“Manifest” Destiny?: How Some Courts Have Fallaciously Come To Require A Greater Showing Of Congressional Intent For Jurisdictional Exhaustion Than They Require For Preemption

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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 any 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 traditional areas of state law, courts have understandably
required that preemptive legislation evince “clear and manifest” Congressional intent to
supersede state and local legislation.

Conversely, when Congress includes a jurisdictional exhaustion requirement in a statute
pursuant to its Article III powers, it merely defers and does not supersede federal court
jurisdiction. Courts have created the doctrine of prudential or administrative exhaustion, which

(Scalia, J., concurring in part and concurring in the judgment) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S.
218, 230 (1947)).
is the requirement that potential litigants exhaust available administrative remedies before they can bring suit in federal court. Because this requirement is prudential, federal courts can still, in their discretion, hear claims brought before a litigant exhausts her administrative remedies in certain circumstances, such as when she can prove agency bias.

By statute, however, Congress can include in a statute a jurisdictional or statutory exhaustion requirement, which makes the exhaustion of administrative remedies a jurisdictional prerequisite to bringing suit in federal court. When a Congressional statute mandates jurisdictional exhaustion, federal courts lack jurisdiction, without exception, to hear cases covered by that statute until potential litigants first exhaust available administrative remedies.

This being the case, the excerpted portion of Justice Scalia’s concurring opinion in *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Company* makes sense. The Supreme Court rightfully requires a clearer expression of Congressional intent in the preemption context than it requires in the jurisdictional exhaustion context 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.

Thus, to the extent that Scalia is correct, courts applying the analysis of the second quotation are placing too heavy of 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 by certain courts holding that exhaustion

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requirements are jurisdictional only when Congress includes “sweeping and direct” language in statutory enactments. It argues that these courts are improperly citing Supreme Court precedent, and, to an extent, applying the preemption analysis to jurisdictional exhaustion. Furthermore, these courts are actually requiring a greater showing of Congressional intent in the jurisdictional exhaustion context than in the preemption context because, 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.

Sections 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 as courts should be less demanding of Congress in the jurisdictional exhaustion context than they are in the preemption context.

Section IV analyzes Weinberger v. Salfi, the Supreme Court case that explicitly created the prudential/jurisdictional exhaustion dichotomy and introduced the phrase “sweeping and direct” language into the judicial lexicon. It then explains how while the Supreme Court consistently ignored this phrase since Salfi and while the federal courts largely ignored it for decades, courts began applying it again in the wake of the Prison Litigation Reform Act, although these courts did not appear to be treating “sweeping and direct” language as the sine non qua for jurisdictional exhaustion. Section IV then explains how, in the wake of the Supreme Court’s landmark decision in Darby v. Cisneros, circuit splits began to form as some circuits began applying the “sweeping and direct language” test to other exhaustion requirements and

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treating it as the sine non qua for jurisdictional exhaustion, while other courts continue to look at other factors such as a statute’s structure and legislative history in determining whether it is jurisdictional or prudential.

Section V argues that courts applying the “sweeping and direct” language test in post-PLRA are in fact requiring a greater showing of Congressional intent in the preemption context than in the jurisdictional exhaustion context. It argues that in doing so, these courts have flatly contradicted Supreme Court precedent and begun creating 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 their structures and legislative histories.

II. The Preemption Doctrine

A. Express and Implied Preemption

The 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.\(^4\)

\(^4\)U.S. CONST. art. VI, cl. 2.
Based on the Supremacy Clause of the United States Constitution, courts have held that Congress may enact legislation that preempts state and local regulation over subject matters historically covered by the state’s police powers. 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.”

Because courts “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose,” they first consider whether a Congressional statute was an act of express preemption, which numerous courts have defined as “an explicit statutory command that state law be displaced.” There is no single test that courts use to determine whether a statute expressly preempts state law, but courts have used certain catchphrases in finding statutory provisions to be expressly preemptive. For instance, 29 U.S.C. §1144(a) of ERISA states that “[e]xcept as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

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5Id.
7Rice 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).
9Ting v. AT&T, 319 F.3d 1126, 1135 (9th Cir. 2003).
described in section 1003(a) of this title and not exempt under section 1003(b) of this title.”\textsuperscript{11} 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] pre-emptive reach is apparent from [its] language,...it has broad scope,...and an expansive sweep,...and...it is broadly worded,...deliberately expansive,...and conspicuous for its breadth.”\textsuperscript{12}

The Supreme Court has found the Copyright Act to be expressly preemptive based upon similar grounds.\textsuperscript{13} 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.\textsuperscript{14}

Similarly, in \textit{Cipollone v Ligget Group, Inc.}, the Supreme Court was presented, \textit{inter alia}, with the issue of whether the Federal Cigarette Labeling Advertising Act, which established the Surgeon General’s warning, and its successor, the Public Health Cigarette Smoking Act of 1969, expressly preempted state law claims against tobacco companies for failure to warn.\textsuperscript{15} The tobacco companies claimed that these Acts expressly preempted any state statutes which required

\textsuperscript{11}29 U.S.C. §1144(a)
\textsuperscript{13}See Kane v. Nace Intern., 117 F.Supp.2d 592, 597 (S.D. Tex. 2000) (holding that §301(a) of the Copyright Act is expressly preemptive).
\textsuperscript{14}17 U.S.C. §301(a).
\textsuperscript{15}505 U.S. 504 (1992).
warnings more informative than the Surgeon General’s warning while the plaintiffs claimed that states could still require more informative warnings.\textsuperscript{16}

The Supreme Court found that the Federal Cigarette Labeling Advertising Act was not expressly preemptive of state law claims against tobacco companies for failure to warn based upon its narrow wording and modest legislative history.\textsuperscript{17} In contrast, the Court found that the Public Health Cigarette Smoking Act of 1969 expressly preempted state law claims against tobacco companies for failure to warn because it found that 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.\textsuperscript{18}

If a court finds that a Congressional statute is not expressly preemptive because it does not explicitly displace state law,\textsuperscript{19} it can still find that the statute was an exercise of implied preemption by Congress.\textsuperscript{20} Although there is some dispute over the details,\textsuperscript{21} most courts hold that there are two types of implied preemption: field preemption and conflict preemption.\textsuperscript{22} Congress engages in field preemption when it enacts legislation that “so ‘thoroughly occupies a

\textsuperscript{16} See id. at 524-25.
\textsuperscript{17} See id. at 518-20.
\textsuperscript{18} See id. at 521-22.
\textsuperscript{19} 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.”).
\textsuperscript{20} See Horn v. Thoratec Corp., 376 F.3d 163, 184 (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, 297 (1995).
\textsuperscript{21} 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. General Elec. Co., 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).
\textsuperscript{22} Oxygenated Fules Ass’n Inc. v. Davis, 331 F.3d 665, 667-68 (9th Cir. 2003) (“Field preemption and conflict preemption are both forms of implied preemption.”).
legislative field’ as to make it reasonable to infer that Congress left no room for the states to act.”

