IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Saad Bin Khalid, Plaintiff, v. Merrick Garland; *et al.*, Defendants.	Case No. 1:21-cv-02307 (CRC)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND THE OPINION AND ORDER PARTIALLY GRANTING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER CLAIMS

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INTRODUCTION

On March 16, 2023, this Court issued an order granting the Government's motion to dismiss in part and finding that "Khalid's claims challenging his placement on the No Fly List are dismissed with prejudice for lack of subject matter jurisdiction because the courts of appeals have exclusive jurisdiction over those claims" pursuant to 49 U.S.C. § 46110. Op. and Order, ECF No. 32 at 13 (the "Order"). The Order relied on the plain language of the statute, as well as case law from the Ninth Circuit and district courts within the D.C. Circuit confirming that challenges to orders of the Transportation Security Administration ("TSA") Administrator, such as the one to maintain Plaintiff on the No Fly List, must be brought in the courts of appeals. Just four days later, on March 20, 2023, the D.C. Circuit published an opinion it had issued a month before confirming that this Court's order was correct. *See Busic v. Transp. Sec. Admin.*, 62 F.4th 547, 549 (D.C. Cir. 2023) ("Because the TSA Administrator now has the authority to issue No Fly List determinations, we have jurisdiction to review Busic's petition.").

Nevertheless, two weeks after *Busic* was published and without referencing it in his briefing, Plaintiff now moves this Court to amend its Order and take the extraordinary measure of certifying that Order for interlocutory appeal or, alternatively, transferring just a portion of Plaintiff's claims to the D.C. Circuit while allowing the case to simultaneously proceed in this Court as to his remaining claims. *See* Pl.'s Mot. to Amend the Op. & Order Partially Granting Defs.' Mot. to Dismiss or, In the Alternative, Transfer Claims, ECF No. 34 (the "Motion" or "Pl.'s Mot."). But Plaintiff's Motion is not based on a controlling question of law for which there are grounds for a difference of opinion—as required to certify an interlocutory appeal—but merely a disagreement with the Order itself and with the law of the D.C. Circuit. And an immediate appeal here would not materially advance the ultimate termination of the litigation but rather prolong it

by requiring the parties and two separate courts to simultaneously litigate similar issues in piecemeal fashion. Because that is no basis to certify an interlocutory appeal or to partially transfer Plaintiff's claims, the Court should deny Plaintiff's Motion.

BACKGROUND

On March 16, 2023, the Court issued an Order in which it partially granted and partially denied the Government's motion to dismiss. Order at 13. The Court ruled that "Khalid's claims challenging his placement on the No Fly List are dismissed with prejudice for lack of subject matter jurisdiction because the courts of appeals have exclusive jurisdiction over those claims." *Id.* However, "Khalid's claims regarding his placement on the terrorist watchlist are permitted to continue subject to further briefing as to whether he has adequately pled a due process violation based on government-imposed stigma and whether he may proceed under the APA." *Id.* at 13–14.

On April 6, 2023, Plaintiff filed his Motion. In the Motion, Plaintiff asks the Court to either (1) certify that the Order is an interlocutory order that can be immediately appealed or, in the alternative, (2) transfer the claims over which the Court lacks jurisdiction to the D.C. Circuit pursuant to 28 U.S.C. §1631. *Id.*

LEGAL STANDARDS

Although Plaintiff never specifies the basis for his Motion to Amend, it appears to arise under Federal Rule of Civil Procedure 52(b) ("Amended or Additional Findings"), given that he asks this Court to enter a finding that the Court's order is eligible for interlocutory appeal. *See also* Fed. R. Civ. P. 52(a)(2) ("In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action."). Under Rule 52(b), "[o]n a party's motion filed no later than 28 days after the entry of judgment, the court may amend its

findings—or make additional findings—and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). The rule "permits the trial court to correct manifest errors of law or fact, make additional findings or take other action that is in the interests of justice." *Ashraf–Hassan v. Embassy of France*, 185 F. Supp. 3d 94, 108 (D.D.C. 2016) (quoting *Bigwood v. Def. Intel. Agency*, 770 F. Supp. 2d 315, 318 n.2 (D.D.C. 2011)). "The decision to amend findings or the judgment is committed 'to the sound discretion of the trial judge.'" *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 247 F. Supp. 3d 76, 91 (D.D.C. 2017) (quoting *Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, No. 94-1184, 1997 WL 243223, at *2 (D.D.C. May 7, 1997)). The party filing a Rule 52(b) motion "bears a heavy burden." *Ashraf–Hassan*, 185 F. Supp. 3d at 108 (quoting *Material Supply Int'l*, 1997 WL 243223, at *2).

