IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| SUZANNE SISLEY, M.D.; SCOTTSDALE RESEARCH INSTITUTE, LLC; BATTLEFIELD FOUNDATION, DBA Field to Healed; LORENZO SULLIVAN; KENDRICK SPEAGLE; GARY HESS,<br><br>Petitioners,<br><br>v.<br><br>U.S. DRUG ENFORCEMENT ADMINISTRATION; WILLIAM P. BARR, Attorney General; TIMOTHY SHEA, Acting Administrator, Drug Enforcement Administration,<br><br>Respondents. | No. 20-71433 |

**REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

The Controlled Substances Act provides that persons may petition the Drug Enforcement Administration (DEA) Administrator, acting on delegated authority from the Attorney General, to remove or reschedule controlled substances through rulemaking. 21 U.S.C. § 811(a). The Act further provides that if the petition is denied, an "aggrieved person" may seek review of the denial in a court of appeals. *Id.* § 877. Exercising their right to petition under § 811(a), Stephen Zyszkiewicz and Jeramy Bowers filed a petition asking DEA to reschedule marijuana. When their petition was denied, Zyszkiewicz sought review in the District Court for the District

of Columbia, which dismissed the action because Zyszkiewicz should instead have sought review in the court of appeals in accordance with the statute. *Zyszkiewicz v. Barr*, 2020 WL 3572908 (D.D.C. June 30, 2020) In dismissing the case, the district court explained that Zyszkiewicz had "an adequate remedy under the Controlled Substances Act," because 21 U.S.C. § 877 allowed him to seek judicial review of DEA's denial of his petition in "the D.C. Circuit or another appropriate circuit court." *Id.* at *1.

Petitioners here, rather than file their own petition for rulemaking with DEA, purport to seek review of the denied petition filed by Zyszkiewicz and Bowers. Petitioners do not contend that the one-page petition filed by Zyszkiewicz and Bowers presented the arguments they would assert to this Court, and their attempt to bypass the administrative process is at odds with the structure of the Controlled Substances Act and the purposes of administrative exhaustion. Even when judicial review is not premised on an agency's denial of a petition for rulemaking, it is axiomatic that litigants must first present their arguments and evidence to the agency charged with implementing the statute, thus "produce[ing] a useful record for subsequent judicial consideration." *Woodford v. Ngo*, 584 U.S. 81, 89 (2006); *Washington v. Barr*, 925 F.3d 109, 117 (2d. Cir. 2019) (exhaustion under the Controlled Substances Act will "generate a comprehensive record that would aid in eventual judicial review"). Indeed, even when litigants pursue the administrative process and obtain a final determination, courts will generally decline to hear contentions not properly

presented to the agency. *See United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *Pharmacy Doctors Enters. v. DEA*, 789 F. App'x 724 (11th Cir. 2019). This Court has thus repeatedly held that dismissal is appropriate when a party has not exhausted their administrative remedies. *See, e.g.*, *Agua Caliente Tribe of Cupeño Indians of Pala Reservation v. Sweeney*, 932 F.3d 1207, 1216, 1219 (9th Cir. 2019) (petitioners "have made no attempt to exhaust that [administrative] process" and "until they do so, they are not entitled to the relief they seek in this lawsuit."); *Cabaccang v. U.S. Citizenship and Immigration Services*, 627 F.3d 1313, 1316-17 (9th Cir. 2010)(petitioners may not seek judicial review "[u]ntil they have exhausted this available administrative remedy").

These principles apply with full force to petitions to reschedule controlled substances. *See Washington*, 925 F.3d at 122 (petitioner seeking to reschedule marijuana required to pursue proceedings before DEA); *cf. John Doe, Inc. v. DEA*, 484 F.3d 561, 570 (D.C. Cir. 2007) (plaintiff required to complete DEA administrative process and seek review under 21 U.S.C. § 877 rather than to "'jump the gun' by going directly to" court "instead of exhausting their administrative remedies before the agency.").

**2.** Petitioners nevertheless contend (at 17) that this principle is inapplicable here because they raise purely legal issues and "[n]o facts are disputed." As an initial matter, that characterization is plainly incorrect. Their petition contends that DEA has erred in concluding that there "is a lack of accepted safety for use of marijuana under medical supervision." Dkt. 1-6 at 18, *Sisley v. DEA*, No. 20-71433 (9th Cir.

May 21, 2020) (quotation marks omitted). That determination necessarily involves a detailed analysis of scientific studies to determine marijuana's use under medical supervision, its safety in that use, and the standards for whether that safety is generally accepted.

In any event, litigants must present legal as well as factual contentions to an agency, and petitioners are not excused from this requirement based on their assertions (at 18) that DEA has "no special expertise to apply" to their "purely legal" and constitutional challenges. Petitioners' legal challenges cannot be divorced from the underlying question of whether DEA appropriately construed the Controlled Substances Act and weighed the relevant evidence in denying a petition filed by two other people—questions as to which DEA clearly has expertise. *See* Dkt. 1-6 at 14-19, *Sisley v. DEA* (petition alleging that DEA has erred in construing the Act); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214-15 (1994) (holding that plaintiff must first exhaust administrative remedies because, *inter alia*, "'agency expertise [could] be brought to bear on' the statutory questions presented here").

