No. 20-71433

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; MERRICK B. GARLAND, ATTORNEY GENERAL; ANNE MILGRAM, ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION,

Respondents

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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1. In *Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993), the Supreme Court held that "[w]hile federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, [5 U.S.C. § 704], by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which *the statute or rule clearly mandates*." (emphasis added). Thus, in Administrative Procedure Act (APA) cases, "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final'." *Id.* at 154.

This is an APA case. *See* Op. 15 (noting § 704's applicability); Pet. for Rev. 2. Petitioners seek review of a final agency decision. *See* Op. 15 (finality is undisputed). And neither statute nor rule "clearly mandates" exhaustion. *See* Op. 13 (the Controlled Substances Act (CSA) "does not, in terms, require exhaustion"). Yet the Panel Opinion (Opinion) imposed exhaustion anyway as "judge-made law" because it did not think this was "an appropriate case" for judicial review "under the circumstances." Op. 15-16.

The panel erred. There is no "under the circumstances" or "appropriate[ness]" exception to binding Supreme Court precedent. The en banc Court should vacate the panel's dismissal because it is a direct affront to *Darby* and § 704, and it creates circuit splits on fundamental APA issues.

2. The Opinion also presents issues of exceptional societal and jurisprudential importance. Substantively, Petitioners asked this Court to re-examine a key misinterpretation of the CSA's text that fuels the divide between federal and state medical marijuana laws.

But don't be fooled. This case isn't just about pot. It is about fundamental administrative law questions with weighty separation of powers implications: *When* is judicial review of final agency action available? *Who* may obtain it? And *which branch* says what the law is?

In his statement in *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021), Justice Thomas lamented the untenable chasm between state and federal marijuana laws and the "half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana." This case illustrates, unfortunately, that judicial mistakes on these fundamental questions shoulder blame. In the early nineties, the D.C. Circuit misapplied *Chevron* deference to ignore the CSA's text. Here, the panel erred by applying prudential exhaustion to ignore *Darby* and the APA's text.

This Court should grant the petition, discharge the judicial duty to say what the law is, and set aside unlawful agency action.

BACKGROUND

I. Congress tentatively placed marijuana in Schedule I—the CSA classification reserved for drugs with "no currently accepted medical use in treatment in the United States," 21 U.S.C. § 812(b)(1)(B)—because in 1970, marijuana had no accepted medical use. Br. 22. Simultaneously, it enacted a flexible, public, and formal rulemaking process to gather evidence from FDA, medical authorities, the industry, and experts to reschedule marijuana if the situation changed. Br. 20-22.

The situation changed. But marijuana remains in Schedule I because 30 years ago, DEA rewrote § 812(b)(1)(B).

Shortly after the tentative placement, organizations petitioned DEA's predecessor to initiate rescheduling. *See* Br. 26-27, 29. Those proceedings spanned two decades and included four D.C. Circuit remands and two ALJ hearings. *See id.* Toward their end, an ALJ concluded that marijuana had a "currently accepted medical use" and should be reclassified. *See id.*

DEA rejected that recommendation. Instead, it rewrote "currently accepted medical use in treatment in the United States," to effectively require FDA approval. Br. 30 (citing 1.ER.170-72). In the final order explaining the rationale for that standard, DEA's Administrator admitted it was incompatible with 21 U.S.C. § 812(b)(1)'s plain language but imposed it

anyway, insisting that the statutory text was "inconsistent with scientific reality." Br. 63 (citing 1.ER.170, 57 Fed. Reg. 10,499, 10,504 (Mar. 26, 1992)). The D.C. Circuit waived the *Chevron* ambiguity flag without opening its judicial toolkit. *Compare Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 939 (D.C. Cir. 1991) ("[Because] neither the statute nor its legislative history precisely defines the term 'currently accepted medical use' … we are *obliged to defer*.") *with Medina Tovar v. Zuchowski*, 982 F.3d 631, 634-35 (9th Cir. 2020) (en banc) ("To maintain the proper separation of powers … we must exhaust all the traditional tools of construction before we wave the ambiguity flag.") (quot. omitted).

No court exhausting tools of construction could bless DEA's rewrite. Among other things, it introduces flagrant and acknowledged surplusage. *See* 1.ER.170, 57 Fed. Reg. at 10,504 (stating that while statutory "scheduling criteria appear to treat the lack of medical use and lack of safety as separate considerations …. In retrospect, this is inconsistent with scientific reality."). Unfortunately, the only time judicial review occurred was in an era of reflexive *Chevron* deference.

II. This improvident statutory rewrite has gutted the flexible rulemaking process Congress designed. Today, DEA jettisons marijuana rescheduling petitions because under its rewrite, marijuana is *inherently* a

Schedule I drug. *See* Br. 31-33; 72. Indeed, widespread state acceptance of medical marijuana and current "medical use in treatment" are categorically irrelevant under its counter-textual reading of § 812(b)(1)(B). *E.g.*, *Ams. for Safe Access v. DEA*, 706 F.3d 438, 440 (D.C. Cir. 2013) (emphasizing DEA's view that state acceptance is irrelevant (quoting DEA Br. at 23)).

Worse, these petitions languish for years. *See* Br. 28-35; *Washington v. Barr*, 925 F.3d 109, 120 (2d Cir. 2019) (average: **nine**). Sometimes a mandamus petition is needed to dislodge them. *See In re: Coalition to Reschedule Cannabis, et al.*, No. 11-5121, 2011 U.S. App. LEXIS 20972 (D.C. Cir. Oct. 14, 2011). Persons aggrieved by DEA's unlawful policy therefore have, on average, just 30 days twice a decade to seek judicial review. *See* 21 U.S.C. § 877 ("any person aggrieved" may petition for review within 30 days after notice of decision). Hence, DEA's counter-textual monstrosity escapes judicial review, and the problems Justice Thomas identified fester.

III. In the historically anomalous case of the one-page handwritten petition at issue here, DEA's final denial arrived in four months. Steven Zyszkiewicz petitioned DEA from prison in January 2020, raising one unassailable original public meaning argument:

> [T]he current situation of cannabis in Schedule I is completely untenable. *Half the states allow for medical use* ...