Courts infer a Congressional intent for field preemption “where federal legislation is pervasive or where the federal interest dominates, precluding state regulation.” For instance, the Supreme Court found that there was field preemption of state sedition laws in Commonwealth of Pennsylvania v. Nelson using the pervasiveness analysis. The Court considered Congress’ 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.”

An example of field preemption based on the federal interest dominating can be found in Howard v. Uniroyal, Inc. Uniroyal dealt with 29 U.S.C. §793, section 503 of the Rehabilitation Act of 1973. 29 U.S.C. §793(a) states that “every contract in excess of $2,500 with any federal department or agency must ‘contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals.’” 29 U.S.C. §793(b), meanwhile, states “that any handicapped individual who believes any contractor has failed or refuses to comply with this provision may file a complaint with the Department of Labor.”

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23 Hoagland v. Town of Clear Lake, Ind., 415 F.3d 693, 696 (7th Cir. 2005) (quoting Cipollone, 505 U.S. at 516).
26 Id. at 504.
27 719 F.2d 1552 (1983).
28 See id. at 1553-54.
29 Id. at 1553 (quoting 29 U.S.C. §793(a)).
30 Id. at 1554.
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.”\textsuperscript{31} The court proceeded to consider whether the federal interests involved dominated the state interests involved.\textsuperscript{32} It found “that the federal interest expressed by section 503 lies at least in the interest of the federal government in determining with whom and on what conditions it will contract.”\textsuperscript{33} 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.”\textsuperscript{34}

The court then noted the plaintiff’s countervailing contention “that any interest of the federal government [wa]s 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.”\textsuperscript{35} 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 enforcement scheme of section 503(b) and its implementing regulations.”\textsuperscript{36} Because this 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 federal interest dominating.\textsuperscript{37}

\textsuperscript{31} Id. at 1555.
\textsuperscript{32} See id. at 1560-61.
\textsuperscript{33} Id. at 1560.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} See id. at 1560-61.
Furthermore, “even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.” 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.”

United States v. City and County of Denver provides an example of conflict preemption by physical impossibility. In City and County of Denver, the Environmental Protection Agency issued a remedial order pursuant to CERCLA which required a chemical company to perform “on-site solidification of contaminated soils....” 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.” 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.”

Crosby v. National Foreign Trade Council provides 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

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40 100 F.3d 1509 (10th Cir. 1996).
41 42 U.S.C. §9606(a).
42 City and County of Denver, 100 F.3d at 1511-12.
43 Id. at 1512.
44 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 EPA the flexibility needed to address site-specific problems.” Id. (citing the legislative history of CERCLA).
with or in Burma (Myanmar).”46 Three months later, “Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma,” which would be imposed at the discretion of the President.47 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.”48 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.49

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 issue50 Before proceeding to a discussion of exhaustion, two final points need to be addressed.

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.51 In the domestic relations context, however, courts have sometimes

46 Id. at 366-67.
47 Id. at 368.
48 Id. at 375-76.
49 See id. at 376.
51 See supra note 7 and accompanying text.
used an alternate phraseology, holding that Congressional preemption must be “‘positively required by direct enactment’ that state law be pre-empted.”\textsuperscript{52} Interestingly, the Supreme Court actually applied this phraseology 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, holding that “[u]nless positively required by direct enactment the courts should not presume a design on the part of Congress, in relieving the unfortunate debtor, to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to support and maintain his children.”\textsuperscript{53}

It does not appear that courts intended for there to be a substantive difference between these two phraseologies or that “clear and manifest” purpose test was supposed to replace the “positively required by direct enactment” test. In fact, in describing the test, 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.”\textsuperscript{54} Other courts have cited to both phraseologies in the same paragraph of an opinion.\textsuperscript{55} Furthermore, even courts not using the alternate phraseology have frequently found statutes to be preemptive based on “direct” language. For instance, in \textit{Anweiler v. American Elec. Power Service Corp.}, the District Court

\textsuperscript{52}Hisquierdo v. Hisquierdo, 439 U.S. 572, 582 (1979) (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).
\textsuperscript{53}Markoe, 196 U.S. at 77.
for the Northern District of Indiana found that “ERISA’s basic preemption rule...is broad and
direct.”56

C. Sweeping

As previously noted, the Supreme Court has found statutes to be preemptive based upon
finding that they “sweep broadly” or have an “expansive sweep.”57 Other courts have
intermingled the “clear and manifest” purpose test with the word “sweep[ing],” such as when the
District Court for the Western District of Virginia found that a provision of the
Telecommunications Act of 1996 was preemptive in City of Bristol, Virginia v. Early.58 There,
Judge Jones wrote, “Because of the broad language chosen by Congress, I find it to be ‘clear and
manifest’ that Congress intended [the provision] to have sweeping application, including areas in
which states traditionally enjoyed exclusive regulatory power.”59 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 general purpose of
Congress to confer power upon the government of Puerto Rico to legislate in respect of all local
matters is manifest.”60

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57 See supra note 12, 18 and accompanying text.
59 Id. at 747-48.
III. Exhaustion

A. The Exhaustion Doctrine

*Myers v. Bethlehem Shipbuilding Corp.*\(^61\) is “the seminal decision on the exhaustion doctrine...”\(^62\) *Myers* stated the basic rule of prudential (or administrative) exhaustion: “no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”\(^63\) Courts have found that they should stay their hands in such situations “because it serve[s] the twin purposes of protecting administrative agency authority and promoting judicial efficiency.”\(^64\) With regard to the first purpose, courts require exhaustion because it respects Congress’ delegation of authority to the agency and allows the agency to “correct its own mistakes...before it is hailed into federal court.”\(^65\) Exhaustion is also grounded in the recognition of the “possib[ility] that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.”\(^66\) With regard to the second purpose, requiring exhaustion can allow several cases to be mooted when agencies correct earlier mistakes through their own appeal and review processes.\(^67\) Additionally, the requirement of exhaustion conserves judicial resources because it allows the agency “to compile a record which is adequate for judicial review.”\(^68\)

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\(^{60}\)302 U.S. 253, 263 (1937).

\(^{61}\)303 U.S. 41 (1938).

\(^{62}\)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 as it essentially, without precedential support, applied a doctrine previously used only in suits in equity to proceedings at law. *See id.*

\(^{63}\)Myers, 303 U.S. at 50-51.


\(^{65}\)Id.


