become stricter over the years, at least in those jurisdictions applying the "sweeping and direct" language test in post-PLRA cases. *Avocados Plus* involved the question of whether the Hass Avocado Promotion, Research, and Information Act[220] contained a jurisdictional exhaustion requirement, such that avocado importers who failed to exhaust their available administrative remedies were prohibited from bringing suit in federal court as to their First Amendment rights.[221] The court remarked:

> Under the § 7806 of the Act, any "person subject to an order" may file a petition with the Secretary "stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law; and . . . requesting a modification of the order or an exemption from the order." § 7806(a)(1). The Secretary must rule on the petition after a hearing. § 7806(a)(3). The Act further provides that the "district courts of the United States . . . shall have jurisdiction to review the ruling of the Secretary on the petition[,]" § 7806(b)(1), and must remand it if it "is not in accordance with law[.]" § 7806(b)(3).[222]

The court then found that this exhaustion requirement was not jurisdictional because it lacked the "sweeping and direct" language required by modern cases such as *Salfi* and *Stockton TRI Industries*.[223]

The court rejected the government's assertion that the Supreme

217. *See, e.g.*, Jasperson v. Fed. Bureau of Prisons, 460 F. Supp. 2d 76, 86 n.7 (D.D.C. 2006) (citing *Avocados Plus*, 370 F.3d at 1248); Lindsey v. United States, 448 F. Supp. 2d 37, 50 (D.D.C. 2006) (quoting *Avocados Plus*, 370 F.3d at 1248).

218. 370 F.3d 1243, 1248 (D.C. Cir. 2004).

219. *Id.*

220. 7 U.S.C. §§ 7801–7813 (2000).

221. *See Avocados Plus*, 370 F.3d at 1245–47.

222. *Id.* at 1246 (quoting the Hass Avocado Promotion, Research, and Information Act, 7 U.S.C. §§ 7801–7813 (2000)).

223. *Id.* at 1249.

Court's 1946 opinion in *United States v. Ruzicka*[224] compelled a finding that the statute's exhaustion requirement was jurisdictional.[225] *Ruzicka* considered whether a milk handler had to exhaust administrative remedies under a provision of the Agricultural Marketing Agreement Act of 1937 (AMAA), before bringing suit in federal district court.[226] The DC Circuit found in *Avocados Plus* that the exhaustion provisions in the AMAA were "nearly identical" to the exhaustion provisions contained in the Hass Avocado Promotion, Research, and Information Act.[227] The Supreme Court in *Ruzicka* found that exhaustion was required under the AMAA, although "Congress did not say [so] in words."[228] Instead, the Court found that congressional intent to require exhaustion "may be imbedded in a coherenr scheme," thus assuring the aggrieved a hearing in an "expert forum."[229]

The D.C. Circuit had cause to address the Supreme Court's ruling when ir decided *American Dairy of Evansville, Inc. v. Bergland, Inc.*[230] in 1980. The court construed *Ruzicka* as holding that the AMAA provision "is more than a codification of the judicially-created exhaustion doctrine with its complement of largely discretionary exceptions intact; rather, a final decision by the Secretary has consistently been deemed an absolute prerequisite to district court review."[231] While this dicta seems to suggest that the court was open to the possibility of a futility exception, it instead held that the provision was jurisdictional.[232]

Twenty-four years later, the D.C. Circuit confirmed in *Avocados Plus* what was apparent from the Supreme Court's decision in *Ruzicka*, stating "the *Ruzicka* Court did not find the exhaustion requirement in the text of the AMAA's provisions . . . relying [instead] on the complex statutory enforcement scheme in the

224. 329 U.S. 287 (1946).

225. *Avocados Plus*, 370 F.3d at 1248–49.

226. *Ruzicka*, 329 U.S. at 291.

227. *Avocados Plus*, 370 F.3d at 1249.

228. *Ruzicka*, 329 U.S. at 292.

229. *Id.*

230. 627 F.2d 1252 (D.C. Cir. 1980).

231. *Id.* at 1270.