Br. 44 (citing 1.ER.1). DEA issued a firm denial (the "2020 decision," 1.ER.2) that incorporated its decision denying a 2011 petition (1.ER.6-7, 81 Fed. Reg. 53,688 at 688-89 (Aug. 12, 2016)). It states the key issues with precision:

1. DEA's duty under 21 U.S.C. § 811(d)(1) to ensure compliance with treaty obligations requires maintaining marijuana in Schedules I or II. It therefore need not consider statutory findings other than whether marijuana has a "currently accepted medical use in treatment in the United States."

2. Marijuana has "no currently accepted medical use in treatment in the United States" under DEA's counter-textual "five-part test."

IV. Zyszkiewicz is not a petitioner. Petitioners are Dr. Suzanne Sisley, Scottsdale Research Institute, LLC ("SRI"), SRI's non-profit arm, and three veterans. Dr. Sisley and SRI have been at the vanguard of marijuana research for over a decade. *See* Br. 35-40. They are not marijuana advocates. They are federally licensed marijuana researchers and manufacturers who have done everything by the book for *ten* years only to have their research stymied by the regulatory issues identified in this case. *Id.*; Reply 11-16. They are substantively and procedurally aggrieved by DEA's 2020 decision. *See id.*

Because DEA no longer publishes § 811 petitions it receives for comment, Petitioners learned of the 2020 decision from Zyszkiewicz. Br. 45. Petitioners timely petitioned for review and requested the decision be set aside under the APA because:

1. DEA's "five-part test" construction of "no currently accepted medical use in treatment in the United States" contravenes § 812(b)(1)(B)'s plain language. Br. 47-69.

2. Section 811(d)(1) delegates to the World Health Organization authority to make determinations binding on the United States in violation of the private non-delegation doctrine. Br. 76-81; Reply 39-41.

Pet. for Rev. 10, 15. Petitioners wrote 20 pages supporting Zyszkiewicz's ordinary public meaning reading of the statute and refuting DEA's counter-textual monstrosity. Br. 47-67.

The government had little to say. It could not, for example, muster a dictionary definition in defense of the five-part test. Instead, it trotted out *Chevron*. Resp. 32-38. And to further avoid having this Court saying what the law is, it focused on jurisdictional issues. Resp. 14-28. Petitioners' response relied on *Darby*, § 877's text, and the fact that pure legal challenges—especially structural constitutional ones—do not require exhaustion. Reply 23-29, 43 n.5; OA 7:48-8:16, 32:45-33:29 ("I would stand on *Darby* ....").

Rather than declare DEA's "five-part test" interpretation unlawful and remand for the agency to evaluate the 2020 petition under a lawful standard, the panel avoided saying what the law is by fashioning a prudential exhaustion requirement that it acknowledged is not clearly mandated by statute or regulation. Op. 13, 15-16.

A squarer *Darby* violation is hard to fathom, which may explain why the Opinion never cites *Darby*. The Opinion's silence on how DEA can grant relief on Petitioners' private non-delegation claim also speaks volumes.

REASONS FOR GRANTING THE PETITION

I. The Opinion Violates *Darby* and Other Controlling Precedents.

1. The Opinion defies § 704 and *Darby*

Every regional circuit, including this one, has concluded *Darby* means what it says: where it applies, § 704 of the APA forecloses prudential exhaustion. *E.g.*, *Alto Dairy v. Veneman*, 336 F.3d 560, 568 (7th Cir. 2003) (Posner, J.); *Trafalgar Cap. Assocs., Inc. v. Cuomo,* 159 F.3d 21 (1st Cir. 1998); *Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90 (2d Cir. 1998); *Jie Fang v. Dir. United States Immigr. & Customs Enf't*, 935 F.3d 172 (3d Cir. 2019); *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324 (4th Cir. 1995); *United States v. Menendez*, 48 F.3d 1401 (5th Cir. 1995); *Bangura v. Hansen*, 434 F.3d 487 (6th Cir. 2006); *Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466 (8th Cir. 1995); *Young v. Reno*, 114 F.3d 879 (9th Cir. 1997); *Hanson v. Wyatt*, 552 F.3d 1148 (10th Cir. 2008); *Mejia Rodriguez v. Dep't of Homeland Security*, 562 F.3d 1137 (11th Cir. 2009); *Qualcomm Inc. v. Intel*

Corp., 6 F.4th 1256 (Fed. Cir. 2021); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009) (Tatel, J.).[1]

The Opinion acknowledges each prerequisite to *Darby*'s application: (1) this is an APA case, Op. 15; (2) the 2020 decision was final, *id.*; and (3) neither statute nor DEA regulation clearly mandates exhaustion, *see* Op. 13. By creating an exhaustion requirement, the Opinion's holding directly contradicts *Darby*'s command, 509 U.S. at 154, that "courts are not free to impose an exhaustion requirement as a rule of judicial administration" once agency action has become final:

Holdings: The Court of Appeals, Fletcher, Circuit Judge, held that:

1 organizations and veterans asserted a direct and particularized interest in rescheduling marijuana in all of its forms, and therefore had Article III standing to challenge DEA's denial of inmate's handwritten petition, and

2 even if DEA's response to inmate's petition was a denial of that petition and a final agency decision under the Administrative Procedure Act (APA), organizations and veterans failed to exhaust administrative remedies, as required to judicially challenge DEA's response.

Petition dismissed.

Watford, Circuit Judge, filed separate opinion concurring.

Procedural Posture(s): Review of Administrative Decision.

The panel thus repeats the error corrected last Term in *Pakdel*. There, this Court "sharply depart[ed] from settled law" and "directly contravene[d]

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[1] In *CSX Transport*, the panel admitted a *Darby* mistake and on rehearing, correctly concluded that courts have "no authority" to impose exhaustion after agency action becomes final.

the Supreme Court's decision" in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) by imposing exhaustion to bar review of a § 1983 takings claim. *Pakdel v. City & Cty. of San Francisco*, 977 F.3d 928, 929 (9th Cir. 2020) (Collins, J. dissenting from reh'g en banc). Just months after a GVR, *Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226 (2021), this panel disregards binding precedent in a different context that identically forecloses exhaustion. The 2020 decision is equally "conclusive" and therefore reviewable under § 877.