\(^{67}\)See Parisi v. Davidson, 405 U.S. 34, 37 (1972).

Because this form of preemption is prudential, courts can deem certain administrative remedies waived and proceed to hear a litigant’s claim. When the court deems prudential exhaustion requirements waived, it hears the claim pursuant to 28 U.S.C. §1331. The Supreme Court’s decision in McCarty 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’).

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.’”

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.” Under this doctrine of “jurisdictional exhaustion,” Congress can attempt to provide greater protection to administrative

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70Avocados Plus v. Veneman, 370 F.3d 1243, 1248 n.3 (D.C. Cir. 2004).
72Id. (quoting Abbey v. Sullivan, 978 F.2d 37, 44 (2nd Cir. 1992)).
73Veneman, 370 F.3d at 1247.
agency authority and judicial efficiency by making exhaustion a jurisdictional prerequisite for bringing suit, without exceptions for claims based on circumstances such as futility or agency bias.\textsuperscript{74} 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.\textsuperscript{75}

An example of jurisdictional exhaustion can be found in 28 U.S.C. §2675(a) of the Federal Tort Claims Act (FTCA).\textsuperscript{76} This provision states in part that:

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.\textsuperscript{77}

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....”\textsuperscript{78}

\textbf{B. Preemption vs. Exhaustion}

As noted, the 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

\textsuperscript{74}See, e.g., Bentley v. Glickman, 234 B.R. 12, 19 (N.D.N.Y. 1999) (construing Bastek, 145 F.3d 90, 94 n.4) (“[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’)....’”).

\textsuperscript{75}Veneman, 370 F.3d at 1248 n.3.

\textsuperscript{76}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.”).

\textsuperscript{77}28 U.S.C. §2675(a).

\textsuperscript{78}635 F.Supp. 114, 116 (S.D. Miss. 1986).
from regulating areas historically covered by state powers. Preemption implicates state sovereignty and removes state regulation over fields that they “traditionally occupied....” Conversely, jurisdictional exhaustion causes 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. Jurisdictional exhaustion merely eliminates these exceptions. This distinction, however, is not relevant in the majority of cases because courts have waived prudential exhaustion requirements only in rare cases.

This comparison of the two doctrines reveals the correctness of the Scalia quote at the beginning of this article. 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. Conversely, through jurisdictional exhaustion, Congress merely eliminates the exceptions to the courts’ prudential exhaustion requirement and requires that federal courts delay hearing a suit in the rare case in which the court would have waived or not required exhaustion.

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80 See Id.
82 See supra notes 69-72 and accompanying text.
83 See, e.g., Wilson v. MVM, Inc., 475 F.3d 166, 174 (3rd Cir. 2007).
84 See, e.g., W.B. v. Matula, 67 F.3d 484, 496 (3rd Cir. 1995) (“Such exceptions, whether based on futility or other grounds, would be rare indeed.”).
85 See supra note 1 and accompanying text.
86 See supra note 7 and accompanying text.
87 For instance, suits under 42 U.S.C. §1983 do not require exhaustion.
A brief discussion of *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation*, which contained Scalia’s concurring opinion, helps to explain this analysis 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 before the Federal Savings and Loan Insurance Corporation (based on 12 U.S.C. §§ 1464(d)(6) and 1729(d)) prior to bringing suit in state court. Scalia concurred in part and in the judgment, but did not join the part of the majority’s decision applying the exhaustion analysis, stating, “This case is not about exhaustion; it is about pre-emption.” Scalia agreed with the majority that there was no exhaustion in the case before the Court, but he argued that if the Court had found a Congressional intent to require exhaustion, it would have delayed the assertion of state claims whereas exhaustion usually only delays the assertion of federal claims. More importantly, unlike in the usual jurisdictional exhaustion case, “exhaustion” as applied by the majority would not merely have provided for the “suspension of rights...and exclusion of...jurisdiction;” instead, “state-created claims whose statute of limitations happen[ed] to expire during” the administrative process would have been extinguished and not merely delayed, effectively preempts state law.

Because he viewed this potential result as preemptive, rather than jurisdictionally exhaustive, Scalia used the language quoted at the beginning of this article to argue that courts

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89 Id. at 579-85.
90 Id. at 588 (Scalia, J., concurring in part and in the judgment).
91 Id.
92 Id. at 590. The majority disagreed with this conclusion, but a further analysis of this dispute is beyond the scope of this article. Id. at 585.
require a greater showing of Congressional intent for preemption -- a “clear and manifest purpose” -- than they do for jurisdictional exhaustion. In other words, courts require a greater showing of Congressional intent to extinguish a claim than they do to delay a claim. This comparison lays the groundwork for considering *Weinberger v. Salfi*, the case explicitly creating the prudential/jurisdictional exhaustion dichotomy and introducing the phrase “sweeping and direct” language into exhaustion jurisprudence.

IV. *Weinberger v. Salfi and its Progeny*

A. *Weinberger v. Salfi*

In *Salfi v. Weinberger*, a three judge district court of the District Court for 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.” The court denied the defendant’s claim that the plaintiffs failed to exhaust their administrative remedies, finding that “exhaustion in this case [was] futile and therefore [wa]s not a prerequisite for bringing the action.” 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.

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93Id. at 589.
97Id. at 964.
9842 U.S.C. §405(h)
The defendant specifically claimed that the plaintiff’s lawsuit was barred for failure to exhaust based on a provision of the Act -- 42 U.S.C. §405(h) – which stated that:

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. 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.”

The Court found that “this provision was intended to do no more than codify the doctrine requiring exhaustion of administrative remedies, and therefore that it [wa]s inapplicable...” to support the defendant’s argument because the court found that exhaustion of administrative remedies would be futile.

On the defendant’s appeal, the Supreme Court found that “[t]he District Court’s readi[n]g of § 405(h) was...entirely too narrow.” The Supreme Court held: “That the third sentence of § 405(h) is more than a codified requirement of administrative exhaustion is plain from its own language, which is sweeping and direct and which states that no action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted.” 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

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99Weinberger, 373 F.Supp. at 963 (quoting 42 U.S.C. §405(h)).
100Id.
102Id.
administrative exhaustion, it would be superfluous.” The Court considered the first two sentences of § 405(h), which, as noted, state:

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

The Court found that these two sentences already required administrative exhaustion, so the third sentence would be cumulative unless the Court read it to “bar[] district court federal question jurisdiction...”

