YetterColeman LLP

July 1, 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 held on June 10, 2021

Dear Ms. Dwyer:

We write regarding the Supreme Court's June 28 activity in *Pakdel v. City and County of San Francisco*, No. 20-1212 ("Op.") and Justice Thomas's statement in *Standing Akimbo, LLC v. United States*, No. 20–645 ("Stmt."), which relate to exhaustion.

In *Pakdel*, the Supreme Court reversed this Court's decision that required the *Pakdel* petitioners to exhaust state administrative procedures before seeking § 1983 relief in federal court of a final decision. Op. 5. In short, under *Knick*, "administrative missteps do not defeat ripeness once the government has adopted its final position." Op. 7.

Although *Pakdel* addresses exhaustion of ripe § 1983 claims, its reasoning applies with full force to actions reviewable under 5 U.S.C. § 704. DEA's final decision dismissing the Zyszkiewicz petition is reviewable under 21 U.S.C. § 877. Like *Knick* and § 1983, *Darby* and § 704 bar exhaustion because neither statute nor regulation require it. An approach that Petitioners must first petition DEA to obtain judicial review of the final agency action dismissing the Zyszkiewicz petition cannot be squared with the plain meaning of the APA and *Darby*, and the import of *Pakdel*.

Justice Thomas's recent statement in *Standing Akimbo* also highlights why, if prudential exhaustion could apply, it should be excused. Citing the 2016 denial, he notes that "[d]espite the Federal Government's recent pro-marijuana actions, the Attorney General has declined to use his authority to reschedule marijuana to permit legal, medicinal use," Stmt. 2 n.4, and recounts absurd consequences that have resulted from DEA's inaction. *Id.* 4. As Petitioners explain, these issues arise out of the issue squarely before the Court: the misinterpretation of 21 U.S.C. § 812(b)(1)(B) and resulting failure to engage in the formal rulemaking required by 21 U.S.C. § 811(a).

Even if exhaustion could apply to Petitioners' claim, the considerations Justice Thomas highlights and other considerations Petitioners brief weigh heavily in favor of excusing it. *See* Reply 25-27, 29. The maladministration of this statute and resulting failure to engage in formal

rulemaking—issues properly brought to this Court under § 877—are issues of national importance that favor prompt Article III intervention.

Yours very truly,

YETTER COLEMAN LLP

By: /s/Matthew C. Zorn
Matthew C. Zorn

MZ:dd

cc: ***Via ECF***
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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 349 words.

By: /s/Matthew C. Zorn
Matthew C. Zorn

Attachment 1

Pakdel v. City and County of San Francisco, No. 20-1212

Per Curiam

SUPREME COURT OF THE UNITED STATES

PEYMAN PAKDEL, ET UX. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20–1212. Decided June 28, 2021

PER CURIAM.

When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a "final" decision. *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 737 (1997). After all, until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation. *See id.,* at 734; *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525 (2013). In the decision below, however, the Ninth Circuit required petitioners to show not only that the San Francisco Department of Public Works had firmly rejected their request for a property-law exemption (which they did show), but *also* that they had complied with the agency's administrative procedures for seeking relief. Because the latter requirement is at odds with "the settled rule . . . that exhaustion of state remedies is *not* a prerequisite to an action under 42 U. S. C. §1983," *Knick* v. *Township of Scott*, 588 U. S. ___, ___ (2019) (slip op., at 2) (brackets and internal quotation marks omitted), we vacate and remand.

I

Petitioners are a married couple who partially own a multiunit residential building in San Francisco. When petitioners purchased their interest in the property, the building was organized as a tenancy-in-common. Under that kind of arrangement, all owners technically have the right to pos-

sess and use the entire property, but in practice often contract among themselves to divide the premises into individual residences. Owners also frequently seek to convert tenancy-in-common interests into modern condominium-style arrangements, which allow individual ownership of certain parts of the building. When petitioners purchased their interest in the property, for example, they signed a contract with the other owners to take all available steps to pursue such a conversion.