232. *Id.* The court saw a "dilemma" in requiring exhaustion in cases of true futility, but it did not have to resolve the dilemma in the case before it because there was no showing of adequate cause for failure to exhaust. *Id.*

AMAA . . . ."[233] The D.C. Circuit then found that the exhaustion requirement in the Hass Avocado Promotion, Research, and Information Act was not jurisdictional because the Act "does not provide for comprehensive market regulation that could be disrupted by ill-timed judicial interference."[234]

The D.C. Circuit, however, then immediately rendered discussion of anything other than the statutory language of the exhaustion requirement irrelevant to the jurisdictional exhaustion analysis. The D.C. Circuit doubted that the Court in *Ruzicka* would still find today that the AMAA's exhaustion requirement is jurisdictional.[235] It noted that "under the modern precedents discussed above," such as *Salfi* and *Stockton TRI Industries*, "rhe AMAA's lack of anything close to explicit jurisdictional language would render any exhaustion requirement non-jurisdictional."[236]

VI. COMPARING THE "SWEEPING AND DIRECT" LANGUAGE TEST AND THE "CLEAR AND MANIFEST" PURPOSE TEST

A. Comparing the Congressional Intent Required for Preemption and Jurisdictional Exhaustion

Having already argued that courts should require a greater showing of congressional intent in the preemption context than they require in the jurisdictional exhaustion context,[237] the first question is whether courts applying the "sweeping and direcr" language rest in post-PLRA are in fact requiring a greater showing of congressional intent in the preemption context than in the jurisdictional exhaustion context.

As is evident from cases such as *McBride Cotton and Cattle Corp. v. Veneman*[238] and *Avocados Plus Inc. v. Veneman*,[239] courts applying the "sweeping and direct" language test in post-PLRA cases are treating "sweeping and direct" language as the sine qua non for jurisdictional exhaustion. In *McBride Cotton and Cattle Corp.*, the

233. *Avocados Plus*, 370 F.3d at 1249.
234. *Id.*
235. *See id.*
236. *Id.*
237. *See supra* notes 79–85 and accompanying text.
238. 290 F.3d 973, 980 (9th Cir. 2002).
239. 370 F.3d at 1249.

Ninth Circuit clearly ignored the First Circuit's structural and legislative history arguments in *Gleichman* in finding that § 6912(e) was not jurisdictionally exhaustive.[240] Meanwhile, the D.C. Circuit in *Avocados Plus* flatly stated that while the Supreme Court found in 1946 that the AMAA contained a jurisdictional exhaustion requirement in *Ruzicka*, its lack of "sweeping and direct" language would prohibit a finding that it is jurisdictionally exhaustive pursuant to modern precedent.[241]

In preemption terms, these courts are finding that there can only be "express" jurisdictional exhaustion and that "implied" jurisdictional exhaustion no longer exists. Of course, such a finding is at odds with Supreme Court cases decided both before and after *Salfi*. As noted, courts have determined that *Ruzicka* was, in effect, a case of implied jurisdictional exhaustion to the extent that the Supreme Court found that the AMAA's exhaustion requirement was jurisdictional based upon factors such as its statutory enforcement scheme and not based upon its language.[242] And while courts such as the Ninth Circuit Court of Appeals and the Court of Appeals for the District of Columbia ostensibly believe that *Salfi*'s "sweeping and direct" language test removed the possibility of implied jurisdictional exhaustion, the Supreme Court's failure to cite to the phrase "sweeping and direct" and post-*Salfi* Supreme Court cases such as *Zipes* make clear that the Court believes that courts should still look at factors such as a statute's structure and legislative history in determining whether it is jurisdictionally exhaustive.[243]

Conversely, courts continue to find that congressional statutes are both expressly and impliedly preemptive as long as courts can find a "clear and manifest" congressional intent to preempt.[244] In other words, courts will find congressional statutes to be expressly preemptive when a congressional intent to preempt is "clear and manifest" from the language of the statute.[245] Barring such a finding, courts will still find congressional statutes to be preemptive over state

240. *McBride*, 290 F.3d at 980.

241. *Avocados Plus*, 370 F.3d at 1249.

242. *See supra* notes 72–88, 237 and accompanying text.

243. *See supra* notes 103–08 and accompanying text.

244. *See, e.g.*, Coit Independence Joint Venture v. Fed. Sav. and Loan Ins. Co., 489 U.S. 561, 589 (1989) (Scalia, J., concurring in part and concurring in the judgment) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

245. *See supra* notes 12–14 and accompanying text.

law in a field in one of four circumstances, even when such a purpose is not "clear and manifest" from the language of the statute: (1) where federal legislation is pervasive in the field (field preemption), (2) where the federal interest expressed by the statute dominates the state interest (field preemption), (3) where compliance with both federal and state statutes is a physical impossibility (conflict preemption), or (4) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal statute (conflict preemption).[246]

These considerations prompt the following conclusions. First, courts using the "sweeping and direct" language test in post-PLRA cases are requiring a showing of congressional intent in the jurisdictional exhaustion context that is commensurate to the showing of congressional intent they require in the express preemption context. As noted, in finding congressional statutes to be acts of express preemption, courts have both focused on the fact that a statute "sweeps broadly"[247] or has "expansive sweep"[248] and determined that statutes are preemptive because they "positively required by direct enactment" that state law be preempted.[249] In other words, sweeping and direct congressional statutes evince the necessary clear and manifest congressional purpose to preempt.[250]