The Court then considered the interplay between § 405(h) and § 405(g), which states Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause of a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under

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103 Id.
104 42 U.S.C. §405(h)
105 Salfl, 422 U.S. at 757.
subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.\textsuperscript{106}

The Court found that “the latter section prescribe[d] typical requirements for review of matters before an administrative agency, including administrative exhaustion.”\textsuperscript{107} 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).\textsuperscript{108} Consequently, the Court found that exhaustion of

\textsuperscript{106} 42 U.S.C. §405(g)
\textsuperscript{107} Id. at 757-58.
\textsuperscript{108} 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).109

Clearly, then, in finding that § 405(h) was jurisdictionally exhaustive, the Court in Salfi found that § 405(h): a) was more than a codified requirement of administrative exhaustion, and b) that it contained sweeping and direct language. It thus seems apparent that to find jurisdictional exhaustion, a court must fund, 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 thus becomes whether the Court intended “sweeping and direct” language to be a necessary or merely a sufficient condition to finding jurisdictional exhaustion.

B. Subsequent Supreme Court cases

In the thirty-two years since the Court decided Salfi, the Court has decided several exhaustion cases110 and cited Salfi on numerous occasions,111 yet it has not once cited the phrase “sweeping and direct.” In fact, 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 other factors such as its legislative history and structure.

For instance, in Zipes v Trans World Airlines, Inc., the Supreme Court considered the question of “whether the timely filing of an EEOC charge is a jurisdictional prerequisite to

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109Id. 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.


111A Westlaw search reveals that the Supreme Court has cited Salfi on 47 occasions, with the most recent citation being in Day v. McDonough, 547 U.S. 198 (2006).
bringing a Title VII suit in federal court or whether the requirement is subject to waiver.” 112 The Court noted that the Seventh Circuit had found that such a timely filing was a jurisdictional prerequisite based “on its reading 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 90-day filing requirement as ‘jurisdictional.’” 113 The Supreme Court then reversed the Seventh Circuit’s opinion, but it did so not solely based upon the statutory language, but also based upon “the structure of Title VII, the congressional policy underlying it, and the reasoning of” prior Supreme Court cases. 114 The Supreme Court’s consideration of the exhaustion issue was expansive; indeed, the Court even considered subsequent legislative history before reaching its conclusion. 115

C. Subsequent federal court cases

Similarly, in the twenty-two years after Salfi, federal circuit and district courts showed a similar insouciance to the phrase “sweeping and direct.” With two exceptions, these courts solely cited to this phrase in successive Social Security Acty cases sorting out the specifics of § 405(g) and § 405(h) and in cases arising under the Medicare Act, which incorporated § 405(h). 116 In these cases, the courts were not applying the phrase as any sort of test to determine whether exhaustion requirements were prudential or jurisdiction; instead, they merely cited in passing to Salfi’s holding that § 405(h)’s language was “sweeping and direct” before addressing other

113 Id. at 392-93.
114 Id. at 393.
115 See id. at 394.
issues. Indeed, in the same manner that the Supreme Court’s opinion in Zipes was representative of how the Supreme Court handled exhaustion issues post-Salfi, the aforementioned Seventh Circuit opinion in the same case was representative of how most other federal court 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.

The first exception to the federal courts’ failure to cite to Salfi’s “sweeping and direct” language came the same year that the Court 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. The provision held that “regulations prescribed by the [Renegotiation] Board under this paragraph, and any determination of the Board that a contract is or is not exempt under this paragraph, shall not be reviewed or redetermined by the Court of Claims or by any other court or agency.” The court then cited to Salfi and held that “the statute in the present case prohibits in equal ‘sweeping and direct’ language a review or redetermination by the Court of Claims.” 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 or structure could have created jurisdictional

117 E.g., Cervoni v. Sec’y of HEW, 581 F.2d 1010, 1016 (1st Cir. 1978) (quoting Salfi, 422 U.S. 749 at 757).
118 See supra notes 113-14 and accompanying text.
119 527 F.2d 629, 635 (Ct. Cl. 1975).
120 Id. at 633-34.
121 Id. at 635.
exhaustion. The absence of any reference to the phrase in subsequent Federal Circuit precedent indicates that the Court of Claims was not creating a new test to decide preemption cases. 122

Before considering the second exception, the District of Columbia Court of Appeals’ 1984 decision in *I.A.M. National Pension Fund Benefit Plan C. v. Stockton Tri Industries*123 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 collect withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)”124 The district court, *inter alia*, declined to refer the dispute to arbitration, and one of the issues that the District of Columbia Court of Appeals had to decide on appeal was whether this decision was improper because the MPPAA contained a jurisdictional exhaustion requirement which mandated arbitration before an action in federal court could be brought.125

29 U.S.C. §1401 of the MPPAA stated 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 arbitration.”126 The District of Columbia Court of Appeals concluded that 29 U.S.C. §1401 was not jurisdictionally exhaustive, and this result in and of itself was unremarkable and consistent with the decisions of other federal circuit courts.127

In reaching this conclusion, however, the court constructively revived a passage that had gone unused in precedent for nearly twenty years. While the court did not specifically cite to the

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122 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).
123 727 F.2d 1204 (D.C. Cir. 1984).
124 *Id.* at 1208
125 See *id.* at 1207.
126 *Id.* at 1207 (quoting 29 U.S.C. §1401).
127 See *id.* at 1207-08.
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.” 128 The court then noted that “*Salfi…provided ‘strong evidence that Congress knows how to withdraw jurisdiction expressly when that is its purpose.’”129

The second exception to the federal courts’ 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.* 130 There, the court similarly had to determine whether arbitration under the MPPAA was “a jurisdictional prerequisite to district court jurisdiction.” 131 The court cited to *Salfi*’s “sweeping and direct” language and then found that the statute before it “contain[ed] no language similarly indicating a congressional intent to vest original jurisdiction exclusively in the arbitral tribunal envisaged by the MPPAA.” 132 Unsurprisingly, after citing *Salfi*, the first case that the Fifth Circuit cited in support of its position was *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.” 133

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128 *See id.* at 1208 (internal citation omitted).
129 *Id.* at 1209 (*quoting* Gulf Oil Corp. v. United States Department of Energy, 663 F.2d 296, 308 n.75 (D.C. Cir. 1981)).
130 826 F.3d 320 (5th Cir. 1987).
131 *T.I.M.E.-DC, Inc.*, 826 F.3d at 325.
132 *Id.* at 327.
133 *See id.* (*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, did proceed to consider the Act’s “scant legislative history” and “other administrative schemes in which Congress...mandated arbitration,” but it found no Congressional intent to make exhaustion jurisdictional. Thus, while the court cited Salfi’s “sweeping and direct” language test, at least in 1987, the Fifth Circuit 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.