In short, *Darby* is the APA's *Knick*.

b. Without mentioning *Darby*, the Opinion cites two non-APA cases: *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019) and *McCarthy v. Madigan*, 503 U.S. 140 (1992). Both confirm its error.

Darby explains that § 704 renders *McCarthy* inapplicable in APA cases. 509 U.S. at 153-54 (discussing *McCarthy*). And while *Washington* involves an unsuccessful CSA challenge, the similarities end there. Because the Opinion concludes otherwise, however, Op. 13-14, this point deserves emphasis: like *McCarthy*, ***Washington* is not an APA case**. It was a constitutional challenge brought in district court.

If *McCarthy* or *Washington* could apply to this APA case (they cannot), prudential exhaustion's exceptions would, too. Many apply here, as

Petitioners explained. Reply at 25-29. The Opinion chides Petitioners for not offering "convincing" reasons to excuse their supposed failure to exhaust, Op. 16, without addressing the reasons they gave.

Consider, for example, that Petitioners cannot exhaust their constitutional claim—that § 811(d)(1), which requires DEA to schedule drugs based on decisions of the World Health Organization, is a private delegation of legislative power. Because DEA lacks authority to declare § 811(d)(1) unconstitutional, it is not subject to exhaustion. *E.g.*, *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021).

This also refutes the notion that a future § 811(a) petition would somehow permit DEA to remedy the irreparable harm Petitioners have already suffered. It could not.[2] And given DEA's insistence that state acceptance is irrelevant to "currently accepted medical use," any future § 811(a) petition would be futile anyway. Reply at 26 (citing *Herr v. United States Forest Serv.*, 803 F.3d 809, 822 (6th Cir. 2015) (Sutton, J.) (exhaustion "futile" where agency previously rejected similar challenge)).

The Opinion makes three other mistakes.

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[2] *See* Supp. Sisley Decl. ¶¶ 6-12.

First, it faults Petitioners for not joining Zyszkiewicz's petition before DEA. Op. 5. But DEA's failure to publish the petition made this impossible. *See Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) (excusing exhaustion where agency's mistake made doing so impossible).

Second, the Opinion faults Petitioners for not intervening in Zyszkiewicz's untimely and futile judicial petitions. Op. 10. This criticism is irrelevant to exhaustion and overlooks the fact that Zyszkiewicz filed *after* Petitioners filed in this Court.

Third, the Opinion claims Petitioners ignored Zyszkiewicz's public-meaning argument. Op. 5. In fact, it was the centerpiece of their opening brief. *See* Br. 47-67. To the extent the Opinion suggests non-jurisdictional *issue* exhaustion bars review, that argument was both waived and foreclosed by Supreme Court precedent. Reply 27-29; *see also Carr*, 141 S. Ct. at 1360.

2. The Opinion rewrites § 877 and disregards APA precedent.

The Opinion speaks in terms of exhaustion—a doctrine focused on the *timing* of judicial review—when in fact it silently limits *who* can seek review by rewriting the judicial-review statute.

According to the Opinion, only the *party* who files the petition under § 811(a) can obtain judicial review of any resulting final DEA decision. Op. 14. But § 877 extends judicial review to "any *person*"—not party—

"aggrieved." This language invokes the familiar test where any person within the zone-of-interests of the specific statute at issue may seek judicial review. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987). That is significant. It permits a class of affected non-parties to protest an agency's "disregard of the law." *Id.* at 397-403.[3]

For example, in *Pacific Maritime Association v. NLRB*, 827 F.3d 1203, 1211 (9th Cir. 2016), this Court explained that the "person aggrieved" standard in § 10(f) of the National Labor Relations Act—a provision virtually identical to § 877—permitted a non-party to seek judicial review "even without intervention." *Id.* at 1211 (citing 29 U.S.C. § 160(f)). "[P]arty status [was] not necessary," this Court held, because "[t]he Act nowhere requires an aggrieved person to have been a party to the underlying proceeding." *Id.*

Likewise, in *Simmons v. ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983), then-Judge Scalia noted that the phrase "party aggrieved" required agency-level participation and rejected an argument equating "party aggrieved" with "person aggrieved." *Accord Sierra Club v. U.S. Nuclear Regul. Comm'n*, 825 F.2d 1356, 1360 (9th Cir. 1987). By implication, "person aggrieved" must not require agency-level participation, contrary to the Opinion's conclusion.

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[3] To permit industry and registrant participation, § 811(a) requires on-the-record *formal* rulemaking. That defines the zone-of-interests.

The Opinion's departure from this settled interpretation creates a square circuit split in the § 877 context. In *Bonds v. Tandy*, 457 F.3d 409, 414-16 & n.10 (5th Cir. 2006), the Fifth Circuit considered and rejected the Opinion's party-only view of § 877. Limiting judicial review to those "who participated in the agency proceeding," it held, is inconsistent with the Supreme Court's "more expansive interpretation of similar language." *Id.* at n.10 (discussing cases).

The Opinion also flips the APA's strong presumption of reviewability by mischaracterizing Petitioners' requested relief. Petitioners seek APA review of *DEA's 2020 decision*—not "judicial decisionmaking in the first instance" as the Opinion claims. Op. 14; *contra* Op. 5 (acknowledging that Petitioners "seek judicial review of the DEA's response to Zyszkiewicz's petition"). Because of this mischaracterization, the Opinion demands Petitioners waste resources[4] instituting and waiting on a separate action—filing another § 811(a) petition—that could not possibly redress the only harms they complain of: those stemming from DEA's unlawful 2020 decision. As Judge Sutton explained in *Herr*, while that might give rise to a

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4 *See* Supp. Sisley Decl. ¶¶ 6-12.

separate, future right of action, 803 F.3d at 820, it would leave DEA's unlawful 2020 decision unreviewable *forever*.

All this ignores the congressional design and destroys the "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). *See also Kucana v. Holder*, 558 U.S. 233, 237 (2010) (Ginsburg, J.) ("Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain").

