

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

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### SUMMARY\*

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#### **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 Zyskiewicz, 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.

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\* 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.

Daniel Aguilar (argued) and Mark B. Stern, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., for Respondents.

Erica W. Harris, Susman Godfrey LLP, Houston, Texas, for Amicus Curiae Iraq and Afghanistan Veterans of America.

Lisa L. Pittman, Coats Rose P.C., Austin, Texas, for Amici Curiae Rice University's Baker Institute of Public Policy, Drug Policy Program, Dr. Kevin Boehnke, and Dr. Daniel Clauw.

John McKay and Christopher Morley, Davis Wright Tremaine LLP, Seattle, Washington; Giancarlo Urey, Nicole S. Phillis, and Heather F. Canner, Davis Wright Tremaine LLP, Los Angeles, California; for Amici Curiae Lori Walker PhD, Stephen Defelice MD, Lyle E. Craker PhD, Daniela Vergara PhD, Christopher J. Hudalla PhD, Rachna Patel MD, Wendy and Tom Turner, and Maureen Leehey MD.

**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

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