Nor can petitioners disregard the agency process by characterizing their claims as a facial constitutional challenge. The Supreme Court has made clear that this argument is unavailing even when the substance of an agency's determination is not intertwined with the constitutional assertions. In *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), where federal employees (who had been fired for failing to register for the draft) sought to bring a facial constitutional challenge to the Selective Service Act,

the Supreme Court held that the employees must first exhaust their remedies under the Civil Service Reform Act, which allowed them to seek administrative review of their firings. *Id.* at 5. The Court declined to create an exception for "facial constitutional challenges to statutes," *id.* at 15, and explained that the agency could apply its expertise by potentially deciding in the employees' favor on other grounds, *id.* at 22-23.[1]

Petitioners' attempted reliance (at 7-8) on *Darby v. Cisneros*, 509 U.S. 137 (1993), underscores the absence of any authority for their position. In *Darby*, the Department of Housing and Urban Development (HUD) initiated administrative proceedings against the plaintiffs and imposed a sanctions order against them that became final. 509 U.S. at 141. Although the plaintiffs could have sought further review within HUD by appealing to the Secretary, they instead filed suit in district court to challenge the sanctions order. *Id.* at 141-42. The Supreme Court held that the plaintiffs did not need to seek further administrative review before filing their district court suit, because they were not required to do so by statute or regulation, and because they were challenging final agency action under the Administrative Procedure Act. *Id.* at

[1] Petitioners mistakenly cite *Cirko v. Commissioner*, 948 F.3d 148 (3d Cir. 2020), for the proposition that parties do not need to exhaust administrative remedies if they bring constitutional claims. But in *Cirko*, there was no dispute that the plaintiffs had completed their administrative proceedings and exhausted their available remedies. The Third Circuit concluded, based on its understanding of the Social Security Act, that the plaintiffs had not forfeited an Appointments Clause claim by failing to raise the issue during the course of those proceedings.

153-54. Here, by contrast, petitioners never participated in any administrative proceeding, and never petitioned DEA to reschedule marijuana.

*Pacific Maritime Ass'n v. NLRB*, 827 F.3d 1203 (9th Cir. 2016), is equally inapposite. In that case, the plaintiff trade association took advantage of the available administrative remedies by seeking to intervene in NLRB administrative proceedings and filing briefs in those proceedings. *Id.* at 1205-06. Although the NLRB ultimately denied its intervention attempts, this Court held that the plaintiff was "aggrieved" by the NLRB's denial of intervention and NLRB's order regarding a labor dispute that directly affected the employment contract for one of plaintiff's member businesses. *Id.* at 1206, 1211. Accordingly, the plaintiff could seek judicial review under the applicable statute. *Id.* at 1211. Here, in contrast, petitioners have made no attempt to avail themselves of any administrative remedies. They did not join Zyszkiewicz and Bowers in filing a petition, nor did they file an separate petition to set out their own arguments for DEA's consideration. And even assuming that petitioners could seek review of the denial of the Zyszkiewicz-Bowers petition—notwithstanding their own failure to file a petition and the separate request for judicial review made by Zyszkiewicz himself—they could not pursue a challenge based on evidence and contentions never presented to the agency.

Petitioners' citations to *Bonds v. Tandy*, 457 F.3d 409 (5th Cir. 2006), and *PDK Laboratories Inc. v. DEA*, 362 F.3d 786 (D.C. Cir. 2004), are similarly unavailing. The question in both cases was one of prudential standing, not administrative exhaustion.

The petitioner in *PDK Laboratories* completed all administrative proceedings before seeking judicial review. 362 F.3d at 790-91. The petitioner in *Bonds* had been denied employment at a pharmacy under applicable DEA regulations because of a past criminal conviction. 457 F.3d at 411. Bonds' prospective employer sought a waiver from DEA, and when the waiver was denied, Bonds sought review of that order. *Id.* Petitioners appear to analogize their circumstances to those in *Bonds*, in that the employer, rather than Bonds himself, sought relief from DEA. But that analogy is inapt—unlike petitioners, Bonds was the subject of an application made to DEA, which could only be made by his employer, and the merits of that application had been presented to DEA. Even so, the Fifth Circuit held that Bonds lacked prudential standing because the waiver provision was not designed to protect his interests. *Id.* at 415-16.

**3.** Petitioners contend (at 19-20) that exhausting their administrative remedies would prejudice them because they are unable to "obtain[] marijuana suitable for the safety and efficacy research" that they wish to perform. This kind of argument is available to any litigant that would prefer to proceed directly to court rather than filing a rescheduling petition. In any event, pursuant to provisions of the Controlled Substances Act, petitioners may file applications with DEA to grow marijuana for research purposes, 21 U.S.C. § 823(a), and petitioner Scottsdale Research Institute has already filed such an application. *See* 84 Fed. Reg. 44920, 44923 (Aug. 27, 2019) (notice of Scottsdale Research Institute's application to grow marijuana); 84 Fed. Reg.

54926 (Oct. 11, 2019) (amended notice). If petitioners are ultimately aggrieved by a DEA decision on such applications to grow marijuana, they may seek judicial review of that decision under 21 U.S.C. § 877.

## CONCLUSION

The petition should be dismissed.

Respectfully submitted,

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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 reply complies with the page limitations of Circuit Rule 27-1(1)(d) because it does not exceed 10 pages.

*/s/ Daniel Aguilar*
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