IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUZANNE SISLEY, M.D.; SCOTTSDALE RESEARCH INSTITUTE, LLC; BATTLEFIELD FOUNDATION, DBA Field to Healed; LORENZO SULLIVAN; KENDRICK SPEAGLE; GARY HESS,

Petitioners,

v.

U.S. DRUG ENFORCEMENT ADMINISTRATION; WILLIAM P. BARR, Attorney General; TIMOTHY SHEA, Acting Administrator, Drug Enforcement Administration,

Respondents.

No. 20-71433

MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Stephen Zyszkiewicz and Jeramy Bowers petitioned the U.S. Drug Enforcement Administration (DEA) to initiate rulemaking, and DEA denied that request. Petitioners—who do not include Zyszkiewicz or Bowers—have filed this action seeking judicial review of that decision. Because these petitioners have not exhausted their administrative remedies, the petition should be dismissed.

BACKGROUND

I. Legal Framework

The Controlled Substances Act, 21 U.S.C. §§ 801-971, establishes a comprehensive federal scheme to regulate the manufacture and distribution of controlled substances. The Act divides controlled substances into five schedules, based on their potential for abuse, medical uses, and risk of physical or psychological dependence. *Id.* § 812(a)-(b). Generally speaking, a schedule I substance has no accepted medical use and a high risk for abuse, while schedule II-V substances have accepted medical uses and decreasing risk of abuse and dependence. *Id.* Congress initially designated scores of substances under the schedules, *id.* § 812(c), and authorized the Attorney General to add, remove, or reschedule substances through rulemaking, *id.* § 811(a). The Attorney General, in turn, delegated this authority to the Administrator of the Drug Enforcement Administration (DEA). 28 C.F.R. § 0.100.

Congress initially designated marijuana as a schedule I substance. *See* Pub. L. No. 91-513, title II § 202(c) (schedule I(c)), 84 Stat. 1242, 1249 (1970). Schedule I substances have "a high potential for abuse," have "no currently accepted medical use in treatment in the United States," and lack "accepted safety for use * * * under medical supervision." 21 U.S.C. § 812(b)(1). In a 1992 rulemaking, the DEA Administrator set forth five factors to consider in determining whether a substance has a currently accepted medical use:

1. Whether the substance's chemistry is known and reproducible;

2. Whether there are adequate safety studies;
3. Whether there are adequate and well-controlled studies proving efficacy;
4. Whether the substance is accepted by qualified experts; and
5. Whether the scientific evidence is widely available.

57 Fed. Reg. 10499, 10506 (Mar. 26, 1992). Under that rulemaking, the DEA Administrator has required all five factors to be satisfied in order for a substance to "be deemed to have a currently accepted medical use." *Americans for Safe Access v. DEA*, 706 F.3d 438, 450 (D.C. Cir. 2013).

The DEA Administrator can, if the evidence warrants, transfer a substance from one schedule to another by rulemaking. 21 U.S.C. § 811(a)(1). Such rulemaking proceedings "may be initiated" by the Administrator "(1) on his own motion, (2) at the request of the Secretary [of Health and Human Services], or (3) on the petition of any interested party." *Id.* § 811(a). "[B]efore initiating [rulemaking] proceedings," the Administrator gathers all "necessary data" and obtains a written "scientific and medical evaluation" and a recommendation from the Secretary of Health and Human Services (HHS) as to whether a substance should be rescheduled. *Id.* § 811(b). The Secretary's recommendations on "scientific and medical matters" are binding. *Id.* If the Administrator determines that substantial evidence supports moving the substance to a different schedule, then "he shall initiate proceedings" to reschedule the substance. *Id.*

"[A]ny person aggrieved by a final decision" regarding rescheduling may seek judicial review in the D.C. Circuit or the circuit in which their principal place of

business is located. 21 U.S.C. § 877. Thus, a person who petitions the DEA Administrator to reschedule a substance may seek judicial review if the Administrator denies that petition. *Americans for Safe Access*, 706 F.3d at 442.

II. Underlying Proceedings

In January 2020, Stephen Zyszkiewicz and Jeramy Bowers filed a one-page, handwritten petition "to remove or reschedule cannabis (marijuana) in all its forms" under "21 U.S.C.[] 811, 812." Dkt. 1-6, at 23.[1] Zyszkiewicz and Bowers stated that "the current situation of cannabis in Schedule I [is] completely untenable" because "[h]alf the states allow for medical use and the FDA allows CBD and THC pharmaceuticals as well as IND compassionate use." *Id.* Petitioners offered no other argument for rescheduling marijuana, and provided no medical evidence regarding its use. DEA issued a letter declining to institute rulemaking in April 2020. Dkt. 1-6, at 25-28.