Similarly, it is obvious that under the "sweeping and direct" language test, "sweeping and direct" congressional statutes are jurisdictionally exhaustive. Alternatively, several courts have found that congressional statutes with "clear, unequivocal terms" are jurisdictionally exhaustive, which undoubtedly would also mean that they would satisfy the "clear and manifest" purpose test for preemption.[251] The courts' intermingled use of the terms sweeping, direct, and clear in both the preemption and the jurisdictional exhaustion contexts establishes that courts using the "sweeping and direct" language test in post-PLRA cases are requiring a showing of

246. *See supra* notes 26–42 and accompanying text.

247. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521–22 (1992).

248. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383–84 (1992) (citations omitted) (quoting 29 U.S.C. § 1144(a)); *see also supra* note 16 and accompanying text.

249. Hisquierdo v. Hisquierdo, 439 U.S. 572, 582 (1979) (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)); *see also supra* notes 45–46 and accompanying text.

250. I.A.M. Nat'l Pension Fund Benefit Plan Co. v. Stockton TRI Indus., 727 F.2d 1204, 1208 (D.C. Cir. 1984) (citation omitted).

251. *Id.*; *see also supra* Part V.E.

congressional intent in the jurisdictional exhaustion context that is commensurate to the showing of congressional intent they require in the express preemption context. By doing so, these courts are acting improperly because "[w]hat is enough to suggest a congressional intent to defer the maturing of a federal cause of action is not enough to suggest a congressional intent to override state law."[252]

Where these courts commit their greatest sin, however, is in completely abolishing "implied" jurisdictional exhaustion. As noted above, even when courts find that a statute is not expressly preemptive, they can still find that statute to be impliedly preemptive in one of four broad categories of circumstances based upon its purpose, structure, or effect.[253] By making "sweeping and direct" language the sine qua non of jurisdictional exhaustion, courts applying the "sweeping and direct" language rest in post-PLRA cases have completely foreclosed the idea that jurisdictional exhaustion can be found based upon similar factors.[254] In doing so, these courts have undoubtedly required a greater showing of congressional intent in the jurisdictional exhaustion context than they require in the preemption context.[255]

B. Why the Post-PLRA "Sweeping and Direct" Cases Matter

Beyond the fact that courts applying the "sweeping and direct" language test in post-PLRA cases are incorrectly requiring a greater showing of congressional intent in the jurisdictional exhaustion context than in the preemption context,[256] and beyond the fact that these courts are ignoring post-*Salfi* Supreme Court precedent considering factors such as statutes' legislative histories and structures in determining whether they are jurisdictional,[257] there are other reasons why the results in these cases are troubling. In *I.A.M. National Pension Fund Benefit Plan C. v. Stockton TRI Industries*, the D.C. Circuit held that "*Salfi* . . . provided 'strong evidence that

252. Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Co., 489 U.S. 561, 589 (1989) (Scalia, J., concurring in part and concurring in the judgment); *see also supra* notes 71–87 and accompanying text.

253. Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1101 (D.C. Cir. 1996) (construing Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 606 (1991) and other cases).

254. *See supra* notes 242–43 and accompanying text.

255. *Id.*

256. *See supra* notes 72–88 and accompanying text.

257. *See supra* notes 109–11 and accompanying text.

Congress knows how to withdraw jurisdiction expressly when that is its purpose.'"[258] The circuit splits that have recently developed over whether exhaustion requirements are prudential or jurisdictional[259] indicate that the D.C. Circuit's assumption is no longer accurate.

At first, courts unanimously concluded that § 6912(e) of the Department of Agriculture Reorganization Act of 1994 was a jurisdictional exhaustion requirement,[260] finding it "hard to imagine more direct and explicit language requiring that a plaintiff suing the Department of Agriculture, its agencies, or employees, must first turn to any administrative avenues before bringing a lawsuit . . . ."[261] Once the Ninth Circuit used the "sweeping and direct" language test in *McBride Cotton and Cattle Corp. v. Veneman*[262] to find that § 6912(e) was not jurisdictional, however, other courts began to follow suit, creating the present circuit split.[263]

Similarly, courts had uniformly found that 26 U.S.C. § 7433(d)(1) contained a jurisdictional exhaustion requirement before courts began using the "sweeping and direct" language test to determine that it was not jurisdictional, creating another circuit split.[264] It is easy to see that more circuit splits will likely develop as courts continue to apply the "sweeping and direct" language test and the "clear, unequivocal terms" test to exhaustion requirements in a manner that clashes with Supreme Court precedent.[265] Such an outcome is troubling because these sharp conflicts in precedent mean rhat Congress is unaware as to the level of intent it must articulate to make an exhaustion requiremenr jurisdictional. A problem inherent in all conflicts of authority is that federal courts waste limited resources by considering the divergenr results, whereas uniformity tends to breed efficiency.[266]

258. I.A.M. National Pension Fund Benefit Plan C. v. Stockton TRI Industries, 727 F.2d 1204, 1209 (quoting Gulf Oil Corp. v. United States Dep't of Energy, 663 F.2d 296, 308 n.75 (D.C. Cir. 1981).