II. The Administrative Law Issues Are Important.

In *Jones v. Bock*, the Supreme Court unanimously held that in "crafting and imposing" exhaustion requirements "not required by the [Prison Litigation Reform Act]," the Sixth Circuit had "exceed[ed] the proper limits on the judicial role." 549 U.S. 199, 203 (2007). "Whatever temptations the statesmanship of policymaking might wisely suggested … the judge's job is to construe the statute—not to make it better." *Id.* at 217 (cleaned up). The Court said the same of the APA in *Darby*: permitting courts "to impose additional exhaustion requirements beyond those provided by Congress or the agency …. would transform § [704] from a provision designed to remove obstacles to judicial review of agency action, into a trap for unwary litigants." 509 U.S. at 146-47 (cleaned up).

The Opinion's defiance of *Darby* alone warrants rehearing. *See* Fed. R. App. P. 35(b)(1); *e.g.*, *CSX Transport*, 584 F.3d at 1078-79. That the legal issues also have societal importance underscores the urgency. *See Standing Akimbo*, 141 S. Ct. at 2238 (Thomas, J. respecting denial of cert.); *see also* Br. 34, 37-39 (widespread societal issues).

The Opinion's references to the "circumstances of this case" will not cabin the consequences of its errors. "Any person aggrieved" (or some variant) appears in countless judicial-review provisions "dating back at least to the Federal Communications Act of 1934." *See Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995) (citing statutes). There is widespread agreement that these words extend judicial review to *non-party* persons aggrieved within the relevant statute's zone-of-interests. *See supra* 15 (discussing cases). As far as Petitioners are aware, the Opinion is the *first* federal appellate court decision to conclude otherwise.

Because this language appears in many other federal statutes *and* the default APA, departing from long-settled interpretations threatens discord and upheaval across this Court's outsized administrative-law docket. Prudential exhaustion is, apparently, now fair game in APA cases. Put simply, the Opinion's endorsement of a new "under the circumstances" or

"appropriate[ness]" exhaustion requirement lays the "trap for unwary litigants" in APA cases that the Supreme Court cautioned about in *Darby*.

Darby ensures that persons aggrieved "know precisely what administrative steps [a]re required before judicial review w[ill] be available," 509 U.S. at 146, and incentivizes *agencies*—not *courts*—to create clear exhaustion rules. It is also a cornerstone of the "procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (quot. omitted). Section 702 embodies the strong presumption that agency action is reviewable by giving "*any* person adversely affected or aggrieved" a right to seek judicial review. *Darby* and § 704 prohibit courts from imposing exhaustion requirements beyond those "clearly mandated" by statute or rule to prevent the immediate exercise of that right once agency action is final.

This is the design our elected representatives chose to achieve the APA's animating principle: "the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure." H.R. Rep. No. 1149, 76th Cong., 1st Sess. 2 (1939). And with today's administrative state, these procedures are an especially important check against "administrative action that is in disregard of

legislative mandates." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (2000) (Thomas, J. dissenting).

III. This Case Is an "Appropriate" Vehicle.

Despite "the strength of petitioners' arguments," Op. 16 (Watford, J., concurring)—the panel abstains for one reason: DEA's conclusive response to a one-page pro se petition applying a longstanding unlawful standard isn't an "appropriate" vehicle to discuss serious issues like *Chevron*.

Petitioners beg to differ. In practice, an "interested" § 811(a) petitioning party often won't be in the best position—or any position—to challenge a denial. *See Gettman v. DEA*, 290 F.3d 430, 433-35 (D.C. Cir. 2002) (petitioning party lacked standing to challenge denial). The CSA thus contemplates one party initiating the process, and someone else—"any person aggrieved"—seeking judicial review. 21 U.S.C. § 877. Zyszkiewicz carried out that plan. He petitioned DEA, publicized his unlawful denial, and permitted other "person[s] aggrieved" to challenge a decision that leaves a "contradictory and unstable state of affairs" that "strains basic principles of federalism and conceals traps for the unwary" in its wake. *Standing Akimbo*, 141 S. Ct. at 2237 (Thomas, J. respecting denial of cert.).

We have good reason to stand by Zyszkiewicz's petition. *Moritz v. Comm'r*, 469 F.2d 466 (10th Cir. 1972) illustrates the point. Moritz appealed a perfunctory Tax Court decision (55 T.C. 113) that had invoked longstanding

law to deny him a $600 tax deduction because he was a single *male* caregiver. Then-advocate Ruth Bader Ginsburg and her husband Martin happened across the dismissive decision one night while reading tax advance sheets. They took the case pro-bono, and in a 35-page brief to the Tenth Circuit (1973 WL 391987), challenged the status quo by defending Moritz's one-page pro-se Tax Court brief, which in substance, said:

> Had I been a dutiful daughter, I could have taken this deduction. I'm a dutiful son. Why should that make any difference?

They described his brief as the "soul of simplicity" and commended its "remarkable … brevity and clarity."[5] Thankfully, they won, setting the first of many key equality precedents, among other things.

The "soul of simplicity" *Moritz* brief and the Zyszkiewicz petition are the same. Uncluttered by irrelevant facts, there is no better vehicle for deciding the pure legal issues Petitioners raised. All Petitioners asked this Court to do was "say what the law is," set aside an unlawful agency decision, and remand to DEA to conduct a lawful process. For these purposes, we admire the soul of simplicity of the Zyszkiewicz petition and the clarity it

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[5] Tr. of Interview of U.S. Associate Justice Ruth Bader Ginsburg, 70 Ohio St. L.J. 805, 809 (2009); *See* M. Ginsburg, *A Uniquely Distinguished Service*, 10 Green Bag 2d 173, 175-76 (2007).

brings regarding how far DEA strayed from statutory text under the cover of *Chevron*.

Since *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976) (citing *Cohens v. Virginia*, 6 Wheat. 264, 5 L.Ed. 257 (1821) (Marshall, J.)), the Supreme Court has repeatedly reminded lower courts of their "virtually unflagging obligation … to exercise the jurisdiction given them." Thus, whatever one thinks of Zyszkiewicz's petition, this much is clear: whether an APA case challenging final agency action arrives in a shoddy Toyota or a shiny Ferrari, barring a clear mandate to the contrary in a statute or rule, remedies exhaustion just doesn't matter. With the APA, Congress declared all final agency decisions "appropriate" vehicles for judicial review—even *this* one.