D. Prison Litigation Reform Act

After the Fifth Circuit Court of Appeals opinion in T.I.M.E.-DC, Inc. in 1987, courts again ignored Salfi’s “sweeping and direct” language for another ten years. This would all change in the wake of the Prison Litigation Reform Act. In McCarthy v. Madigan, the Supreme Court considered the effect of 42 U.S.C. §1997e(a)(1), which addressed the applicability of administrative remedies to prisoners seeking to bring suit in federal court. This provision held 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.” The court found that this provision did not require exhaustion of administrative remedies in all cases. Because courts have recognized no prudential

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134 Id. at 327-38.
137 See Madigan, 503 U.S. at 150.
exhaustion requirement on 42 U.S.C. §1983 claims, this meant that there was no exhaustion requirement on §1983 claims.

In response, Congress passed the Prison Litigation Reform Act (hereinafter PLRA), which was intended to “decrease the number of inmate suits by deterring inmates from filing frivolous claims...[and] ease the federal judiciary’s stranglehold on state prison systems.” 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 until such administrative remedies as are available are exhausted.” Although circuits are sharply divided over the effect of this provision, they unanimously agreed that this provision was not an exercise of jurisdictional exhaustion by Congress, and the Supreme Court agreed.

In coming to this conclusion, however, the Sixth Circuit Court of Appeals in 1997 became the first court to cite Salfi’s “sweeping and direct” language in ten years. 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 “§1997e(a), in contrast, contains neither the sweeping and direct language of §405(h) nor that

141 See, e.g., Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1209 &n.3 (10th Cir. 2003) (noting that most circuits construe §1997e(a) exhaustion as an affirmative defense, but disagreeing with those circuits).
142 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.”).
143 See Johnson v. California, 125 S. Ct. 1141, 1159 n.1 (2005) (Scalia, 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.”).
The Sixth Circuit thus concluded that §1997e(a) did not contain a jurisdictional exhaustion requirement.

Thereafter, the majority of courts surprisingly began applying language from a twenty-two year old case which had been cited substantively on less than a handful of occasions over that period of time. In the wake of the Sixth Circuit’s opinion Morris, the First, Second, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits as well as district courts in the Fourth and Seventh Circuits all cited to Salfi’s “sweeping and direct” language in finding that §1997e(a) did not contain a jurisdictional exhaustion requirement.

The Eighth Circuit’s decision in Chelette v. Harris is fairly 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” in Weinberger v. Salfi. 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.” The Eighth Circuit found the language of §1997e(a) to be neither sweeping nor direct; it quoted to Salfi to hold that it was a mere codification of the traditional

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144 111 F.3d 414, 420 (6th Cir. 1997).
145 Casanova v. Dubois, 289 F.3d 142, 146 (1st Cir. 2002).
146 Richardson v. Goord, 347 F.3d 431, 434 (2nd Cir. 2003).
147 Underwood v. Wilson, 151 F.3d 292, 294-95 (5th Cir. 1998).
148 Chelette v. Harris, 229 F.3d 684, 687 (8th Cir. 2000).
149 Rumbles v. Hill, 182 F.3d 1064, 1067-68 (9th Cir. 1999).
150 Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1208 (10th Cir. 2003).
151 Ali v. District of Columbia, 278 F.3d 1, 5-6 (D.C. Cir. 2002).
154 Chelette, 229 F.3d at 687.
requirement of administrative exhaustion that “‘only those actions shall be brought in which administrative remedies have been exhausted.’” 156 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.” 157

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. 158

As with other courts before it, 159 the Eighth Circuit found that the power §1997e(c)(2) gave courts 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 court jurisdiction in suits brought under the PLRA. 160 The courts’ consideration of the structure of the PLRA and the interplay between a couple of its provisions thus made it questionable whether “sweeping and direct” language was the sine non qua for jurisdictional exhaustion or whether courts would find jurisdictional exhaustion requirements in statutes without sweeping and direct language but with structures or legislative histories

155 Id.
156 Id. (quoting Weinberger v. Salfi, 422 U.S. 749, 757 (1975))
157 Id.
159 See Nyhuis v. Reno, 204 F.3d 65, 69 n.4 (3rd Cir. 2000).
supporting a finding of jurisdictional exhaustion. Indeed, based upon the paucity of citations to
Salfi’s “sweeping and direct” language before the PLRA cases, it was questionable whether
courts would again ignore this language in post-PLRA cases or whether courts 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.\textsuperscript{161}

E. \textit{Darby v. Cisneros, the APA, and the Department of Agriculture Reorganization
Act of 1994}

Except as otherwise provided 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 reconsiderations, or, unless the agency
otherwise requires by rule and provides that the action is
meanwhile inoperative, for an appeal to superior agency
authority.\textsuperscript{162}

In cases where the Administrative Procedures Act (APA) is applicable, this doctrine of
finality governs when potential plaintiffs can bring suit in federal court.\textsuperscript{163} Until\textit{ Darby v. Cisneros}, however, most courts held that courts could impose additional prudential exhaustion
requirements or ignored this section of the APA altogether.\textsuperscript{164} This all changed with \textit{Cisneros},
which held that the APA’s doctrine of finality applied in APA cases; only Congress and
agencies, but not courts, could impose additional exhaustion requirements.\textsuperscript{165}

\textsuperscript{160}See Harris, 229 F.3d at 687 (“Because the existence of jurisdiction is a prerequisite to the evaluation of and
dismissal of a claim on its merits, it follows that that jurisdiction is not divested by failure to exhaust administrative
remedies.”).
\textsuperscript{161}509 U.S. 137 (1993).
\textsuperscript{162}5 U.S.C. §704.
\textsuperscript{164}See Cisneros, 509 U.S. at 146-47.
\textsuperscript{165}See id.
Because *Cisneros* precluded prudential exhaustion in APA cases, Congress began adding new exhaustion provisions to statutes where the APA applied. 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 from decisions of the United States Department of Agriculture. §6912(e) provides that:

> 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.

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*, plaintiffs claimed that the Department of Agriculture improperly suspended them from participating in government programs, including federal financial and non-financial assistance and benefits. The Department of Agriculture thereafter moved to dismiss the claim on the ground that the plaintiffs failed to exhaust the available administrative remedies.

The District Court for the District of Maine found that §6912(e) was jurisdictionally exhaustive because “[i]t [wa]s 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

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167 See id.
168 7 U.S.C. §6912(e).
169 *Gleichman*, 896 F.Supp. at 43.
170 See id.
administrative avenues before bringing a lawsuit….” In coming to this decision, the court rejected three arguments 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[] plaintiffs.” The court rejected this argument based upon structural grounds. The court initially noted that “[t]he term ‘administrative appeal procedures’ is an all-encompassing generic term.” It then noted that the term “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.”

The court determined that the term’s location “suggest[ed] a wideranging effect.” 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.”