259. *See supra* notes 189 and 205 and accompanying text.

260. *See supra* notes 182–88 and accompanying text.

261. Gleichman v. United States Dep't of Agric., 896 F. Supp. 42, 44 (D. Me. 1995).

262. 290 F.3d 973, 978 (9th Cir. 2002).

263. *See supra* notes 189–201 and accompanying text.

264. *See supra* note 201 and accompanying text.

265. *See supra* notes 189–208 and accompanying text.

266. *See, e.g.*, Mahoney v. Nat'l Org. for Women, 681 F. Supp. 129, 135 n.12 (D. Conn. 1987) (describing how a circuit split over an issue regarding congressional intent has caused confusion).

Seen from the other side of the bench, potential litigants who believe that they have a legitimate excuse that would result in a federal court waiving an exhaustion requirement are stuck in a quagmire as they do not know whether to bring suit in federal court based upon uncertainty as to whether an exhaustion requirement is jurisdictional or prudential.[267] For instance, it is easy to see how potential litigants with cases before the Department of Agriculture are hesitant to bring actions in federal court before exhausting the available administrative remedies when some courts hold that "[i]t is hard to imagine more direct and explicit language requiring" jurisdictional exhaustion than the language contained in § 6912(e),[268] and other courts holding that § 6912(e) is clearly not a jurisdictional exhaustion requirement.[269]

C. The "Sweeping and Direct" Language Test Should Be Abolished

All of these factors compel a conclusion that the phrase "sweeping and direct" should no longer be used to determine whether an exhaustion requirement is jurisdictional or prudential. While courts using this phraseology in pre-PLRA cases seemed open to the possibility of statutes conraining jurisdictional exhaustion requirements despite lacking "sweeping and direct" language,[270] it is clear that courts using this phraseology in post-PLRA cases have made "sweeping and direct" language the sine qua non of jurisdictional exhaustion.[271]

VII. CONCLUSION

Preemption and jurisdictional exhaustion are two of the more interesting doctrines that relate to the power of Congress, because they respectively allow Congress to supersede state and local laws and delay federal court jurisdiction. This distinction between the two

267. *See, e.g.*, Robbins v. Bureau of Land Mgmt., 252 F. Supp. 2d 1286, 1294 (D. Wyo. 2003) (describing how the Supreme Court granted cert to resolve a circuit split based upon confusion as to whether private litigants could "obtain injunctive relief pursuant to 18 U.S.C. § 1964(c)").

268. *See, e.g.*, Gleichman v. United States Dep't of Agric., 896 F. Supp. 42, 44 (D. Me. 1995).

269. *See supra* notes 189–201 and accompanying text.

270. *See supra* notes 128 and 154 and accompanying text.

271. *See supra* notes 189–205 and accompanying text.

doctrines explains why courts should require a greater showing of congressional intent in the preemption context than they require in the jurisdictional exhaustion conrext. Whereas preemption extinguishes state claims, jurisdictional exhaustion merely delays claims in the rare cases where federal courts would have decided to waive their own prudential exhaustion requirements.

As is clear, however, from the post-PLRA cases, courts currently applying the "sweeping and direct" language test have proscribed "implied" jurisdictional exhaustion. Whereas federal courts continue to find that congressional statutes are preemptive and jurisdictionally exhaustive based upon their "sweep[ing]" and "direct" language, courts applying the "sweeping and direct" language test in post-PLRA cases are refusing to consider factors such as statutes' structures and legislative histories, the lynchpin factors that courts continue to use in finding statutes to be either exercises of field or conflict preemption.

Courts that apply the "sweeping and direct" language test in post-PLRA cases thus not only improperly require a greater showing of congressional intent in the jurisdictional exhaustion context than they require in the preemption context, but they are doing so in a manner that plainly contradicts Supreme Court precedent and creates circuit splits which are confusing to Congress, the courts, and potential litigants. Accordingly, these courts should resume applying the *Ruzicka* and *Zipes* analysis to exhaustion requirements and determine whether they are prudential or jurisdictional based not only on their language but also upon other factors such as their structures and legislative histories.