CONCLUSION

Either full-bodied textualism, *see Hewitt v. Helix Energy Sols. Grp., Inc.*, 2021 WL 4099598, at *13 (5th Cir. Sept. 9, 2021) (Ho, J. concurring) ("We follow the text where it leads."), or adherence to binding Supreme Court precedent, *see Hylton v. United States Att'y Gen.*, 992 F.3d 1154, 1161 (11th Cir. 2021) (Pryor, J.), requires disregard of irrelevant facts and consideration of this case on its merits. The panel instead summoned prudential exhaustion to chariot the administrative state away—leaving

statutory text, *Darby*, the strong presumption of judicial review, scientists, and countless infirm veterans staring up longingly from below.

Because the Opinion directly conflicts with multiple Supreme Court decisions; authoritative decisions this Court and every other circuit; and fundamental APA norms, this Court should grant the petition.

Dated: September 20, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No. 20-71433

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32 and 40 because it has been prepared in 14-point Georgia font and is proportionally spaced. I further certify that this brief complies with the type-volume limitation of Circuit Rule 40-1 because it contains 4,191 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f), according to Microsoft Word 2016.

Dated: September 20, 2021

/s/Matthew C. Zorn
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CERTIFICATE OF SERVICE

I certify that this document was filed with the Court via the court's electronic filing system, on the 20th day of September, 2021, and copy was served on all counsel of record, as listed below, via the Court's electronic filing system:

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SUPPLEMENTAL DECLARATION OF SUZANNE SISLEY, M.D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUZANNE SISLEY, M.D. ET AL., *Petitioners*, v. U.S. DRUG ENFORCEMENT ADMINISTRATION, ET AL., *Respondents*.	)	No. 20-71433

SUPPLEMENTAL DECLARATION OF SUZANNE SISLEY, M.D.

1. I am the President and Founder of Scottsdale Research Institute, LLC ("SRI"). SRI is an Arizona based limited liability company and clinical trials site dedicated to advancing the state of medical care through rigorous research located at 5436 E Tapekim Rd., Cave Creek, AZ 85331. SRI strives to conduct high quality, controlled scientific studies to ascertain the medical safety and efficacy of cannabis and examine forms of cannabis administration. SRI does not encourage recreational use of cannabis.

2. I am also a physician licensed to practice medicine in the State of Arizona and am in good standing. I completed my medical degree at the University of Arizona College of Medicine and did my residency at Good Samaritan Regional Medical Center in the fields of Internal Medicine and

Psychiatry. I also served as Clinical Faculty at St. Joseph's Hospital and Medical Center at the MercyCare Adult Medicine Clinic for indigent patients.

3. Earlier in July 2020 declaration submitted in this case, I described in detail my ten-year journey to conduct FDA approved clinical trials with cannabis and veterans with PTSD. I also explained how, despite SRI strictly complying with all DEA regulations, its application to cultivate cannabis stalled for four years due to issues relating to the Single Convention on Narcotic Drugs, which is explained in an NBCNews article I cited, "One doctor vs. the DEA: Inside the battle to study marijuana in America," at https://www.nbcnews.com/news/us-news/one-doctor-vs-dea-inside-battle-study-marijuana-america-n1195436.

4. I do not repeat that background here. Here, I briefly provide additional facts about events that have arisen since the oral argument that further describes the ongoing irreparable harm that SRI suffers due to marijuana's Schedule I classification under the CSA.

5. SRI is a registered researcher and manufacturer of Schedule I substances, including marijuana.

6. In late June 2021, SRI registered with DEA to become a domestic cultivator of marijuana. The company is one of just a handful of entities in the United States that is permitted to cultivate marijuana for research.

7. Because marijuana is a Schedule I or II drug, I understand that DEA must comply with certain statutory and regulatory requirements to maintain compliance with the Single Convention of Narcotic Drugs. The agency has explained to me that one of these requirements is that it must charge SRI a significant administrative fee per kilogram of cannabis grown. Over the course of a year, this administrative fee could cost SRI more than a hundred thousand dollars.

8. SRI is not a large company. It is a company that I wholly own and operate with few employees. SRI does not have institutional investors. At present, SRI can afford to pay administrative fees, but at great expense. These fees compromise SRI's ability to fund its important clinical research. The company does not currently have the assets to pay years' worth of administrative fees necessary for multiple clinical trials.

9. In addition, SRI faces significant burdens due to the Schedule I and II quota requirements. Because of these regulatory requirements, SRI cannot cultivate cannabis and have inventory on hand for research and clinical trials. Instead, it must submit quota and procurement requests to DEA before it can grow cannabis for its trials or for other researchers in the United States. Once quota/procurement requests are approved, the grow

cycle takes many months. This quota system significantly delays SRI's clinical trials and clinical trials for scientists around the country.

10. In addition, if cannabis is not suitable for the clinical trial for which the cannabis was initially requested, due to regulatory restrictions, SRI would not be able to remediate or repurpose the cannabis into a different formulation that could be acceptable to FDA. SRI must send all non-compliant material for destruction at further large additional expense to SRI.

11. This quota/procurement system significantly delays SRI's clinical trials and clinical trials for scientists around the country. I understand that the quota and procurement system is significantly different and less cumbersome for Schedule III substances.

12. SRI has not yet petitioned DEA for reclassification because, among other reasons, my understanding is that none the above-described burdens change if marijuana were reclassified from Schedule I to II. My understanding is that to obtain adequate relief from the burdens I have described above, marijuana would need to be reclassified into Schedule III or below. But I also understand that even if SRI were to petition DEA to reschedule marijuana, the agency cannot legally reclassify marijuana into Schedule III, because of 21 U.S.C. § 811(d)(1), which SRI contends is unconstitutional.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 20 September 2021.

Suzanne Sisley, M.D.

COPY OF PANEL DECISION

FOR PUBLICATION

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; MERRICK B. GARLAND, Attorney General; ANNE MILGRAM, Administrator, Drug Enforcement Administration, *Respondents.*	No. 20-71433 DEA No. DEA-427 OPINION

On Petition for Review of an Order of the
Drug Enforcement Agency

Argued and Submitted June 10, 2021
Seattle, Washington

Filed August 30, 2021

Before: William A. Fletcher, Paul J. Watford, and Daniel P. Collins, Circuit Judges.