A Rule 52(b) motion "is not an avenue for relitigating issues upon which the moving party did not prevail . . . ." *Material Supply Int'l*, 1997 WL 243223, at *2. Indeed, a party "who failed to prove his . . . strongest case is not entitled to a second opportunity to litigate a point, to present evidence that was available but not previously offered, or to advance new theories by moving to amend a particular finding of fact or conclusion of law." *Salazar v. District of Columbia*, 685 F. Supp. 2d 72, 75 (D.D.C. 2010) (quoting 9C Charles Wright & Arthur Miller, Federal Practice & Procedure § 2582 (3d ed. 2009)); *see also Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1397 (8th Cir. 1996) (holding that a party could not make an argument using a 52(b) motion that it could have previously raised prior to entry of a final judgment).[1]

[1] Plaintiff does not cite Rule 59(e) ("Motion to Alter or Amend a Judgment") as a basis for his Motion, but those standards are materially the same and not met here either. *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) ("A Rule 59(e) motion 'is discretionary' and need not be granted unless the district court finds that there is an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" (citation omitted)).

ARGUMENT

In his Motion, Plaintiff asks the Court to either (1) certify that the motion to dismiss Order is an interlocutory order that can be immediately appealed or, in the alternative, (2) transfer the claims over which it lacks jurisdiction to the D.C. Circuit pursuant to 28 U.S.C. §1631. Neither action is appropriate. The Order is not an interlocutory order because it does not involve a controlling question of law for which there are substantial grounds for a difference of opinion, and immediate appeal would not materially advance the ultimate termination of the litigation (particularly now that the D.C. Circuit has decided the question, *see infra*). Transfer is also not permitted under controlling D.C. Circuit case law, which does not condone partial transfer of claims within a case, nor would transfer be in the interest of justice.

I. THE COURT SHOULD NOT CERTIFY ITS ORDER FOR INTERLOCUTORY APPEAL.

If a district judge determines that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." 28 U.S.C. § 1292(b). "A party seeking certification pursuant to § 1292(b) must meet a high standard to overcome the 'strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.'" *Jud. Watch, Inc. v. Nat'l Energy Pol'y Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974)); *see also Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984) ("Section 1292(b) 'is meant to be applied in relatively few situations and should not be read as a significant incursion on the traditional federal policy against piecemeal appeals.'" (citation omitted)). "Although courts have discretion to certify an issue for interlocutory appeal, interlocutory appeals are rarely allowed," and "the movant 'bears the burden of showing that

exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgement.'" *Virtual Def. and Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C.2001) (quoting *First Am. Corp. v. Al–Nahyan*, 948 F. Supp. 1107 (D.D.C.1996)) (citation omitted). The "law is clear that certification under § 1292(b) is reserved for truly exceptional cases." *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2000 WL 673936 at *1 (D.D.C. Jan. 27, 2000) (citing *Tolson*, 732 F.2d at 1002). Plaintiff here does not cite or rely on a single case in which any court—either in this circuit or elsewhere—has found that an interlocutory appeal is appropriate, and his own case is far from such a "truly exceptional" one.

A. There is No Substantial Ground for Difference of Opinion with the Court's Order.

"The threshold for establishing the 'substantial ground for difference of opinion' with respect to a 'controlling question of law' required for certification pursuant to § 1292(b) is a high one." *Jud. Watch, Inc.*, 233 F. Supp. 2d at 19. The Court's Order turned on whether Section 46110 grants exclusive jurisdiction to the courts of appeals to review Plaintiff's status on the No Fly List. By statute, the courts of appeals have exclusive jurisdiction over all actions seeking "to affirm, amend, modify, or set aside" any "order" issued "in whole or in part" by the TSA Administrator. 49 U.S.C. § 46110; *see* Defs.' Mot. to Dismiss, ECF No. 19 ("Defs.' Mot. Dismiss") at 15–20, ECF No. 19. Plaintiff agrees. *See* Pl.'s Mot. at 4 ("All parties agree with the narrow proposition that the final order falls within the plain text of Section 46110 and, as this Court correctly explained, Khalid 'must bring his challenges to that determination' an appropriate court of appeals." (quoting Order at 7)). In fact, Plaintiff does not cite any case from any court within the D.C. Circuit that it any way conflicts with this Court's opinion. *See Jud. Watch, Inc. v. Nat'l Energy Pol'y Dev. Grp.*, 219 F. Supp. 2d 20, 43 (D.D.C. 2002) (declining to certify appeal where

"Defendants cite no cases in support of their argument" and "ignore[] the Supreme Court's guidance.").