Until 2013, the odds of conversion were slim because San Francisco employed a lottery system that accepted only 200 applications per year. When that approach resulted in a predictable backlog, however, the city adopted a new program that allowed owners to seek conversion subject to a filing fee and several conditions. One of these was that non-occupant owners who rented out their units had to offer their tenants a lifetime lease.

Although petitioners had a renter living in their unit, they and their co-owners sought conversion. As part of the process, they agreed that they would offer a lifetime lease to their tenant. The city then approved the conversion. But, a few months later, petitioners requested that the city either excuse them from executing the lifetime lease or compensate them for the lease. The city refused both requests, informing petitioners that "failure to execute the lifetime lease violated the [program] and could result in an enforcement action." Brief for Respondents 9.

Petitioners sued in federal court under §1983. Among other things, they alleged that the lifetime-lease requirement was an unconstitutional regulatory taking. But the District Court rejected this claim without reaching the merits. 2017 WL 6403074, *2–*4 (ND Cal, Nov. 20, 2017). Instead, it relied on this Court's since-disavowed prudential rule that certain takings actions are not "ripe" for federal resolution until the plaintiff "seek[s] compensation through

the procedures the State has provided for doing so." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985). Because petitioners had not first brought "a state court inverse condemnation proceeding," the District Court dismissed their claims. 2017 WL 6403074, *4.

While petitioners' appeal was pending before the Ninth Circuit, this Court repudiated *Williamson County*'s requirement that a plaintiff must seek compensation in state court. See *Knick*, 588 U. S., at ___–___ (slip op., at 19–23). We explained that "[t]he Fifth Amendment right to full compensation arises at the time of the taking" and that "[t]he availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim." *Id.,* at ___–___ (slip op., at 7–8). Any other approach, we reasoned, would conflict with "[t]he general rule . . . that plaintiffs may bring constitutional claims under §1983 without first bringing any sort of state lawsuit." *Id.,* at ___ (slip op., at 11) (internal quotation marks omitted).

Rather than remand petitioners' claims in light of *Knick*, a divided panel of the Ninth Circuit simply affirmed. Noting that *Knick* left untouched *Williamson County*'s alternative holding that plaintiffs may challenge only "final" government decisions, *Knick*, 588 U. S., at ___ (slip op., at 5), the panel concluded that petitioners' regulatory "takings claim remain[ed] unripe because they never obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit." 952 F. 3d 1157, 1163 (2020).* Although the city had twice denied their

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*The Ninth Circuit rejected several of petitioners' alternative theories on the merits. See, *e.g.,* 952 F. 3d 1157, 1162, n. 4 (2020) (considering whether "the Lifetime Lease Requirement effects an exaction, a physical taking, [or] a private taking"). On remand, the Ninth Circuit may give further consideration to these claims in light of our recent decision in *Cedar Point Nursery* v. *Hassid*, *ante*, p. ___.

requests for the exemption—and in fact the "relevant agency c[ould] no longer grant" relief—the panel reasoned that this decision was not truly "final" because petitioners had made a belated request for an exemption at the end of the administrative process instead of timely seeking one "through the prescribed procedures." *Id.*, at 1166–1167 (explaining that petitioners waited "six months after [they] had obtained final approval of their conversion . . . and seven months after they had committed to offering a lifetime lease"). In other words, a conclusive decision is not really "final" if the plaintiff did not give the agency the "opportunity to exercise its 'flexibility or discretion'" in reaching the decision. *Id.,* at 1167–1168.

Judge Bea dissented, explaining that the "'finality'" requirement looks only to whether "'the initial decisionmaker has arrived at a definitive position on the issue.'" *Id.,* at 1170. In his view, an additional demand that plaintiffs "follo[w] the decisionmaker's administrative procedures" would "ris[k] 'establish[ing] an exhaustion requirement for §1983 takings claims,' something the law does not allow." *Ibid.* And when the Ninth Circuit declined to rehear the case en banc, Judge Collins dissented along the same lines. He expressed concern that "the panel's unprecedented decision sharply depart[ed] from settled law and directly contravene[d] . . . *Knick*" by "impos[ing] an impermissible exhaustion requirement." 977 F. 3d 928, 929, 934 (2020).