Opinion by Judge W. Fletcher;
Concurrence by Judge Watford;
Concurrence by Judge Collins

SUMMARY*

Exhaustion / Controlled Substances Act

The panel dismissed a petition for review of a Drug Enforcement Agency ("DEA") letter responding to a request that the DEA reschedule marijuana in all of its forms under the Controlled Substances Act ("CSA").

Stephen Zyszkiewicz, a California state prisoner, joined by Jeramy Bowers, a medical cannabis patient, submitted a one-page handwritten petition to the DEA, seeking to reschedule marijuana. The DEA responded by letter, denying the request. Petitioners in this case are Dr. Suzanne Sisley, Scottsdale Research Institute, LLC, Battlefield Foundation, and three veterans, who filed in this court a petition for review of the DEA's response.

The panel held that petitioners had Article III standing. The panel rejected the government's contention that petitioners lacked standing because they only asserted a generalized grievance. Rather, petitioners contended that they suffered direct and particularized harms due to the misclassification of cannabis.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that petitioners failed to exhaust their administrative remedies with the DEA. Although the CSA does not, in terms, require exhaustion of administrative remedies, the panel agreed with the Second Circuit that the text and structure of the CSA show that Congress sought to favor administrative decisionmaking that required exhaustion under the CSA. Petitioners did not seek to join Zyszkiewicz's one-page petition or seek to intervene with respect to his petition to the DEA. In addition, petitioners did not raise the issue that Zyszkiewicz raised in his petition to the DEA, but instead raised two different arguments. The panel concluded that under the circumstances of this case petitioners had not exhausted their administrative remedies and had given no convincing reasons to excuse their failure to exhaust.

Judge Watford concurred. He wrote separately to note that in an appropriate case, the DEA may be obliged to initiate a reclassification proceeding for marijuana given the strength of petitioners' argument that the agency misinterpreted the CSA by concluding that marijuana has no currently accepted medical use in the United States.

Judge Collins concurred in Parts I, II(B), and III of the majority opinion. He did not join Part II(A), which concluded that petitioners had Article III standing to challenge the denial of Zyszkiewicz's handwritten petition to the DEA. Given that petitioners' failure to exhaust administrative remedies was dispositive here, there was no need to address petitioners' Article III standing.

COUNSEL

Matthew Zorn (argued), Yetter Coleman LLP, Houston, Texas; Shane Pennington (argued), Vicente Sederberg LLP, New York, New York; for Petitioners.

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OPINION

W. FLETCHER, Circuit Judge:

Stephen Zyszkiewicz, joined by Jeramy Bowers, filed a one-page, handwritten petition to the United States Drug Enforcement Administration ("DEA") seeking the rescheduling of marijuana in all of its forms under the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*. The DEA wrote a letter in response, stating that Zyszkiewicz's letter was not in the proper format for a petition but that it welcomed the opportunity to respond to his concerns. The DEA's letter gave reasons for having denied an earlier rescheduling petition filed by Governors Lincoln Chafee of Rhode Island and Christine Gregoire of Washington State. Zyszkiewicz treated the DEA's answer as a denial of his petition and unsuccessfully sought judicial review.

Dr. Suzanne Sisley, Scottsdale Research Institute, LLC ("SRI"), Battlefield Foundation (the non-profit research arm of SRI), and three veterans (collectively, "Petitioners") seek judicial review of the DEA's response to Zyszkiewicz's petition. Petitioners did not seek to intervene in Zyszkiewicz's petition before the DEA, nor have they filed a petition of their own before the DEA. The arguments Petitioners now seek to raise were not made in Zyszkiewicz's petition.

The government challenges Petitioners' standing and argues that Petitioners failed to exhaust their claims before the DEA. We hold that Petitioners satisfy Article III's standing requirements, but that they have failed to exhaust their administrative remedies under the CSA. We therefore

do not reach the merits of Petitioners' arguments. We dismiss their petition for review.

I. Background

A. The Controlled Substances Act

The Controlled Substances Act of 1970 places federally regulated substances into one of five schedules depending on the substance's "potential for abuse," "medical use," "safety," and likelihood of physical or psychological "dependence." *See* 21 U.S.C. § 812(b). Schedule I is the most restrictive schedule. Marijuana is currently a Schedule I substance. To merit scheduling in Schedule I, a substance must have "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision." *Id.* § 812(b)(1)(A), (B), (C). Schedule II requires, *inter alia*, that a substance have "a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions." *Id.* § 812(b)(2)(B). Schedules III through V each require, *inter alia*, "a currently accepted medical use in treatment in the United States." *Id.* § 812(b)(3)–(5).

The CSA authorizes the Attorney General through rulemaking proceedings to reclassify drugs by assigning them to less restrictive schedules, or to remove them from control entirely. 21 U.S.C. § 811(a). The Attorney General may initiate rulemaking proceedings "(1) on his own motion, (2) at the request of the [Department of Health and Human Services ("HHS")] Secretary, or (3) on the petition of any interested party." *Id.* The Attorney General has delegated this authority to the DEA Administrator.

Before initiating proceedings to control, reschedule, or remove a substance from control, the Attorney General must request (1) "a scientific and medical evaluation" and (2) a scheduling recommendation from the HHS Secretary. *Id.* § 811(b). "If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of [section 811] or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of [section 811]." *Id.* § 811(d)(1).

"[A]ny person aggrieved by a final decision of the Attorney General [under this subchapter] may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision." *Id.* § 877.

B. Zyszkiewicz's Petition to the DEA

Stephen Zyszkiewicz, a prisoner in Soledad State Prison in California, joined by Jeramy Bowers, a "medical cannabis epilepsy patient," submitted a one-page, handwritten petition to the DEA, dated January 3, 2020, seeking to reschedule marijuana or to remove it from the schedules. Zyszkiewicz stated in his petition that he was in prison after a conviction for selling cannabis. Zyszkiewicz's petition read, in relevant part:

> I hereby petition the US AG, DOJ, ONDCP, DEA and Congress to remove or reschedule cannabis (marijuana) in all its forms . . . .
>
> Petitioner finds the current situation of cannabis in Schedule I completely untenable. Half the states allow for medical use and the FDA allows CBD and THC pharmaceuticals as well as IND Compassionate Use.
>
> Under the Constitution and 21 USCS 811, 812 the continued war on drugs (cannabis) must be corrected by removing or rescheduling cannabis.