Plaintiff does, however, omit from his Motion the single most relevant case that fully resolves the question at issue and that is controlling precedent here. In *Busic v. Transportation Security Administration*, an opinion filed on February 17, 2023, and reissued for publication on March 20, 2023, the D.C. Circuit explained:

> This court can review "order[s] issued" by the TSA Administrator and "set aside any part of" them. 49 U.S.C. § 46110(a), (c). Previously, when the TSA lacked authority to issue these types of orders, we held that petitions challenging No Fly List determinations presented no redressable injury because we did not have the authority under 49 U.S.C. § 46110 to set those orders aside. *See Ege v. U.S. Dep't of Homeland Sec.*, 784 F.3d 791, 793 (D.C. Cir. 2015). Under the TSA's current procedures, however, the TSA Administrator is tasked with "issu[ing] a final order maintaining" or "removing" a traveler from the No Fly List. J.A. 300; *see also Kashem v. Barr*, 941 F.3d 358, 391 (9th Cir. 2019) (observing this). Because the TSA Administrator now has the authority to issue No Fly List determinations, we have jurisdiction to review Busic's petition.

Busic, 62 F.4th at 549. *Busic* decided the controlling question of law for which Plaintiff seeks certification.

The D.C. Circuit's decision in *Busic* underscores that this Court's opinion was correct, and there is no "substantial ground for a difference of opinion." Each of the arguments Plaintiff advances to the contrary is incorrect and relies exclusively on out-of-circuit caselaw. *First*, Plaintiff argues that "there are substantial grounds for disagreement with this Court's conclusion that . . . Section 46110 forbids this Court from reviewing Khalid's initial placement on the No Fly List, in addition to the final order maintaining him on that list." Pl.'s Mot. at 4. Plaintiff's argument seeks to draw a distinction between (1) Plaintiff's initial placement on the No Fly List and (2) the TSA Administrator's final order maintaining that placement on the No Fly List after Plaintiff proceeded through the DHS TRIP process. But for the purposes of the jurisdictional question at issue here, this is a distinction without a difference. As the Court correctly noted,

ordering the relief that Plaintiff seeks here—removal from the No Fly List—"would necessarily alter the TSA Administrator's final order, which Section 46110 prevents this Court from doing." Order at 7. Plaintiff's only argument to the contrary relies on an out-of-circuit opinion that held that the plaintiff there was "not challenging the TSA Administrator's decision refusing to remove him from the No Fly List under the DHS Trip process" and plaintiff's "complaint does not purport to challenge" TSA's decision that plaintiff "would remain on the No Fly List" because the plaintiff *had already been removed from the list*. *See Fikre v. FBI* ("*Fikre II*"), 35 F.4th 762, 774–75 & n.9 (9th Cir. 2022)[2]; *see also* Order at 7. But even assuming that the Ninth Circuit was correct to draw a distinction between an individual's challenge to his initial placement on the No Fly List after that individual is removed from the List, and an individual's challenge to TSA's maintaining that individual on the List, there still would be no substantial grounds for a difference of opinion as to the Court's order here. Plaintiff here expressly challenges "Defendants' conduct in placing *and maintaining* Plaintiff on the watchlist," Am. Compl. ¶ 167, ECF No. 17 ("Am. Compl.") (emphasis added), so the distinction drawn in *Fikre II* does not apply to Plaintiff's claim, and exclusive jurisdiction lies in the courts of appeals.

In any event, a single circuit court's isolated opinion would not render this Court's order subject to interlocutory appeal where the overwhelming bulk of the precedent—including controlling D.C. Circuit precedent—cuts against that single court's interpretation. *See, e.g.*, *Kashem v. Barr*, 941 F.3d 358, 390 (9th Cir. 2019) (holding that courts of appeals have exclusive jurisdiction under 49 U.S.C. § 46110 to review plaintiffs' "substantive due process challenges to their inclusion on the No Fly List"); *Matar v. TSA*, 910 F.3d 538, 542 (D.C. Cir. 2018) (reviewing,

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[2] The Ninth Circuit denied the Government's petition for rehearing en banc on January 4, 2023. The due date for a petition for a writ of certiorari, as extended by the Supreme Court, is June 2, 2023.

under 49 U.S.C. § 46110, DHS TRIP final order and dismissing petition on other grounds); *Scherfen v. DHS*, No. 3:CV-08-1554, 2010 WL 456784, at *10–13 (M.D. Pa. Feb. 2, 2010) (finding that outcome of DHS TRIP process pertaining to watchlist placement was subject to review in court of appeals); *cf. Tooley v. Bush*, No. 06–306, 2006 WL 3783142, at *26 (D.D.C. 2006), *aff'd in part, rev'd in part, on other grounds*, 586 F.3d 1006 (D.C. Cir. 2009) (holding that courts of appeals had exclusive jurisdiction to review security directive establishing watchlist); *Olivares v. TSA*, 819 F.3d 454, 462 (D.C. Cir. 2016) (holding that court of appeals could review TSA decision identifying plaintiff as a security risk); *Roberts v. Napolitano*, 798 F. Supp. 2d 7, 10 (D.D.C. 2011) (applying Section 46110 and dismissing challenge to TSA order in district court for lack of subject matter jurisdiction), *aff'd*, 463 F. App'x 4 (D.C. Cir. 2012).