171 Id. at 44.
172 Id.
173 Id.
174 Id. (quoting 7 U.S.C. §6901).
175 Id.
176 Id.
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 which “applie[d] only to ‘nonprocurement debarment proceedings.’” 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. The court disagreed, finding that “[t]he only proper way to make sense of what Congress has done here is to employ the plain meaning of the statute as it passed, language that is all inclusive.”

The plaintiffs’ third argument was that §6912(e) was merely a prudential exhaustion requirement similar to other prudential exhaustion requirements that courts have waived in certain circumstances. The plaintiffs cited to, *inter alia*, certain Individuals with Disability Act (hereinafter 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. The court, however, rejected, these comparisons for three reasons.

First, the court noted that both prior 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

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177 Id. (quoting 42 U.S.C. §1769(f)).  
178 See id.  
179 See id. at 44-45.  
180 Id.  
181 See id.
futile.” 182 Second, the court noted that both 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. 183 Finally, the court pointed out that “neither the IDEA nor the Social Security Act contains the blunt prohibition against judicial review without exhaustion that is provided here.” 184

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. 185 In coming to this conclusion, the First Circuit followed a process similar to the process followed by the Supreme Court in the wake of Salfi. As noted, in post-Salfi cases such as Zipes v. Trans World Airlines, Inc., 186 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. 187 In Gleichman, the First Circuit similarly considered all of these factors before determining that §6912(e) mandated jurisdictional exhaustion. 188

In the immediate wake of Gleichman, the courts uniformly found in reported opinions 189 that §6912(e) mandated jurisdictional exhaustion, frequently relying on Gleichman for this

182 Id.
183 See id.
184 Id.
185 See id.
186 455 U.S. 385, 392 (1982)
187 See supra notes 113-14 and accompanying text.
188 See supra notes 169-85 and accompanying text.

In 2002, the Ninth Circuit Court of Appeals finally disrupted this uniformity in its opinion in *McBride Cotton and Cattle Corp. v. Veneman*. 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...contains ‘sweeping and direct’ language that goes beyond a requirement that only exhausted claims can be brought.” The court then noted that the Secretary of the Department of Agriculture cited to the Second Circuit’s opinion in *Bastek* for the proposition that §6912(e) mandated jurisdictional exhaustion. The Ninth Circuit then proceeded to grossly oversimplify the Second Circuit’s holding by claiming that its holding was

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190 145 F.3d 90, 94-95 (2nd Cir. 1998).
191 228 F. Supp.2d 999, 1003-04 (D. Minn. 2002).
196 290 F.3d 973 (9th Cir. 2002).
197 *Id.* at 978 (*quoting* Weinberger v. Salfi, 422 U.S. 749, 757 (1975)).
based upon the finding that §6912(e) was jurisdictional because it was a statutory requirement, not one that had been judicially developed.\textsuperscript{199}

The Ninth Circuit then rejected this straw man argument, holding that its previous precedent supported the finding “that not all statutory exhaustion requirements are created equal.”\textsuperscript{200} The court thus concluded that §6912(e) was prudential because “[o]nly statutory exhaustion requirements containing ‘sweeping and direct’ language deprive a federal court of jurisdiction,” and “Section 6912(e) contains no such language.”\textsuperscript{201} At no point did the court address the cornerstone arguments from \textit{Gleichman} about how the structure of Department of Agriculture Reorganization Act of 1994, its legislative history, and §6912(e)’s contrast with prudential exhaustion requirements made it clear that the statute was intended to be a jurisdictional exhaustion requirement.\textsuperscript{202} Instead, the Ninth Circuit focused solely on the plain language of §6912(e), effectively making “sweeping and direct” language the sine non qua of a jurisdictional exhaustion requirement.\textsuperscript{203}

After \textit{McBride}, several other courts followed its lead. In \textit{Ace Property and Cas. Ins. Co. v. Fed. Crop. Ins. Corp.}, the Eight Circuit Court of Appeals cited to both \textit{Veneman} and the “sweeping and direct” language test in finding that §6912(e) was prudential, thus overruling the Iowa and Minnesota district court cases cited above.\textsuperscript{204} Other courts that have followed the Ninth Circuit’s lead include the District Court for the District of North Dakota in \textit{Kuster v.}

\begin{flushleft}
\textsuperscript{198} See id. at 980. \\
\textsuperscript{199} See id. \\
\textsuperscript{200} Id. \\
\textsuperscript{201} Id. \\
\textsuperscript{202} See supra notes 169-85 and accompanying text. \\
\textsuperscript{203} See \textit{Veneman}, 290 F.3d at 980. \\
\textsuperscript{204} 440 F.3d 992, 997 (8th Cir. 2006).
\end{flushleft}
Veneman\textsuperscript{205} and the District Court for the Southern District of Texas in \textit{Rain & Hail Ins. Service, Inc. v. Fed. Crop. Ins. Corp.}\textsuperscript{206}

Since McBride, numerous courts have also begun applying the “sweeping and direct” language test in a variety of contexts, frequently deciding that exhaustion requirements were prudential based solely upon their lack of “sweeping and direct” language and without reference to other factors such as structure or legislative history. For instance, in \textit{Moussa v. I.N.S.}, the Eighth Circuit applied the test to a Board of Immigration Appeals exhaustion requirement.\textsuperscript{207} The Court of Federal Claims found in \textit{Elk v. United States} that compliance with the Sioux Treaty of April 29, 1868 was not a jurisdictional prerequisite to bringing an action under the Tucker Act based upon the “sweeping and direct” language test.\textsuperscript{208}

Most significantly, in \textit{Mercado Arocho v. United States}, the District Court for the District of Puerto Rico, relying in part upon a 2006 decision by the District Court for the District of Columbia, found based upon the “sweeping and direct” language test that 26 U.S.C. §7433(d)(1) did not contain a jurisdictional exhaustion requirement depriving federal courts from hearing taxpayer suits seeking damages for the conduct of the IRS until the available administrative remedies were exhausted.\textsuperscript{209} These decisions are especially significant because it appears that previously courts had unanimously found that 26 U.S.C. §7433(d)(1) contained a jurisdictional exhaustion requirement.\textsuperscript{210}

\textsuperscript{205} 226 F.Supp.2d 1190, 1192 (D.N.D. 2002).
\textsuperscript{206} 229 F.Supp.2d 710, 714 (S.D. Tex. 2002).
\textsuperscript{207} 302 F.3d 823 (8th Cir. 2002).
\textsuperscript{208} 70 Fed. Cl. 405, 407-08 (Fed. Cl. 2006).
\textsuperscript{210} See, e.g., Porter v. Fox, 99 F.3d 271, 274 (8th Cir. 1996).
F. Clear, Unequivocal Terms

As noted in Section II.B., in the domestic relations context, some courts have alternately phrased the typical requirement that there must be clear and manifest Congressional purpose for preemption as a requirement that Congress positively require by direct enactment that state law be preempted.\textsuperscript{211} As was noted, 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 phraseologies in the same sentence or paragraph of an opinion.\textsuperscript{212}

Similarly, as was previously noted, in \textit{I.A.M. National Pension Fund Benefit Plan C. v. Stockton Tri Industries}, the District of Columbia Court of Appeals, relying upon the “sweeping and direct” language in \textit{Salfi}, held 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 \textit{Salfi}, has the Supreme Court held that exhaustion is a jurisdictional prerequisite.\textsuperscript{213} While at first, with on exception,\textsuperscript{214} only courts within the D.C. Circuit used this alternate phraseology,\textsuperscript{215} other circuits and district courts thereafter began adopting this phraseology, often at or near the same time that “sweeping and direct” began re-appearing in court opinions.