The DEA responded by letter to Zyszkiewicz's petition on April 22, 2020. The letter stated:

> . . . Although your letter is not in the proper format of a petition as outlined in Section 811 of the Federal Criminal Code, DEA appreciates the opportunity to address your concerns.
>
> On August 12, 2016, the Federal Register addressed similar concerns from a petition submitted on November 30, 2011, from the Honorable Lincoln D. Chafee and the Honorable Christine O. Gregoire. The above [governors] petitioned DEA to initiate rulemaking proceedings under the rescheduling provisions of the [CSA]. Specifically, they petitioned DEA to have marijuana and "related items" removed from

> schedule I of the CSA and rescheduled as medical cannabis in schedule II. They requested that DEA remove marijuana and related items from schedule I based on their assertion that: (1) Cannabis has accepted medical use in the United States; (2) Cannabis is safe for use under medical supervision; (3) Cannabis for medical purposes has a relatively low potential for abuse, especially in comparison with other schedule II drugs.
>
> In accordance with the CSA rescheduling provisions, after gathering the necessary data, DEA requested a scientific and medical evaluation and scheduling recommendation from [HHS]. HHS concluded that marijuana has a high potential for abuse, has no accepted medical use in the United States, and lacks an acceptable level of safety for use even under medical supervision. Therefore, HHS recommended that marijuana remain in schedule I. The scientific and medical evaluation and scheduling recommendation that HHS submitted to DEA is enclosed with this letter.
>
> Based on HHS's evaluation and all other relevant data, DEA has concluded that there is no substantial evidence that marijuana should be removed from schedule I. A document prepared by DEA addressing these materials in detail is also enclosed. In short, marijuana continues to meet the criteria for schedule I control under the CSA.

> In sum, DEA recognizes the possibility that drugs containing marijuana or its derivatives might, in the future, be proven to be safe and effective for the treatment of certain conditions and thus approved [] by the United States Food and Drug Administration for marketing. Until then, we will continue to identify opportunities to assist researchers in this area while never losing sight of the need to protect the public.

Zyszkiewicz petitioned for mandamus in the District Court for the District of Columbia. The district court denied mandamus, and the D.C. Circuit affirmed. *See Zyszkiewicz v. Barr*, No. CV 20-1599, 2020 WL 3572908 (D.D.C. June 30, 2020), *aff'd*, 831 F. App'x. 519 (D.C. Cir. 2020). Zyszkiewicz also petitioned for review directly to the D.C. Circuit, which denied the petition as untimely. Order, *Zyszkiewicz v. Barr*, No. 20-1308 (D.C. Cir. Jan. 25, 2021). Petitioners did not seek to join or to intervene in either of Zyszkiewicz's judicial petitions.

C. The Present Petition

On May 21, 2020, Petitioners filed in this court a petition for review of the DEA's response to Zyszkiewicz's petition. Petitioners argue (1) that the DEA's interpretation of "no currently accepted medical use" under 21 U.S.C. § 812(b)(1)(B) with respect to cannabis is arbitrary and capricious or otherwise contrary to law; and (2) that 21 U.S.C. § 811(d)(1) constitutes an unconstitutional delegation of legislative power. Neither of these arguments was made in Zyszkiewicz's petition.

The government moved to dismiss for failure to exhaust administrative remedies. A motions panel of this court denied the government's motion without prejudice to presenting the argument in its brief to the merits panel.

II. Discussion

The government makes two preliminary arguments: (1) that Petitioners lack standing under Article III and (2) that Petitioners have failed to exhaust their administrative remedies under the CSA. We conclude that Petitioners have Article III standing, but that they have failed to exhaust their administrative remedies. We therefore dismiss the petition without reaching the merits.

A. Article III Standing

Article III standing requires that a plaintiff demonstrate (1) an "injury in fact," (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotations omitted). "An injury in fact is an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) (quotation marks and alteration omitted) (citing *Lujan*, 504 U.S. at 560). "Because a generalized grievance is not a particularized injury, a suit alleging only generalized grievances fails for lack of standing." *Id.* "The fact that a harm is widely shared does not necessarily render it a generalized grievance." *Ecological Rts. Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1093 (9th Cir. 2017) (alteration omitted) (quoting *Novak*, 795 F.3d at 1018). "Rather, a

grievance too 'generalized' for standing purposes is one characterized by its 'abstract and indefinite nature—for example, harm to the common concern for obedience to law.'" *Id.* (quoting *Novak*, 795 F.3d at 1018).

The government argues that Petitioners lack Article III standing because they assert only a generalized grievance. Characterizing Petitioners' challenge as based on an asserted interest in the Executive Branch following the law, the government argues that Petitioners lack standing because that interest is common to all who may wish to reschedule controlled substances. The government may be right that such an interest is too generalized to warrant Article III standing, but Petitioners do not assert only a generalized harm. Rather, they contend they suffer direct and particularized harms due to the misclassification of cannabis. Dr. Sisley and her associated institutions contend that the misclassification impedes their research efforts, and the veterans contend that it forecloses their access to medical treatment with cannabis through the Department of Veterans Affairs. The government also argues Petitioners' claims rest "on the legal rights or interests of third parties." While it is undoubtedly true that the interests of third parties would be affected by a rescheduling of cannabis, this fact does not diminish Petitioners' direct and particularized interest in rescheduling. *See Americans for Safe Access v. DEA*, 706 F.3d 438, 445–49 (D.C. Cir. 2013).

We therefore conclude that Petitioners have Article III standing.

B. Failure to Exhaust

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law." *Woodford v. Ngo*, 548 U.S. 81, 88 (2006) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)); *see Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). "[P]roper exhaustion of administrative remedies . . . means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)." *Woodford*, 548 U.S. at 90 (quotations and emphasis omitted). "As a general rule . . . 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." *Id.* (alteration adopted and emphasis omitted) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

Where Congress has not clearly required exhaustion, courts may impose it as an act of "sound judicial discretion." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Our discretion requires "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court." *Id.* Any "fashioning of exhaustion principles" must be made "in a manner consistent with congressional intent and any applicable statutory scheme." *Id.*

The CSA does not, in terms, require exhaustion of administrative remedies. However, we agree with the Second Circuit that the text and structure of the CSA "show[] that Congress sought to favor administrative decisionmaking" and that requiring exhaustion under the CSA "is consistent with

congressional intent." *Washington v. Barr*, 925 F.3d 109, 116, 118 (2d Cir. 2019). As stated by the Second Circuit:

> The exhaustion requirement under the CSA is . . . prudential, not jurisdictional. It is not mandated by the statute. Rather, it is a judicially-created administrative rule, applied by courts in their discretion.