A month later, petitioners—Suzanne Sisley, Scottsdale Research Institute LLC, Battlefield Foundation, Lorenzo Sullivan, Kendrick Speagle, and Gary Hess—filed a petition in this Court seeking "review of [DEA's] final determination denying Stephen Zyszkiewicz's January 3, 2020 petition to reschedule." Dkt. 1-6, at 6. Petitioners urge several grounds for reversal, challenging (1) DEA's construction of 21 U.S.C. § 812 and its use of a five-factor test to determine whether a substance has a currently

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[1] All citations to docket entries refer to docket entries in this case, *Sisley v. U.S. Drug Enforcement Admin.*, No. 20-71433 (9th Cir.).

accepted medical use, Dkt. 1-6, at 14-17; (2) DEA's construction of 21 U.S.C. § 811, and its determination that drugs without a currently accepted medical use are governed by schedule I, Dkt. 1-6, at 17-18; (3) DEA's conclusion that there is a lack of accepted safety for use of marijuana under medical supervision, *id.* at 18-19; and (4) DEA's determination that marijuana does not qualify for rescheduling to schedules III, IV, or V, *id.* at 19-20.

DISCUSSION

The petition should be dismissed because none of the petitioners have exhausted their administrative remedies. Any of the petitioners may ask DEA to consider rescheduling marijuana under 21 U.S.C. § 811(a), as Zyszkiewicz and Bowers did. In doing so, petitioners may raise the arguments they have raised to this Court, and DEA would be able to consider those arguments in the first instance. Petitioners may also submit any evidence regarding marijuana's efficacy, safety, and use in medical treatment, which DEA and HHS can evaluate. *Id.* § 811(b). But petitioners "have made no attempt to exhaust that process" and "until they do so, they are not entitled to the relief they seek in this lawsuit." *Agua Caliente Tribe of Cupeño Indians of Pala Reservation v. Sweeney*, 932 F.3d 1207, 1216, 1219 (9th Cir. 2019).

1. The requirement that plaintiffs exhaust their administrative remedies before seeking judicial review "is well established in the jurisprudence of administrative law." *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006). Administrative exhaustion "serves two main purposes." *Id.* at 89. First, by requiring plaintiffs to first present their claims to

the agency, exhaustion provides agencies "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of [the agency's] procedures." *Id.* (quotation marks omitted). Second, exhaustion "promotes efficiency" by permitting claims to "be resolved much more quickly and economically in proceedings before an agency." *Id.* In this way, the agency proceedings may grant plaintiffs the relief they seek, or otherwise "convince the losing party not to pursue the matter in federal court." *Id.* And even if plaintiffs ultimately seek judicial review, the completed administrative proceedings "may produce a useful record for subsequent judicial consideration." *Id.* Thus, the "courts should not topple over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under its practice." *United Sates v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Woodford*, 548 U.S. at 90 (collecting cases).

Consistent with these principles, this Court has held that plaintiffs must exhaust the administrative remedies available before seeking judicial review. Thus, an Indian tribe seeking federal recognition must first exhaust the Department of the Interior's administrative procedures for federal recognition before seeking judicial review. *Agua Caliente Tribe*, 932 F.3d at 1216-19. Similarly, aliens who are in removal proceedings and seek an adjustment of status must first seek that relief "during their pending removal proceedings," and may not seek judicial review "[u]ntil they have exhausted this available administrative remedy." *Cabaccang v. U.S. Citizenship and*

Immigration Services, 627 F.3d 1313, 1316-17 (9th Cir. 2010). And parents who seek damages because they believe their child should have received a different placement under the Individuals with Disabilities Education Act may not pursue that action if they "failed to exhaust" their administrative remedies. *Paul G. by and through Steve G. v. Monterey Peninsula Unified School Dist.*, 933 F.3d 1096, 1098 (9th Cir. 2019); *id.* at 1102.