As previously noted, in 1987 the Fifth Circuit Court of Appeals applied this phraseology to find that the MPPAA was not jurisdictionally exhaustive in \textit{Central States Southeast and

\textsuperscript{211} See supra notes 51-56 and accompanying text.
\textsuperscript{212} See supra notes 54-56 and accompanying text.
\textsuperscript{213} See supra note 128 and accompanying text.
\textsuperscript{214} See supra note 133 and accompanying text.
\textsuperscript{215} See supra note 133 and accompanying text.
Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc.\textsuperscript{216} In 1991, the Fourth Circuit similarly used the phraseology to find that the MPPAA was not jurisdictionally exhaustive in McDonald v. Centra, Inc.\textsuperscript{217} In Doe v. Oberweis Dairy, the Seventh Circuit noted in dicta in a Title VII case that a statute must contain “clear, unequivocal terms” to be jurisdictionally exhaustive.\textsuperscript{218} As previously noted, the Eighth Circuit found that §6912(e) was not a jurisdictional exhaustion requirement in Ace Property and Cas. Ins. Co. v. Fed. Crop. Ins. Corp. because it lacked “sweeping and direct” language, but it also premised its finding on the ground that it did not state in “clear, unequivocal terms” that exhaustion was a jurisdictional prerequisite to bring suit in federal court.\textsuperscript{219} The District Court for the Eastern District of Pennsylvania\textsuperscript{220} and the District Court for the District of Puerto Rico\textsuperscript{221} have also used the “clear, unequivocal terms” test to determine whether statutes in a variety of contexts contain jurisdictional exhaustion requirements.

As was the case with “positively required by direct enactment” vis a vis “sweeping and direct,” there is no reason to believe that the courts have intended for there to be substantive differences between the two tests. Initially, as was noted, the District of Columbia Court of Appeals constructively crafted the “clear, unequivocal terms” test from Salfi’s “sweeping and

\textsuperscript{215} See, e.g., Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 99 n.12 (D.C. Cir. 1986).
\textsuperscript{216} 826 F.2d 320, 328 (5th Cir. 1987).
\textsuperscript{217} 946 F.2d 1059, 1063 (4th Cir. 1991).
\textsuperscript{218} 456 F.3d 704, 712 (7th Cir. 2006).
\textsuperscript{219} 440 F.3d 992, 997 (8th Cir. 2006).
direct” language test. Furthermore, on ten occasions courts have quoted to the “sweeping and direct” language test while in the same paragraph citing to the “clear, unequivocal terms” test.

G. The Increasing Strictness of the Jurisdictional Exhaustion Analysis

The District of Columbia Court of Appeals’ decision in Avocados Plus Inc. v. Veneman, which makes reference to both the “sweeping and direct” and “clear, unequivocal terms” tests, helps to crystallize how the test for finding an exhaustion requirement to be jurisdictional has become stricter over the years, at least in those courts 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 contained a jurisdictional exhaustion requirement, such that avocado importers who had failed to exhaust the available administrative remedies were prohibited from bringing suit in federal court claiming that the Act violated their first amendment rights.

The court noted that

[un]der 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

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222 See supra note 128 and accompanying text.
224 370 F.3d 1243 (D.C. Cir. 2004).
225 See id. at 1245-47.
the Secretary on the petition[,]” § 7806(b)(1), and must remand it if it “is not in accordance with law[,]” § 7806(b)(3). 226

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. 227

The court noted that the government claimed that the Supreme Court’s 1946 opinion in United States v. Ruzicka228 compelled a finding that the statute’s exhaustion requirement was jurisdictional. 229 Ruzicka considered whether a milk handler had to exhaust administrative remedies under a provision of the Agricultural Marketing Act (AMAA) before bringing suit in federal district court. 230 As the D.C. Circuit found in Avocados Plus, the exhaustion provisions in the AMAA were “nearly identical” to the exhaustion provisions contained in the Hass Avocado Promotion, Research, and Information Act. 231 The Supreme Court in Ruzicka found that exhaustion was required under the AMAA although “Congress did not say [so] in words....” 232 Instead, the Court found that Congressional intent to require exhaustion was “imbedded in a coherent scheme that assured an aggrieved a hearing in an “expert forum....” 233

The D.C. Circuit had cause to address the Supreme Court’s ruling when it decided American Dairy of Evansville, Inc. v. Bergland, Inc. 234 in 1980. The court agreed with the uniform precedent construing Ruzicka as holding that the AMAA provision “is more than a

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226 Id. at 1246.
227 Id. at 1249.
228 329 U.S. 287 (1946).
229 Veneman, 370 F.3d at 1248-49.
230 Ruzicka, 329 U.S. at 291.
231 Veneman, 370 F.3d at 1249.
232 Id. at 292.
233 Id.
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.”235 While in dicta the court seemed
open to the possibility of an exception for futility, it clearly held that the provision was
jurisdictional.236

Twenty-four years later, the D.C. Circuit confirmed in Avocados Plus what was apparent
from the Supreme Court’s decision in Ruzicka -- “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....”237 The D.C. Circuit then found that the exhaustion requirement in the
Hass Avocado Promotion, Research, and Information Act was not jurisdictional because “the
Avocado Act does not provide for comprehensive market regulation that could be disrupted by
ill-timed judicial interference.”238

This D.C. Circuit, however, then immediately rendered this discussion of anything
besides 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.239 It noted that “[u]nder the modern
precedents discussed above” such as Salfi and Stockton Tri Industries “the AMAA’s lack of

234 627 F.2d 1252 (D.C. Cir. 1980).
235 Id. at 1270.
236 Id. at 1270. 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.
237 Veneman, 370 F.3d at 1249.
238 Id.
239 See id.
anything close to explicit jurisdictional language would render any exhaustion requirement non-
jurisdictional.” 240