II

We, too, think that the Ninth Circuit's view of finality is incorrect. The finality requirement is relatively modest. All a plaintiff must show is that "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" *Suitum*, 520 U. S., at 739 (brackets omitted).

In this case, there is no question about the city's position:

Petitioners must "execute the lifetime lease" or face an "enforcement action." Brief for Respondents 9. And there is no question that the government's "definitive position on the issue [has] inflict[ed] an actual, concrete injury" of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government. *Williamson County*, 473 U. S., at 193.

The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary. This requirement ensures that a plaintiff has actually "been injured by the Government's action" and is not prematurely suing over a hypothetical harm. *Horne*, 569 U. S., at 525. Along the same lines, because a plaintiff who asserts a regulatory taking must prove that the government "regulation has gone 'too far,'" the court must first "kno[w] how far the regulation goes." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348 (1986). Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution.

The Ninth Circuit's contrary approach—that a conclusive decision is not "final" unless the plaintiff *also* complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits. Petitioners brought their takings claim under §1983, which "guarantees 'a federal forum for claims of unconstitutional treatment at the hands of state officials.'" *Knick*, 588 U. S., at ___ (slip op., at 2). That guarantee includes "the settled rule" that "exhaustion of state remedies is *not* a prerequisite to an action under . . . §1983." *Ibid.* (internal quotation marks omitted). In fact, one of the reasons *Knick* gave for rejecting *Williamson County*'s state-compensation requirement is that this rule had "effectively established an exhaustion requirement for §1983 takings claims." *Knick*, 588 U. S., at ___ (slip op., at 12).

The Ninth Circuit's demand that a plaintiff seek "an exemption through the prescribed [state] procedures," 952

F. 3d, at 1167, plainly requires exhaustion. In fact, this rule mirrors our administrative-exhaustion doctrine, which "provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford* v. *Ngo*, 548 U. S. 81, 88–89 (2006) (internal quotation marks omitted). As we have often explained, this doctrine requires "*proper* exhaustion"—that is, "compliance with an agency's deadlines and other critical procedural rules." *Id.,* at 90 (emphasis added). Otherwise, parties who would "prefer to proceed directly to federal court" might fail to raise their grievances in a timely fashion and thus deprive "the agency [of] a fair and full opportunity to adjudicate their claims." *Id.,* at 89–90. Or, in the words of the Ninth Circuit below, parties might "make an end run . . . by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant." 952 F. 3d, at 1166.

Whatever policy virtues this doctrine might have, administrative "exhaustion of state remedies" is not a prerequisite for a takings claim when the government has reached a conclusive position. *Knick*, 588 U. S., at ___ (slip op., at 2). To be sure, we have indicated that a plaintiff's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision. See, *e.g., Williamson County*, 473 U. S., at 192–194 ("The Commission's refusal to approve the preliminary plat . . . leaves open the possibility that [the plaintiff] may develop the subdivision according to the plat after obtaining the variances"); *Knick*, 588 U. S., at ___ (slip op., at 5) ("[T]he developer [in *Williamson County*] still had an opportunity to seek a variance from the appeals board"); cf. *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 624–625 (2001) (dismissing accusations that the plaintiff was "employing a hide the ball strategy" when "submission of

[a] proposal would not have clarified the extent of development permitted . . . , which is the inquiry required under our ripeness decisions"). But, contrary to the Ninth Circuit's view, administrative missteps do not defeat ripeness once the government has adopted its final position. See *Williamson County*, 473 U. S., at 192–193 (distinguishing its "finality requirement" from traditional administrative "exhaust[ion]"). It may very well be, as Judge Bea observed, that misconduct during the administrative process is relevant to "evaluating the *merits* of the . . . clai[m]" or the measure of damages. 952 F. 3d, at 1170, n. 2 (dissenting opinion); cf. *Palazzolo*, 533 U. S., at 625. For the limited purpose of ripeness, however, ordinary finality is sufficient.

