

YetterColeman LLP

May 7, 2021

Via ECF

Molly C. Dwyer, Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: No. 20-71433; *Suzanne Sisley, M.D. v. U.S. Drug Enforcement Administration*;
in the U.S. Court of Appeals for the Ninth Circuit; oral argument scheduled for
June 10, 2021

Dear Ms. Dwyer:

We write to inform the Court of the Supreme Court's recent unanimous opinion in *Carr v. Saul*, No. 19-1442 (Apr. 22, 2021) ("Op."), reversing and remanding lower-court decisions imposing issue-exhaustion requirements to bar judicial consideration of Appointments Clause challenges not raised during agency proceedings.

The majority opinion affirms the standard for issue exhaustion set forth in the plurality opinion in *Sims v. Apfel*, 530 U.S. 103 (2000), cited on page 29 of Petitioners' Reply Brief: Where the relevant statute and regulations do not require it, issue exhaustion is generally inappropriate in non-adversarial contexts. Op. 6-8.

Carr also notes two additional relevant considerations that tipped the scales "decidedly against imposing an issue-exhaustion requirement." Op. 9. First, "it is sometimes appropriate for courts to entertain constitutional challenges to statutes or other agency-wide policies even when those challenges were not raised in administrative proceedings." *Id.* Second, under the futility exception, "[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested." Op. 10. *Carr* further states that "[i]ssue exhaustion should not be confused with exhaustion of administrative remedies." Op. 4 n.2.

In this case, Petitioners argue issue exhaustion cannot apply for four reasons: first, Respondents waived issue exhaustion by arguing remedies exhaustion and never clearly raising issue exhaustion in either their motion to dismiss briefing or Response Brief, Reply 27; second, the Petition raised the issue, *id.*; third, DEA considered and decided the issue, *id.* at 27-28; and finally, *Sims* forecloses the government's attempted imposition of issue exhaustion, *id.* at 29.

Carr powerfully supports Petitioners' last argument: issue exhaustion does not apply because "neither the statute nor the regulations at issue here requires exhaustion, and the § 811(a) petition process is inquisitorial and informal." *Id.* *Carr* is especially pertinent to Petitioners'

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structural constitutional claim like the claim in *Carr*. DEA lacks expertise to apply to Petitioners' facial non-delegation claim and is powerless to grant the relief Petitioners seek. *See id.* at 27; Dkt. 14 at 19.

Yours very truly,

YETTER COLEMAN LLP

By: /s/Matthew C. Zorn

Matthew C. Zorn

MZ:dd

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CERTIFICATE OF COMPLIANCE

No. 20-71433

I hereby certify that this document complies with the requirements of Federal Rule of Appellate Procedure 28(j) because contains 332 words.

By: /s/Matthew C. Zorn

Matthew C. Zorn