U.S. Department of Justice

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February 23, 2018

Via ECF and Facsimile: (212) 805-7942
Honorable Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Washington et al. v. Sessions et al.*, 17 Civ. 5625 (AKH)

Dear Judge Hellerstein:

This Office represents Defendants in this action. After argument on February 14, 2018, the Court denied Plaintiffs' oral request to submit supplemental briefing. We write respectfully in opposition to Plaintiffs' February 20 letter seeking reconsideration of that denial. *See* Dkt. No. 61.

The parties have submitted more than 200 pages in combined briefing on Defendants' motion to dismiss. *See* Dkt. Nos. 37, 44-46, 49. The briefing contains a full examination of Defendants' argument that this suit should be dismissed because Plaintiffs failed to exhaust an available administrative remedy—the petition process that Congress created as part of the Controlled Substances Act ("CSA"), which permits individuals to seek the rescheduling of drugs by the Drug Enforcement Administration ("DEA"), with guidance from the Department of Health and Human Services. *See* 21 U.S.C. § 811. Accordingly, no further briefing is necessary.

To the extent Plaintiffs now attempt to raise new arguments, those arguments should be disregarded, given that the government's motion has been fully briefed and argued. Moreover, Plaintiffs' arguments are meritless. Plaintiffs' letter cites cases in which certain courts have held that 21 U.S.C. § 877—the CSA's provision providing for appellate review of a DEA rescheduling decision—does not bar the exercise of jurisdiction by district courts considering constitutional challenges in criminal cases. *See, e.g.*, *United States v. Pickard*, 100 F. Supp. 3d 981, 995-96 (E.D. Cal. 2015); *United States v. Heying*, No. 14 Cr. (JRT) (SER), 2014 WL 5286153, at *2 (D. Minn. Aug. 15, 2014), *report and rec. adopted*, 2014 WL 5286155 (D. Minn. Oct. 15, 2014). Even were these decisions applicable to the question of whether the CSA divests the Court of jurisdiction to decide the questions Plaintiffs have raised in this civil case—and the government respectfully submits that they are not—the Court should still dismiss this case under the exhaustion doctrine as a *prudential* matter. *See, e.g.*, *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003) (discussing distinction between statutory and judicially imposed exhaustion requirements).

"The exhaustion requirement serves several purposes, including protecting an agency's authority, conserving the resources of the federal courts, and allowing the agency to develop the factual record, apply its expertise, and exercise its discretion without premature interference by the courts." *McCrory v. Adm'r*, 22 F. Supp. 3d 279, 288 (S.D.N.Y. 2014), *aff'd*, 600 F. App'x 807 (2d Cir. 2015) (summary order). "Exhaustion may also moot a judicial controversy." *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 713 (2d Cir. 1998) (brackets and internal quotation marks omitted). "[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context[,] or where . . . the underlying issues are particularly within the agency's expertise." *Id.* (internal quotation marks omitted). These purposes of the exhaustion doctrine would undoubtedly be served here, as Plaintiffs' allegations implicate the evaluation of scientific data and complex policy considerations. *See Krumm v. Holder*, No. 08 Civ. 1056, 2009 WL 1563381, at *10 (D.N.M. May 27, 2009) (holding that "a scheduling decision is not a legal determination that an Article III court is qualified to make without an administrative record to review," as it "requires consideration of complex policy implications and scientific data").

Moreover, even where exhaustion is prudential—and not specifically mandated by statute—it is still necessary for the Court to give "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court," which in turn "requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds as stated in Porter v. Nussle*, 534 U.S. 516 (2002). Here, the rescheduling scheme Congress created under the CSA permits "flexibility and receptivity to the latest scientific information," and will create "a thorough factual record upon which to base an informed judgment." *United States v. Kiffer*, 477 F.2d 349, 357 (2d Cir. 1973). The existence of this provision indicates Congress' intent that challenges to drug scheduling under the CSA should be brought through the administrative process under 21 U.S.C. § 811, with subsequent review of the complete administrative record in the courts of appeals—not *seriatim* constitutional challenges in district courts around the country. Thus, even if the Court concludes it has jurisdiction to consider Plaintiffs' challenge, it should nonetheless dismiss this case under the exhaustion doctrine as a prudential matter.

Last, Plaintiffs incorrectly assert that the Court must accept their allegations of futility of the administrative scheme—a legal conclusion—as "true." Courts regularly reject similar claims of futility as a matter of law at the pleading stage, and this Court should do the same here. *See Krumm*, 2009 WL 1563381, at *10-13 (rejecting claim of futility at the pleading stage in challenge to marijuana scheduling under the CSA); *cf., e.g., Greifenberger v. Hartford Life Ins. Co.*, No. 03 Civ. 3238 (SAS), 2003 WL 22990093, at *5 (S.D.N.Y. Dec. 18, 2003) (rejecting futility argument and granting motion to dismiss for failure to exhaust in ERISA case where the plaintiff failed to plead facts "meet[ing] the very high standard required for a showing of futility"), *aff'd*, 131 F. App'x 756 (2d Cir. 2005) (summary order).

Accordingly, because supplemental briefing is unnecessary in light of the extensive briefing already before the Court, and because any new arguments that Plaintiffs advance are without merit, Plaintiffs' request for reconsideration should be denied.

Thank you for your consideration of this matter.

Respectfully submitted,

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