Second, Plaintiff argues that "reasonable people could vigorously disagree" with the Court's holding that it "'lacks jurisdiction over any challenges that Khalid might bring to his inclusion on the No Fly List,' including both substantive challenges to his initial placement and procedural due process challenges to the DHS TRIP process, because those challenges 'would be "inescapably intertwined" with a review of the TSA Administrator's order.'" Pl.'s Mot. at 6 (quoting Order at 6 (quoting *Durso v. Napolitano*, 795 F. Supp. 2d 63, 72 (D.D.C.))). But there are no substantial grounds for a difference of opinion on this issue either; both the TSA's denial of boarding determination, as well as the redress procedures to challenge such an action, constitute orders of the TSA subject to review under Section 46110. *See Busic*, 62 F.4th at 549–51 (holding that court of appeals has jurisdiction over petitioner's claim that the "administrative procedures [do not] satisfy due process" and her claim that it was "arbitrary and capricious" to include her on the No Fly List.).

The only two cases on which Plaintiff now relies are, again, out-of-circuit precedent, and neither is compelling. The Fourth Circuit case of *Mohamed v. Holder*, No. 11-1924, ECF No. 86 (4th Cir. May 28, 2013), was an unpublished opinion that was decided prior to the Government's 2015 adoption of revised DHS TRIP procedures for U.S. citizens and lawful permanent residents who make redress inquiries regarding the denial of aircraft boarding. *See* Defs.' Mot. Dismiss at 9–10. It was only *after Mohamed* was decided that the Government issued revised redress procedures for U.S. persons on the No Fly List, such that the TSA Administrator reviews the information on the individual's placement, including both TSC's recommendation and any information the individual submitted, and will either issue a final order removing the individual from, or maintaining the individual on, the No Fly List, or remand the matter back to TSC with a request for additional information or clarification. *See Busic*, 62 F.4th at 549 ("Previously, . . . we held that petitions challenging No Fly List determinations presented no redressable injury because we did not have the authority under 49 U.S.C. § 46110 to set those orders aside. Under the TSA's current procedures, however, the TSA Administrator is tasked with 'issu[ing] a final order maintaining' or 'removing' a traveler from the No Fly List." (citation omitted)). There are therefore no substantial grounds for a difference of opinion where those claimed grounds are based on superseded unpublished case law from a different circuit.

Plaintiff's reliance on *Kashem* is misplaced. In *Kashem*, decided after the 2015 revisions to the DHS TRIP procedures and approving of those revisions, the Ninth Circuit recognized that a plaintiff must assert such "substantive challenges to [his] inclusion on the No Fly List by filing a petition for review in an appropriate court of appeals under § 46110." *Kashem*, 941 F.3d at 391. As for procedural challenges, it is true that the parties in *Kashem* did not dispute that the district court had jurisdiction over the plaintiffs' procedural claims, *id.* at 391 n.19, but that was only

because of the unique circumstances of that case. The *Kashem* plaintiffs had filed their complaint in 2010; at that time, the Terrorist Screening Center (not TSA) had final authority to remove a person from the No Fly List during the redress process, and for that reason, the Ninth Circuit had previously held that procedural and substantive challenges to the No Fly List may proceed in the district court. *See id.* at 367 (citing *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012)). But after five years of litigation, and "as a result of [the *Kashem*] litigation," *id.* at 366, the Government revised its redress procedures to give TSA final authority to remove a person from the No Fly List at the culmination of the redress process, *id.* at 367. While giving final authority to TSA would control the jurisdictional analysis going forward in future cases filed after the revisions took effect (as this Court held in the present case), the redress revisions did not necessarily affect the district court's jurisdiction over those plaintiffs' procedural challenges to the No Fly List that they had filed years earlier and before the Government revised its redress procedures. Rather, it is "hornbook law" that "the jurisdiction of the court depends upon the state of things at the time of the action brought," *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570 (2004), and thus, mid-litigation changes in facts would not necessarily have divested the district court of jurisdiction over those plaintiffs' procedural challenge to the No Fly List under the narrow circumstances of that case. In the present case, by contrast, Plaintiff filed his complaint years after the Government revised its redress procedures in 2015.[3]

[3] In *Kashem*, the parties had spent years litigating the plaintiffs' procedural due process claims, and the district court had spent years resolving the merits of those claims. By contrast, the district court had never resolved or even addressed the merits of plaintiffs' substantive challenges to their No Fly List status before it dismissed those substantive claims for lack of jurisdiction. Those different postures explain why the jurisdictional analysis may have differed for the two claims in *Kashem*. Regardless, as noted above, the Government's 2015 revisions to its redress procedures plainly changed the jurisdictional analysis for future cases (such as this one) filed after those revisions had taken effect.