2. Petitioners have administrative remedies available to them which they have not yet exhausted. Petitioners may petition the DEA Administrator to remove or reschedule marijuana from schedule I. 21 U.S.C. § 811(a). As part of that petition, they may present evidence related to the health effects, medical use, safety, and efficacy of marijuana as a treatment for disease or illness. *See Americans for Safe Access*, 706 F.3d at 450 (describing petition for rescheduling that cited "more than two hundred peer-reviewed published studies"). In arguing for marijuana to be rescheduled, petitioners may seek to persuade the DEA Administrator to reconsider interpretations of the Controlled Substances Act or DEA regulations adopted by previous Administrators. *See Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 930 F.2d 936, 938-39 (D.C. Cir. 1991). But petitioners have not yet sought that relief or advanced those arguments. If they were to do so, DEA would be able to consider any such claims and issue a decision that adequately addresses them and determines whether further rulemaking is appropriate. *See* 81 Fed. Reg. 53767-845 (Aug. 12, 2016) (79-page decision based on analysis from DEA, HHS, and FDA to not initiate further rulemaking based on the current scientific record).

In similar circumstances, the Second Circuit has held that plaintiffs must first exhaust their administrative remedies under the Controlled Substances Act before seeking judicial review. *Washington v. Barr*, 925 F.3d 109, 115-18 (2d Cir. 2019). The plaintiffs in *Washington* sued in district court to challenge marijuana's status as a schedule I substance, "but did not first bring this challenge to" the DEA, which "has the authority to reschedule marijuana." *Id.* at 115. In light of the rulemaking provisions provided by 21 U.S.C. § 811, the court held that "[r]equiring would-be plaintiffs to exhaust that process before turning to the courts is consonant with" Congress's purpose in passing the Controlled Substances Act. *Id.* at 116. That rescheduling process could potentially obviate any need for judicial review, because plaintiffs could persuade DEA to reschedule marijuana. *Id.* at 117. And at a minimum, the rulemaking process would "generate a comprehensive record that would aid in eventual judicial review." *Id.* Accordingly, the Second Circuit held that the plaintiffs must first exhaust their administrative remedies in a DEA rescheduling proceeding before seeking judicial review. *Id.* at 122.[2]

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[2] The *Washington* court retained jurisdiction over the case while permitting the plaintiffs to petition DEA to reschedule marijuana. 925 F.3d at 122. For the reasons Judge Jacobs explained in his dissent, the correct course would have been to affirm the district court's dismissal of the suit for failure to exhaust administrative remedies. *Id.* at 122-24 (Jacobs, J., dissenting). As this Court has explained, a plaintiff "may not maintain [an] action after he failed to" exhaust administrative remedies. *Paul G.*, 933 F.3d at 1102. The Second Circuit did ultimately affirm dismissal of the case when plaintiffs refused to exhaust their administrative remedies. Order, *Washington v. Barr*, No. 18-859 (2d Cir. Feb. 3, 2020) (affirming district court's judgment and dismissing case with prejudice).

The same reasoning applies with full force here. Petitioners must first petition DEA to consider rescheduling marijuana, where they may advance their arguments concerning statutory interpretation (Dkt. 1-6, at 14-18), the safety of marijuana for medical use (*id.* at 18-19), and DEA's ability to place marijuana in schedules III, IV, or V (*id.* at 19-20). These arguments were not presented in the one-page rescheduling petition filed by Zyskiewicz and Bowers (*see id.* at 23), and the DEA Administrator has not yet had an opportunity to consider them. As this Court has explained, the "principal purpose of requiring administrative exhaustion" is "to ensure the agency has had an opportunity to rule on a claim before a plaintiff goes to court." *Paul G.*, 933 F.3d at 1102 (affirming dismissal of complaint). That is because "a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address that question." *Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019). Accordingly, the Court should not address claims "where the agency's final decisionmaker has not had a chance to address the merits at all." *Id.* Allowing petitioners to bypass DEA and seek judicial intervention on their claims in the first instance would "undermine the text and structure of the [Controlled Substances Act]." *Washington*, 925 F.3d at 117.

After receiving a request from petitioners to reschedule marijuana, DEA can evaluate petitioners' claims and their scientific evidence, and determine whether it should commence formal rulemaking under the Administrative Procedure Act. 21 U.S.C. § 811(a)(citing 5 U.S.C. §§ 551-559). If petitioners are ultimately aggrieved by

DEA's decision after this process is complete, they may seek judicial review under 21 U.S.C. § 877. But they may not do so now—before they have even attempted to invoke these administrative procedures or give DEA an opportunity to consider their claims.

CONCLUSION

The petition should be dismissed.

Respectfully submitted,

MARK B. STERN
/s/ Daniel Aguilar
DANIEL AGUILAR
(202) 514-5432
Attorneys, Appellate Staff
Civil Division, Room 7266
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the page limitations of Circuit Rule 27-1(1)(d) because it is less than 20 pages.

/s/ Daniel Aguilar
Daniel Aguilar