V. 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, 241 the first question is whether courts applying the “sweeping and direct” language test 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 242 and Avocados Plus Inc. v. Veneman, 243 courts applying the “sweeping and direct” language test in post-PLRA cases are treating “sweeping and direct” language as the sine non qua for jurisdictional exhaustion. In McBride Cotton and Cattle Corp. v. Veneman, the Ninth Circuit clearly ignored the First Circuit’s structural and legislative history arguments in Gleichman in finding that §6912(e) was not jurisdictionally exhaustive. 244 Meanwhile, the D.C. Circuit in Avocados Plus Inc. v. Veneman 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

240 Id.
241 See supra notes 79-95 and accompanying text.
242 290 F.3d 973, 980 (9th Cir. 2002).
243 370 F.3d at 1249.
“sweeping and direct” language would prohibit a finding that it is jurisdictionally exhaustive pursuant to modern precedent. 245

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. 246 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. 247

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. 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

\[244\] 290 F.3d at 980.
\[245\] 370 F.3d at 1249.
\[246\] See supra notes 237 and accompanying text.
\[247\] See supra notes 111-14 and accompanying text.
Barring such a finding, courts will still find Congressional statutes to be preemptive over state 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, or (4) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal statute.  

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” or has “expansive sweep” and determined that statutes are preemptive because they “positively required by direct enactment” that state law be preempted. In other words, “sweep[ing]” and “direct” Congressional statutes evince the necessary “clear and manifest” Congressional purpose to preempt.

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.\textsuperscript{253} The courts’ intermingled use of the terms sweep[ing], 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 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.”\textsuperscript{254}

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.\textsuperscript{255} By making “sweeping and direct” language the sine non qua of jurisdictional exhaustion, courts applying the “sweeping and direct” language test in post-PLRA cases have completely foreclosed the idea that jurisdictional exhaustion can be found based upon similar factors.\textsuperscript{256} 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.\textsuperscript{257}

\textsuperscript{252}See supra note 52-56 and accompanying text.
\textsuperscript{253}See supra note 128 and accompanying text.
\textsuperscript{254}Coit Independence Joint Venture v. Federal Savings and Loan Insurance Company, 489 U.S. 561, 589 (1989) (Scalia, J., concurring in part and concurring in the judgment); see also supra notes 79-95 and accompanying text.
\textsuperscript{255}See supra note 50 and accompanying text.
\textsuperscript{256}See supra notes 239-40 and accompanying text.
\textsuperscript{257}See id.
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, and beyond the fact that these courts are ignoring post-\textit{Salfi} Supreme Court precedent considering factors such as statutes’ legislative histories and structures in determining whether they are jurisdictional, there are other reasons why the results in these cases are troubling. In \textit{I.A.M. National Pension Fund Benefit Plan C. v. Stockton Tri Industries}, the D.C. Circuit held that “\textit{Salfi}…provided ‘strong evidence that Congress knows how to withdraw jurisdiction expressly when that is its purpose.’”\textsuperscript{260} The circuit splits that have recently developed over whether exhaustion requirements are prudential or jurisdictional\textsuperscript{261} indicates that the D.C. Circuit’s assumption no longer holds any water.

Courts initially unanimously concluded that §6912(e) of the Department of Agriculture Reorganization Act of 1994 was a jurisdictional exhaustion requirement, finding that “[i]t [wa]s 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….”\textsuperscript{263} Once the Ninth Circuit used the “sweeping and direct”

\textsuperscript{258} See supra notes 79-95 and accompanying text.
\textsuperscript{259} See supra notes 114-15 and accompanying text.
\textsuperscript{260} 727 F.2d 1204, 1209 (quoting \textit{Gulf Oil Corp. v. United States Department of Energy}, 663 F.2d 296, 308 n.75 (D.C. Cir. 1981)).
\textsuperscript{261} See supra notes 196 and 210 and accompanying text.
\textsuperscript{262} See supra notes 189-95 and accompanying text.
\textsuperscript{263} Gleichman v. United States Department of Agriculture, 896 F.Supp. 42, 44 (D. Me. 1995).
language test in *McBride Cotton and Cattle Corp. v. Veneman*\(^{264}\) to find that §6912(e) was not jurisdictional, however, other courts started to follow suit, creating the present circuit split.\(^{265}\)

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.\(^{266}\) It is easy to see how more circuit splits will 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 prior precedent.\(^{267}\) Such an outcome is troubling because these sharp conflicts in precedent mean that Congress is unaware what expression of intent it must express to make an exhaustion requirement jurisdictional, and federal courts must waste limited resources by considering the divergent results in different cases whereas uniformity would breed efficiency.\(^{268}\)

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.\(^{269}\) For instance, it is easy to see how potential litigants with cases before the Department of Agriculture

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\(^{264}\) 290 F.3d 973, 978 (9th Cir. 2002).

\(^{265}\) *See supra* notes 196-206 and accompanying text.

\(^{266}\) *See supra* notes 206-07 and accompanying text.

\(^{267}\) *See supra* notes 204-213 and accompanying text.


\(^{269}\) *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)”).

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are hesitant to bring actions in federal court before exhausting the available administrative remedies when some courts are holding that “[i]t is hard to imagine more direct and explicit language requiring” jurisdictional exhaustion than the language contained in §6912(e), and other courts holding that §6912(e) is clearly not a jurisdictional exhaustion requirement.

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 containing jurisdictional exhaustion requirements despite lacking “sweeping and direct” language, it is clear that courts using this phraseology in post-PLRA cases have made “sweeping and direct” language the sine non qua of jurisdictional exhaustion. In doing so, they have flatly contradicted Supreme Court precedent, improperly required a greater showing of Congressional intent in the jurisdictional exhaustion context than they require in the preemption context, and begun creating circuit splits which are confusing to Congress, the courts, and potential litigants. Instead, these should courts should resume applying the Ruzicka and Zipes analysis to exhaustion requirements and determine whether they are prudential

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270 See supra note 171 and accompanying text.
271 See supra notes 196-206 and accompanying text.
272 See supra notes 134 and 160 and accompanying text.
273 See supra note 240 and accompanying text.
274 See supra notes 111-14 and accompanying text.
275 See supra notes 19-50 and accompanying text.
276 See supra notes 196 and 210 and accompanying text.
or jurisdictional based not only on their language but also upon other factors such as their structures and legislative histories.277

VI. 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 doctrines explains why courts should require a greater showing of Congressional intent in the preemption context than they require in the jurisdictional exhaustion context. 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 applying the “sweeping and direct” language test in post-PLRA cases are thus not only improperly required 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

277 See supra notes 111-14 and 237 and accompanying text.
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.