Finally, Plaintiff claims that "[r]easonable people could disagree" as to the Court's determination that Plaintiff's complaint raises "'only as-applied challenges to his own placement on the watchlist and the No Fly List,' and, on that basis, concluded that it need not determine if Section 46110 also grants courts of appeals exclusive jurisdiction over facial challenges to the No Fly List." Pl.'s Mot. at 6–7 (quoting Order at 8). Here, Plaintiff does not cite a single case in support of his argument that the Court incorrectly construed his claim. Nor does Plaintiff's argument find any support in the statutory text, which provides that when a person "disclosing a substantial interest" in a covered TSA order applies "for review of the [TSA] order," the court of appeals has "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order." 49 U.S.C. § 46110(a), (c). The statute nowhere specifies that the courts of appeals' exclusive jurisdiction to review TSA orders turn on whether the petitioner's interest in the order is as-applied or facial. Rather than relying on statutory text, Plaintiff cites three law review articles, all written more than a decade ago, which collectively suggest that it is hard to draw distinctions between facial and as-applied challenges. That may be true, but as noted above, the statutory text does not in any way condition jurisdiction on whether a litigant's claim is as-applied or facial. And even if it did, this Court has already observed that the Plaintiff's prayer for relief in this case "seek[s] remedies exclusive to [Plaintiff]." Order at 8 (quoting Am. Compl. at 39). He does not, for example, ask the Court to terminate the No Fly List, but simply to remove him from it. Plaintiff's last resort argument that he "could simply amend his complaint under Rule 15(a)(2) to more clearly assert facial challenges," Pl.'s Mot. at 7, is unavailing. Leaving aside that he has brought no such claim and "cannot amend his complaint through briefing," Order at 9 (citing *Crowder v. Bierman, Geesing, & Ward LLC*, 713 F. Supp. 2d 6, 9 n.5 (D.D.C. 2010)), a facial challenge concerning No Fly List claims would change nothing. A party must still have standing to bring a facial challenge,

Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 959 (1984), and courts consider as-applied claims first precisely to avoid broader facial challenges, *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Thus, Plaintiff's as-applied No Fly List claims would necessarily remain in play, and would still belong in the court of appeals.

In sum, Plaintiff has failed to establish the existence of a "substantial ground for difference of opinion" with respect to the question of whether Section 46110 vests exclusive jurisdiction in the courts of appeals to review No Fly List claims. In the D.C. Circuit, particularly after the resolution of *Busic* earlier this year, it is a settled question of law that it does.

B. An Immediate Appeal Would Not Advance the Termination of this Litigation.

Plaintiff's contention that an immediate appeal would advance the termination of this litigation is meritless. The premise of that argument appears to be that jurisdictional questions should be resolved by interlocutory appeal as a general matter. *See* Pl.'s Mot. at 8 ("When there are substantial grounds for difference of opinion as to a court's subject matter jurisdiction, courts regularly hold that an immediate appeal may 'materially advance the ultimate termination of the litigation.'" (quoting *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009)). But this contention presupposes that jurisdictional questions are in doubt, such that an appeal on them would potentially avoid unnecessary litigation in district court. After its definitive holding in *Busic* on the very issue that Plaintiff seeks to appeal, it is far more likely that this Court would be affirmed, and this litigation would be back in the place it is now – not advanced – after months of delay. *See U.S. ex rel. Hollander v. Clay*, 420 F. Supp. 853, 859 (D.D.C. 1976) ("While certainly the ultimate termination of this litigation would be advanced if the Court of Appeals heard and sustained defendant's defense at this time, the court is not of the opinion that this is a likely course

of events. Therefore, the court will not invoke its discretionary authority to certify the issues decided in [its] order to the Court of Appeals under section 1292(b).").