Of course, Congress always has the option of imposing a strict administrative-exhaustion requirement—just as it has done for certain civil-rights claims filed by prisoners. See 42 U. S. C. §1997e(a); *Ngo*, 548 U. S., at 84–85 ("Before 1980, prisoners asserting constitutional claims had no obligation to exhaust administrative remedies"). But it has not done so for takings plaintiffs. Given that the Fifth Amendment enjoys "full-fledged constitutional status," the Ninth Circuit had no basis to relegate petitioners' claim "'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick*, 588 U. S., at ___ (slip op., at 6).

* * *

For the foregoing reasons, we grant the petition for a writ of certiorari, vacate the judgment of the Ninth Circuit, and remand the case for proceedings consistent with this opinion.

It is so ordered.

Attachment 2

Standing Akimbo, LLC v. United States, No. 20–645

SUPREME COURT OF THE UNITED STATES

STANDING AKIMBO, LLC, ET AL., *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 20–645. Decided June 28, 2021

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

Sixteen years ago, this Court held that Congress' power to regulate interstate commerce authorized it "to prohibit the local cultivation and use of marijuana." *Gonzales* v. *Raich*, 545 U. S. 1, 5 (2005). The reason, the Court explained, was that Congress had "enacted comprehensive legislation to regulate the interstate market in a fungible commodity" and that "exemption[s]" for local use could undermine this "comprehensive" regime. *Id.*, at 22–29. The Court stressed that Congress had decided "to prohibit *entirely* the possession or use of [marijuana]" and had "designate[d] marijuana as contraband for *any* purpose." *Id.,* at 24–27 (first emphasis added). Prohibiting any intrastate use was thus, according to the Court, "'necessary and proper'" to avoid a "gaping hole" in Congress' "closed regulatory system." *Id.,* at 13, 22 (citing U. S. Const., Art. I, §8).

Whatever the merits of *Raich* when it was decided, federal policies of the past 16 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.

This case is a prime example. Petitioners operate a med-

ical-marijuana dispensary in Colorado, as state law permits. And, though federal law still flatly forbids the intrastate possession, cultivation, or distribution of marijuana, Controlled Substances Act, 84 Stat. 1242, 1247, 1260, 1264, 21 U. S. C. §§802(22), 812(c), 841(a), 844(a),[1] the Government, post-*Raich*, has sent mixed signals on its views. In 2009 and 2013, the Department of Justice issued memorandums outlining a policy against intruding on state legalization schemes or prosecuting certain individuals who comply with state law.[2] In 2009, Congress enabled Washington D. C.'s government to decriminalize medical marijuana under local ordinance.[3] Moreover, in every fiscal year since 2015, Congress has prohibited the Department of Justice from "spending funds to prevent states' implementation of their own medical marijuana laws." *United States* v. *McIntosh*, 833 F. 3d 1163, 1168, 1175–1177 (CA9 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law).[4] That policy

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[1] A narrow exception to federal law exists for Government-approved research projects, but that exception does not apply here. 84 Stat. 1271, 21 U. S. C. §872(e).

[2] See Memorandum from Dep. Atty. Gen. to Selected U. S. Attys., Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); Memorandum from Dep. Atty. Gen. to All U. S. Attys., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013). In 2018, however, the Department of Justice rescinded those and three other memorandums related to federal marijuana laws. Memorandum from U. S. Atty. Gen. to All U. S. Attys., Marijuana Enforcement (Jan. 4, 2018). Despite that rescission, in 2019 the Attorney General stated that he was "'accepting the [2013] Memorandum for now.'" Somerset, Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition, Forbes, Apr. 15, 2019.

[3] See Congress Lifts Ban on Medical Marijuana for Nation's Capitol, Americans for Safe Access, Dec. 13, 2009.