Id. at 119.

Section 811(a) tasks the Attorney General with scheduling, rescheduling, or removing from the schedules drugs or other substances by rulemaking. As we noted above, such proceedings "may be initiated by the Attorney General (1) on his own motion, (2) at the request of the [HHS] Secretary, *or (3) on the petition of any interested party*." 21 U.S.C. § 811(a) (emphasis added). Congress thus expressly authorized individuals to petition the DEA—not the courts directly—to schedule, reschedule, or remove a substance. The CSA prescribes steps for the Attorney General to follow before initiating proceedings, § 811(b), and details factors to consider in so doing, § 811(c). In § 877, the CSA provides for judicial review of final agency action, not judicial decisionmaking in the first instance. To require interested individuals to petition the DEA before seeking judicial review is consistent with—indeed almost demanded by—this carefully established statutory process. *See United States v. Cal. Care Corp.*, 709 F.2d 1241, 1248–49 (9th Cir. 1983) (requiring exhaustion where to do otherwise "would encourage the deliberate bypass of the administrative scheme").

In the case before us, Petitioners ask us either to conclude that their administrative remedies have been exhausted by Zyszkiewicz's one-page petition or to excuse their failure to exhaust. The government has not argued to us that the DEA's response to Zyszkiewicz's petition was not a denial of the petition, or that its response was not final agency action within the meaning of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 704. In light of the government's failure to make such arguments, we are willing to assume for present purposes that the DEA's response to Zyszkiewicz's petition was a denial of that petition and was final agency action under the APA, even though the DEA characterized its action as only an "opportunity to address [Zyszkiewicz's] concerns" rather than as a denial of the petition.

Petitioners did not seek to join Zyszkiewicz's one-page petition or seek to intervene with respect to his petition to the DEA. Zyszkiewicz advanced only one argument in his petition to the DEA. Petitioners ignore that argument; instead, they advance two different arguments. Petitioners were asked during oral argument before our court why they did not file their own petition with the DEA and then seek review if the DEA denied their petition. They responded that that process would take too long, even though Zyszkiewicz's petition was filed in January 2020, and the DEA responded to that petition in April 2020. Oral Argument at 31:54–33:19, *Sisley v. DEA*, No. 20-71433 (9th Cir. June 10, 2021).

Recognizing that administrative exhaustion under the CSA is judge-made law, "applied by courts in their discretion," *Washington*, 925 F.3d at 119, we hold, under the circumstances of this case, that Petitioners have not exhausted

their administrative remedies and have given no convincing reason to excuse their failure to exhaust. We are well aware that reclassification of cannabis is a matter of ongoing active debate. However, this is not an appropriate case in which to consider that issue.

III. Conclusion

Petitioners seek to bypass the normal administrative process by seeking review of the DEA's response to Zyszkiewicz's petition and then seeking to make arguments never advanced by Zyszkiewicz. Nothing prevents Petitioners from filing a petition of their own before the DEA, raising the arguments they seek to raise before us now. Because Petitioners have failed to exhaust their administrative remedies with the DEA, their petition for judicial review is

DISMISSED.

WATFORD, Circuit Judge, concurring:

I agree that the petitioners in this case failed to exhaust their administrative remedies and therefore join the court's opinion dismissing their petition for review. I write separately to note that, in an appropriate case, the Drug Enforcement Administration may well be obliged to initiate a reclassification proceeding for marijuana, given the strength of petitioners' arguments that the agency has misinterpreted the controlling statute by concluding that marijuana "has no

currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(B).

COLLINS, Circuit Judge, concurring in part:

I concur in Parts I, II(B), and III of the majority opinion, which provide fully sufficient grounds for dismissing the petition in this case. I do not join Part II(A), which concludes that Petitioners have Article III standing to challenge the denial of Zyszkiewicz's handwritten petition to the U.S. Drug Enforcement Administration ("DEA"). I am skeptical that the particular injuries that Petitioners assert are "fairly traceable" to *that* decision of the DEA, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (simplified), but I do not think that it is necessary to decide the point. Because exhaustion of administrative remedies "does not entail any assumption by the court of substantive 'law-declaring power,'" it raises the sort of threshold, non-merits issue that we may resolve first, without having to address subject matter jurisdiction. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 433 (2007) (citation omitted); *see also id*. at 431 (noting that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits'" (citation omitted)).[1] And

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[1] *See also Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824 & n.1 (9th Cir. 2008) (en banc) (plurality) (concluding that, under *Sinochem*, it was appropriate to direct the district court to consider whether to require exhaustion of local remedies in a suit under the Alien Tort Statute, 28 U.S.C. § 1350, despite the presence of unresolved jurisdictional issues); *id*. at 833–37 (Bea, J., concurring) (agreeing with the plurality's remand to consider exhaustion, while differing as to the source of the exhaustion requirement); *id*. at 840 & n.1 (Kleinfeld, J., concurring)

given that Petitioners' failure to exhaust administrative remedies is dispositive here, we have no need to address Petitioners' Article III standing, and I do not do so.[2]

(agreeing that, under *Sinochem*, a remand to consider exhaustion was appropriate, despite jurisdictional issues); *id*. at 837–38 (Ikuta, J., dissenting) (agreeing that, under *Sinochem*, "there is no mandatory sequencing of non-merits grounds for disposing of a case," but concluding that, under the circumstances of that case, the jurisdictional issue should be resolved first and was dispositive); *Valenzuela v. Silversmith*, 699 F.3d 1199, 1205 (10th Cir. 2012) (whether appellant "failed to exhaust tribal court remedies is . . . a threshold, nonmerits issue" that may be decided without resolving subject matter jurisdiction).

[2] I likewise express no view whatsoever on the merits of the claims.