Also, interlocutory review to resolve jurisdictional issues is appropriate where *the entire case* would be resolved, which is not true here. *See Al Maqaleh*, 620 F. Supp. 2d at 55 ("If this Court is reversed on appeal, then these cases will be terminated."). That consideration has no bearing on cases like this one, in which Plaintiff's Watchlist claims would remain pending in the district court, regardless of how the court of appeals rules. If this Court were to certify its order for interlocutory appeal and the court of appeals were to accept jurisdiction, that would not terminate the case: proceedings could potentially continue in this Court on the remaining claims. Thus, Plaintiff's claimed efficiencies in district court proceedings may never materialize. *See* Pl.'s Opp. at 8 (arguing interlocutory review "will avoid the risk of unnecessary lengthy and duplicative discovery"). If anything, proceeding on one set of claims while another is on appeal would be less efficient, as the outcome on related No Fly List claims would impact the claims still in district court, potentially both lengthening the case and leading to duplicative proceedings. If Plaintiff were to prevail or lose on his remaining claims in either court, the outcome could impact the issues in the other court.[4] Conversely, if the Court resolves Plaintiff's remaining claims now, then it is

[4] While there are several possible outcomes, if Plaintiff's Watchlist claims proceed, the Court might very well dismiss them and avoid the need for discovery altogether. Indeed, those claims should be subject to record review without discovery in this APA case. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). But to the extent discovery is allowed, it would not have been avoided by permitting an interlocutory appeal but could also be inappropriate until the No Fly List issues are resolved. If the Court dismisses Plaintiff's claims, then he will likely appeal that outcome to the D.C. Circuit, and if Plaintiff were to prevail on any claim remaining in this Court, the Government may appeal, and it is possible the court of appeals may never have to take up the Section 46110 question in this case. All of these potential and uncertain outcomes demonstrate the problem with piecemeal litigation of related claims in two separate courts.

possible an appeal would result from that decision, and the time and resources of the parties and the courts will be saved by the court of appeals hearing a single challenge to all claims in Plaintiff's Amended Complaint rather than contend with piecemeal litigation. *See Jud. Watch, Inc.*, 233 F. Supp. 2d at 28 ("Conversely, untimely interlocutory appeal of orders can 'prolong and substantially delay the litigation,' causing all parties to incur greater expense, and thus do not 'materially advance the litigation.'" (citing *In re Vitamins Antitrust Litig.*, 2000 WL 673936 at *3)). And either way, at a minimum, all proceedings would be needlessly delayed while the court of appeals first considers whether to accept jurisdiction and then proceeds to consider briefing and potentially argument on the issue itself.

Finally, Plaintiff's argument that an interlocutory appeal will materially advance the ultimate termination of the litigation because Plaintiff will choose "to wait until this Court enters an appealable final order to challenge this Court's interpretation of Section 46110," thereby causing him to "run[] afoul of Section 46110's time limitation," Pl.'s Mot. at 9, is both irrelevant and unfounded. It was Plaintiff's own choice to not petition the correct court for review of his No Fly List determination that might result in the court of appeals rejecting his case. Section 46110 requires that a "petition must be filed not later than 60 days after the [TSA Administrator's] order is issued." 49 U.S.C. § 46110. Here, the TSA Administrator issued his order on June 9, 2022, Am. Compl. ¶¶ 140–42—before Plaintiff filed his Amended Complaint instead of petitioning the court of appeals for review—and Plaintiff readily admitted that these sixty days "ha[ve] long since run," Pl.'s Mot. at 9. Thus, whether the court of appeals will ultimately reject Plaintiff's petition or find that there are reasonable grounds for his delay in filing, should he eventually choose to file it there, is likely already determined. In any event, compensating for a party's prior litigation decisions is not a factor in deciding whether to certify an interlocutory appeal.

II. THE COURT SHOULD NOT TRANSFER PLAINTIFF'S NO FLY LIST CLAIMS.

In the event this Court declines to certify Plaintiff's No Fly List claims, Plaintiff requests that the Court transfer just those claims to the D.C. Circuit while leaving his remaining Watchlist claims pending in this Court. When a "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court . . . in which the action or appeal could have been brought at the time it was filed or noticed." 28 U.S.C. § 1631. In the D.C. Circuit, however, transfer of only a portion of the claims is frowned upon, and in any case, the interest of justice would not be served by transfer here.

A. Partial Transfer of Claims Is Not Condoned.

Although some circuit courts permit the transfer of only portions of a case for want of jurisdiction pursuant to 28 U.S.C. § 1631, the D.C. Circuit has suggested that it is not permitted. In *Hill v. Air Force*, 795 F.2d 1067, 1070 (D.C. Cir. 1986), the D.C. Circuit held that a district court had not abused its discretion in not transferring individual claims within a case to another court in which those could have been brought because "Section 1631 directs a court to transfer an 'action' over which it lacks jurisdiction, rather than an individual claim." Plaintiff neither acknowledges nor responds to this case that counsels against the relief he seeks, nor does he point to any case in which the D.C. Circuit has ever permitted such a partial transfer. *Hill* comports with the rulings of other courts in the D.C. Circuit. *See Ctr. for Nuclear Resp. v. USNRC*, 781 F.2d 935, 943 (D.C. Cir. 1986) (Ginsburg, J., dissenting) (If a federal court lacks jurisdiction but determines that another federal court would have it, "the first federal court must transfer *the case* to the proper court.") (emphasis added); *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 80 (D.C. Cir. 1985) ("[W]here a court finds that it lacks jurisdiction, it must transfer *such action* to the proper court.") (emphasis added); *ITServe All., Inc. v. Cuccinelli*, 502 F. Supp. 3d 278, 290 (D.D.C.

2020) ("The court thus faces an unusual circumstance: it lacks jurisdiction over Plaintiffs' first two claims, but not the third. . . . The court cannot, however, transfer individual claims over which it lacks jurisdiction. It must transfer the entire 'action' or not at all." (citation omitted)). Because transfer of individual claims is not available in the D.C. Circuit, the Court should deny Plaintiff's motion to transfer.

B. Transfer Is Not in the Interest of Justice.

Even if the D.C. Circuit permitted the transfer of individual claims within a cause of action, it would not be in the interest of justice for this Court to transfer Plaintiff's No Fly List claims. "The decision whether a transfer or a dismissal is in the interest of justice . . . rests within the sound discretion of the district court." *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 789 (D.C. Cir. 1983). "Congress contemplated that the provision would aid litigants who were confused about the proper forum for review." *Am. Beef Packers, Inc. v. ICC*, 711 F.2d 388, 390 (D.C. Cir. 1983) (per curiam) (citing S. Rep. No. 275, 97th Cong., 2d Sess. 11 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 21). "Courts have found that transfer is 'in the interest of justice' when, for example, the original action was misfiled by a *pro se* plaintiff or by a plaintiff who, in good faith, misinterpreted a complex or novel jurisdictional provision." *Janvey v. Proskauer Rose, LLP*, 59 F. Supp. 3d 1, 7 (D.D.C. 2014) (citation omitted). Courts also consider "whether it would be time consuming and costly to require a plaintiff to refile his or her action in the proper court or whether dismissal would work a significant hardship on plaintiff who would likely now be time barred from bringing his or her action in the proper court." *Id.* The circumstances here do not fit the bill.

First, "Plaintiff[] [is] not [a] pro se litigant[] who w[as] simply confused as to the proper forum in which to file [his] action." *Janvey*, 59 F. Supp. 3d at 7. Rather, Plaintiff is represented by senior counsel at the Council on American-Islamic Relations ("CAIR"), "America's largest Muslim civil liberties organization" with offices across twenty states around the country. "CAIR

at a Glance," CAIR, https://www.cair.com/about_cair/cair-at-a-glance/ (last visited Apr. 17, 2023). Plaintiff's counsel have specifically been litigating No Fly List and Watchlist cases for over a decade in courts in the D.C. Circuit and across the country. In short, these are sophisticated litigants who have the skills and resources necessary to determine the correct court in which to file—not inexperienced pro se filers who made an inadvertent error, like those pro se individuals Congress sought to protect with 28 U.S.C. § 1631.

Second, Plaintiff is not a "litigant[] who w[as] confused about the proper forum for review." *Am. Beef Packers*, 711 F.2d at 390. By the time Plaintiff filed his complaint, nearly two years had passed since the Ninth Circuit held in *Kashem* that "[Section] 46110 grants the courts of appeals, rather than the district courts, exclusive jurisdiction over the plaintiffs' substantive due process claims" related to their inclusion on the No Fly List. *Kashem*, 941 F.3d at 390. Plaintiff knew or should have known about this precedent, given its centrality to his No Fly List claims here and given that his counsel was simultaneously litigating the exact same issue in another challenge to the No Fly List in *Long v. Barr*. In *Long*, which was decided after the *Kashem* decision but before Plaintiff filed his complaint, the court ruled against the plaintiff and found that the courts of appeals had exclusive jurisdiction over the plaintiff's claims under Section 46110, based primarily on *Kashem*. *See Long v. Barr*, 451 F. Supp. 3d 507, 529 (E.D. Va. 2020), *vacated and remanded sub nom. Long v. Pekoske*, 38 F.4th 417 (4th Cir. 2022). Plaintiff cannot plausibly claim surprise that he should have proceeded in the D.C. Circuit.

This is particularly true where in this same litigation, Plaintiff was put on notice of his mistake and provided opportunities to correct it and avoid the sixty-day time bar. Even if Plaintiff could somehow claim surprise about the jurisdictional rule when he filed his complaint, he was unmistakably on notice of this on July 13, 2022, when the Government moved to dismiss the

complaint and cited the relevant jurisdictional precedent. *See* Defs.' Mot. Dismiss at 15–20. Indeed, because the TSA Administrator had issued his final order on June 9, 2022, Plaintiff could have, in response to that motion to dismiss, filed a timely petition for review in the court of appeals before August 9, 2022 (*i.e.*, within 60 days of TSA's final order), if for no other reason than to protect his jurisdictional rights.[5] And after this Court held on October 7, 2022, in denying Plaintiff's motion for a preliminary injunction, that it lacked jurisdiction over his No Fly List claims, *see* Order, ECF No. 30 at 1 ("After Plaintiff sought redress for his no-fly status through the DHS TRIP process, his inclusion on the list was affirmed by a Final Order issued by the TSA Administrator. As a result, he must bring any substantive challenge to that determination in the courts of appeals."), Plaintiff again did nothing to preserve his jurisdictional rights in the court of appeals. Now, he cannot plausibly claim surprise, so much as unhappiness, with the jurisdictional outcome.

Neither of the cases Plaintiff cites to the contrary is particularly relevant here. In *Long*, the plaintiff originally filed his complaint in 2015, when the state of the case law was considerably different than what it was in 2021 when Plaintiff filed his complaint in this case. As of 2015, the prevailing law held that district courts had jurisdiction over No Fly List claims because, at that time, no court had yet assessed whether the revised redress procedures changed the jurisdictional analysis. That was true in the Fourth Circuit, in particular, given that the most recent decision on point was the unpublished *Mohamed* decision already discussed and cited by the district court in the *Long* transfer order. *See Long*, 451 F. Supp. 3d at 526; *see supra* at 9. Accordingly, while the

[5] Contrary to Plaintiff's claim, Pl.'s Mot. at 11, filing a petition for review in the D.C. Circuit would have involved no unfairness or oddity. Plaintiff could have simply filed a petition for review and asked the court of appeals to hold that petition in abeyance pending this Court's decision on whether it had jurisdiction over Plaintiff's claims or whether they belonged exclusive in the court of appeals instead.

plaintiff in *Long* could plausibly claim that at the time he filed his complaint in district court in 2015, he could not be expected to know how the jurisdictional rules would change by the time his No Fly List claims were transferred to the court of appeals in 2020, Plaintiff cannot plausibly make the same claim here. Again, Plaintiff filed his complaint in August 2021, well after *Kashem* was decided in October 2019, and well after the district court in *Long* agreed with *Kashem*'s analysis and transferred that plaintiff's No Fly List claims to the court of appeals.

Finally, Plaintiff argues that transfer is appropriate because, in the absence of a transfer, he may be time-barred from filing a petition for review now. 49 U.S.C. § 46110(a) (Absent "reasonable grounds," "[t]he petition must be filed not later than 60 days after the order is issued."). Plaintiff's argument might have had merit if he had been confused or surprised by the jurisdictional outcome, but for the reasons noted above, he cannot plausibly make that claim here. Indeed, even after the Government laid bare Plaintiff's jurisdictional deficiency in its July 2022 motion to dismiss, Plaintiff *still* could have filed a timely petition for review in the court of appeals within the 60-day filing period but chose not to do so. *See supra* at 17–18.

In some cases, transfer may serve the interests of justice to assist a litigant who is reasonably caught unaware of the correct jurisdictional rules. But it does not serve the interests of justice to transfer here, where Plaintiff made a calculated, conscious strategic choice to ignore or defy jurisdictional rules and now asks the district court to save him from the consequences of his own litigation choices. Specifically, Plaintiff plainly acknowledges that he attempted to litigate in the district court—despite contrary jurisdictional rules apparent before he filed his complaint—because he believed that doing so would entitle him to wide-ranging discovery related to the No Fly List and allow him to overcome any assertions of privilege. Pl.'s Mot. at 8. Had Plaintiff instead filed a petition for review under 49 U.S.C. § 46110, however, Plaintiff would have no

argument for such discovery, because "the focal point for judicial review should be the administrative record already in existence." *Camp*, 411 U.S. at 142. Nor would he overcome any privilege assertions in this No Fly List case, because in those circumstances a litigant has no right to "the full administrative record." *Busic*, 62 F.4th at 551. If transfer is permitted or granted here, it excuses Plaintiff (and others like him) from the consequences of their own litigation choices. They would be free to file in district court and flout contrary jurisdictional precedent of which they were fully aware with the hopes that they will obtain the wide-ranging discovery they would never get in the court of appeals – knowing that if the district court catches their jurisdictional flaw there will be no consequences because their claims will be transferred to the court of appeals to cure the problem that the litigant consciously created. Such a transfer is not in the interests of justice. *See Janvey*, 59 F. Supp. at 8 ("Plaintiffs' failure to recognize that the District of Columbia District Court lacked jurisdiction over their lawsuit suggests that Plaintiffs filed their suit in this jurisdiction either in bad faith and/or as an attempt at forum shopping.").

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion to amend the Court's March 16, 2023 opinion and certify an interlocutory appeal or, in the alternative, transfer claims to the Court of Appeals.

Dated: April 20, 2023

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