[4] Despite the Federal Government's recent pro-marijuana actions, the Attorney General has declined to use his authority to reschedule marijuana to permit legal, medicinal use. *E.g., Krumm* v. *Holder*, 594 Fed. Appx. 497, 498–499 (CA10 2014) (citing §811(a)); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688

has broad ramifications given that 36 States allow medicinal marijuana use and 18 of those States also allow recreational use.[5]

Given all these developments, one can certainly understand why an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana. See, *e.g.,* Halper, Congress Quietly Ends Federal Government's Ban on Medical Marijuana, L. A. Times, Dec. 16, 2014. One can also perhaps understand why business owners in Colorado, like petitioners, may think that their intrastate marijuana operations will be treated like any other enterprise that is legal under state law.

Yet, as petitioners recently discovered, legality under state law and the absence of federal criminal enforcement do not ensure equal treatment. At issue here is a provision of the Tax Code that allows most businesses to calculate their taxable income by subtracting from their gross revenue the cost of goods sold *and* other ordinary and necessary business expenses, such as rent and employee salaries. See 26 U. S. C. §162(a); 26 CFR. 1.61–3(a) (2020). But because of a public-policy provision in the Tax Code, companies that deal in controlled substances prohibited by federal law may subtract only the cost of goods sold, not the other ordinary and necessary business expenses. See 26 U. S. C. §280E. Under this rule, a business that is still in the red after it pays its workers and keeps the lights on might nonetheless owe substantial federal income tax.

As things currently stand, the Internal Revenue Service is investigating whether petitioners deducted business expenses in violation of §280E, and petitioners are trying to

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(2016).

[5] Hartman, Cannabis Overview, Nat. Conference of State Legislatures (June 22, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx. The state recreational use number does not include South Dakota, where a state court overturned a ballot measure legalizing marijuana. *Ibid.*

prevent disclosure of relevant records held by the State.[6] In other words, petitioners have found that the Government's willingness to often look the other way on marijuana is more episodic than coherent.

This disjuncture between the Government's recent laissez-faire policies on marijuana and the actual operation of specific laws is not limited to the tax context. Many marijuana-related businesses operate entirely in cash because federal law prohibits certain financial institutions from knowingly accepting deposits from or providing other bank services to businesses that violate federal law. Black & Galeazzi, Cannabis Banking: Proceed With Caution, American Bar Assn., Feb. 6, 2020. Cash-based operations are understandably enticing to burglars and robbers. But, if marijuana-related businesses, in recognition of this, hire armed guards for protection, the owners and the guards might run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a "drug trafficking crime." 18 U. S. C. §924(c)(1)(A). A marijuana user similarly can find himself a federal felon if he just possesses a firearm. §922(g)(3). Or petitioners and similar businesses may find themselves on the wrong side of a civil suit under the Racketeer Influenced and Corrupt Organizations Act. See, *e.g.*, *Safe Streets Alliance* v. *Hickenlooper*, 859 F. 3d 865, 876–877 (CA10 2017) (permitting such a suit to proceed).

I could go on. Suffice it to say, the Federal Government's current approach to marijuana bears little resemblance to

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[6] In their petition for a writ of certiorari, petitioners contend that the lack of a deduction for ordinary business expenses causes the tax to fall outside the Sixteenth Amendment's authorization of "taxes on incomes." Therefore, they contend the tax is unconstitutional. That argument implicates several difficult questions, including the differences between "direct" and "indirect" taxes and how to interpret the Sixteenth Amendment. Cf. *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 570–571 (2012); *Taft* v. *Bowers*, 278 U. S. 470, 481–482 (1929). In light of the still-developing nature of the dispute below, I agree with the Court's decision not to delve into these questions.

the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow States to act "as laboratories" "'and try novel social and economic experiments,'" *Raich*, 545 U. S., at 42 (O'Connor, J., dissenting), then it might no longer have authority to intrude on "[t]he States' core police powers . . . to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid.* A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach.