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

Hon. Judge Christopher R. Cooper

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

Plaintiff Saad bin Khalid hereby moves this Court to amend its order issued on March 16, 2023 to state in writing that, under 28 U.S.C. § 1292(b), the order involves a controlling question of law as to which there is a substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Whether 49 U.S.C. § 46110, properly interpreted, divests this Court of jurisdiction to hear Khalid's No Fly List-related claims is a question on which courts and the parties here vigorously disagree. Reasonable minds could believe that this Court's decision conflicts with both *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022) and *Mohamed v. Holder*, No. 11-1924, Dkt. 86 (4th Cir. May 28, 2013) (Ex. A), and the scope of this Court's jurisdiction is plainly a controlling question of law. Moreover, an interlocutory appeal of the Section 46110 issue would materially advance the ultimate termination of the litigation because it would avoid the potential for unnecessarily lengthy and duplicative discovery.

In the alternative, Khalid asks that this Court transfer the claims over which it believes it lacks jurisdiction to the D.C. Circuit under 28 U.S.C. § 1631. A transfer would be in the interest of justice because it would avoid the possibility of Section 46110's 60-day deadline barring adjudication of Khalid's No Fly List claims altogether. It would also impose no prejudice on the Government and simplify Khalid's procedural journey to seek D.C. Circuit review of this Court's interpretation of Section 46110.

INTRODUCTION AND BACKGROUND

Khalid brings this lawsuit to challenge his inclusion in the Terrorist Screening Dataset (TSDS), colloquially referred to as the "Watchlist," and the No Fly List annotation on his TSDS listing that prevents him from flying into, out of, or through U.S. airspace. *See* Dkt. 17 at ¶ 64 (Complaint). Defendants moved to dismiss the complaint under Rule 12(b)(1) and Rule 12(b)(6), arguing that this Court lacks subject matter jurisdiction to alter Khalid's No Fly List annotation and that Khalid failed to state a claim. This Court granted in part, agreeing with Defendants on the former but not the latter proposition. *See* Dkt. 32 (Opinion Granting in Part Motion to Dismiss).

On the jurisdictional issue, 49 U.S.C. § 46110 directs a person with a claim challenging "an order issued by the Secretary of Transportation" to file a petition for review in "the United States Court of Appeals for the District of Columbia Circuit" or "the court of appeals of the United States for the circuit in which the person resides or has its principal place of business," which have "exclusive jurisdiction to affirm, amend, modify, or set aside" any such order. This Court interpreted that provision to bar its consideration of Khalid's No Fly List annotation because, after Khalid "sought redress for his placement on the No Fly List through the DHS TRIP process, his inclusion on the list was affirmed by a final order issued by the

TSA Administrator." Dkt. 32 at 7. Proceeding from that premise, this Court held that any challenges to Khalid's No Fly List annotation would be "inescapably intertwined" with review of that order. *Id.* at 7-8. This Court declined to decide whether Section 46110 also grants the courts of appeals exclusive jurisdiction over the review of facial challenges to the No Fly List because, on the Court's reading of Khalid's complaint, it raised "only as-applied challenges to his own placement on the watchlist and No Fly List." *Id.* at 8.

A few days after this Court issued its opinion and order, on March 21, Khalid's counsel emailed the Government's counsel to ask whether the Government would join in or consent to a motion to amend the Court's order to authorize interlocutory appeal under 28 U.S.C. § 1292(b) or, alternatively, to transfer the No Fly List portion of the case to the D.C. Circuit. The Government denied that request on March 28, noting its opposition to both forms of relief. Khalid now moves this Court to amend its order to certify that an interlocutory appeal of that jurisdictional question is appropriate or, in the alternative, to transfer the No Fly List portions of Khalid's claims to the D.C. Circuit.

ARGUMENT

I. A permissive interlocutory appeal of the Section 46110 jurisdictional issue is appropriate.

28 U.S.C. § 1292(b) instructs that, where a district judge believes that an order "involves a controlling question of law as to which there is a 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." That standard requires the party seeking certification to 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.'" *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233

F. Supp. 2d 16, 20 (D.D.C. 2002) (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974)). Khalid meets that high bar here.

A. There are substantial grounds for a difference of opinion on whether Section 46110 divests this Court of jurisdiction to hear No Fly List challenges other than the specific decision of the TSA Administrator not to remove a listee at the end of the DHS TRIP process.

This Court's determination that Khalid's No Fly List-related claims must be brought in either the D.C. Circuit or the court of appeals in which he resides proceeded in several steps, most of which give rise to serious disagreement between courts and the parties here. First, this Court held that, because "[a]fter Khalid sought redress for his placement on the No Fly List through the DHS TRIP process, his inclusion on the list was affirmed by a final order issued by the TSA Administrator." Dkt. 32 at 7. 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" in an appropriate court of appeals. *Id.*

But there are substantial grounds for disagreement with this Court's conclusion that, as a result, 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. *See id.* As this Court acknowledged, in *Fikre v. FBI ("Fikre II")*, 35 F.4th 762 (9th Cir. 2022), the Ninth Circuit reached a different bottom-line conclusion, holding 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," but instead "challenging the ***Screening Center***'s decision to place him on the No Fly List in the first place." *Id.* at 774; *see also Latif v. Holder*, 686 F.3d 1122, 1127 (9th Cir. 2012) ("Because TSC actually compiles the list of names ultimately placed on the List, § 46110 does not strip the district court of federal question jurisdiction over

substantive challenges to the inclusion of one's name on the List.") (cleaned up). This Court distinguished *Fikre II* by pointing out that, there, the plaintiff had already been removed from the No Fly List, so "none of the relief sought would require altering a final order issued by the TSA Administrator." Dkt. 32 at 7. On this Court's understanding, this case differs from *Fikre II* because removing Khalid from the list "would necessarily alter the TSA Administrator's final order, which Section 46110 prevents this Court from doing." *Id.*

Reasonable minds could find that distinction of *Fikre II* unconvincing. For starters, the *Fikre II* opinion nowhere suggests that the plaintiff's removal from the List affected its Section 46110 jurisdictional analysis. That makes sense: the district court had jurisdiction over the case in the first instance (before the plaintiff was removed from the List mid-lawsuit) and jurisdiction is generally determined at the time the complaint was filed. *See Mollan v. Torrance*, 22 U.S. 537, 539 (1824) (diversity jurisdiction exists if the parties are diverse when the action was brought, even if diversity is not maintained throughout the litigation); *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 574-75 (2004) (post-filing change in a partnership's citizenship resulting from withdrawal of two partners could not cure the defect in diversity jurisdiction); *Whitmire v. Victus Ltd.*, 212 F.3d 885, 888 (5th Cir. 2000) (an amendment to a complaint may "remedy inadequate jurisdiction allegations," but it cannot remedy "defective jurisdictional facts"); *Pressroom Unions-Printers League Income Sec. Fund v. Continental Assur. Co.*, 700 F.2d 889, 893 (2d Cir. 1983) (amendment to add new plaintiff could not create jurisdiction where none existed before). And if *Fikre II* cannot be convincingly distinguished, this Court's opinion squarely conflicts with the Ninth Circuit's interpretation of Section 46110, further illustrating that there are substantial grounds for disagreeing with its conclusion.

After concluding that Section 46110 removes this Court's jurisdiction to review the TSA Administrator's order keeping Khalid on the List, this Court went a step further and held that it also "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." Dkt. 32 at 7 (quoting *Durso v. Napolitano*, 795 F. Supp. 2d 63, 72 (D.D.C. 2011).

Again, reasonable people could vigorously disagree. In *Mohamed v. Holder*, No. 11-1924, Dkt. 86 (4th Cir. May 28, 2013) (Ex. A), a district court transferred the plaintiff's claims about his No Fly List placement to the Fourth Circuit because it believed "that it lacked jurisdiction to consider Mohamed's challenge to past or future restrictions on his ability to travel because such claims are 'inescapably intertwined' with the review of TSA orders, over which this Court has exclusive jurisdiction under 49 U.S.C. § 46110." *Id.* at 3. The Fourth Circuit disagreed, explaining that it could not "fairly discern" from Section 46110 "a congressional intent to remove such claims from review in the district court," as the "inescapably intertwined" analysis requires, and remanded the claims to the district court. *Id.* at 4-5, 6. Indeed, as this Court acknowledged in its opinion, this Court's determination that Khalid's procedural due process claims are "inescapably intertwined" with the TSA Administrator's order is in tension with the parties' consensus in *Kashem v. Barr*, 941 F.3d 358, 391 n.16 (9th Cir. 2019), that "original jurisdiction over the plaintiffs' ***procedural*** due process claims lies in the district court." Dkt. 32 at 8 (emphasis in *Kashem v. Barr*).

The ongoing need for clarification from the D.C. Circuit is highlighted by the final step in this Court's analysis, which interpreted Khalid's complaint to raise "only as-applied

challenges to his own placement on the watchlist and 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. Dkt. 32 at 8. Reasonable people could disagree once more. The distinction between facial and as-applied challenges is notoriously confusing and difficult to parse. *See, e.g.*, Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 659-60 (2010) ("[C]ategorizing constitutional cases into 'facial' and 'as-applied' challenges, and relying on these categories to shape doctrine and inform case outcomes, is an inherently flawed and fundamentally incoherent undertaking."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third–Party Standing,* 113 Harv. L. Rev. 1321, 1324 (2000) ("[T]here is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her."); Michael C. Dorf, *Facial Challenges to State and Federal Statutes,* 46 Stan. L. Rev. 235, 239 (1994) ("Reliance on ultimately superficial distinctions between facial and as applied challenges to statutes only confuses the underlying concerns of substantive constitutional doctrine and institutional competence that govern the resolution of each case."); *see generally Plunkett v. Castro*, 67 F. Supp. 3d 1, 21 n.8 (D.D.C. 2014). In any event, Khalid could simply amend his complaint under Rule 15(a)(2) to more clearly assert facial challenges, squarely presenting this Court with the question it declined to decide.

In sum, the correct application of Section 46110 to Khalid's challenges to his No Fly List annotation—and perhaps even the No Fly List in general—is far from clear. As required under Section 1292(b), there is "substantial ground for difference of opinion" on that "controlling question of law" here.

B. An interlocutory appeal will materially advance the ultimate termination of the litigation because it will avoid the risk of unnecessary lengthy and duplicative discovery.

"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.'" *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (quoting *APCC Servs., Inc. v. AT & T Corp.*, 297 F. Supp. 2d 101, 109 (D.D.C. 2003)). Here, expeditiously resolving the Section 46110 jurisdictional question would eliminate the risk of an unnecessarily duplicative and lengthy discovery process. *See id.*; *APCC Servs.*, 297 F. Supp. 2d at 109. If Khalid is forced to wait until this Court enters an appealable final order to challenge the Section 46110 issue, he will likely not reach the D.C. Circuit for several years and, in the meantime, the scope of discovery is less likely to include the No Fly List itself. As it now stands, the Government will all but certainly object to any No-Fly-List-related discovery and, with the No Fly List claims out of the case, Khalid will be at a disadvantage in proving that discovery's relevance or necessity in overcoming the Government's assertions of qualified privileges. As a result, should the D.C. Circuit eventually reverse this Court's Section 46110 holding, the parties would then need to return to this Court and conduct another round of discovery pertaining to the No Fly List. Then all of those discovery disputes will arise again, with new necessary rounds of discovery, new objections, and new assertions of privilege. That two-tiered structure would draw out a discovery process that is already likely to be quite protracted.[1]

[1] In one challenge to the Terrorist Watchlist, *Elhady v. Piehota*, 16-cv-375 (E.D. Va.), discovery took nearly two years and included five separate motions to compel. In another ongoing case, *Jardaneh v. Garland*, 18-cv-2415 (D. Md.), discovery has been ongoing for three years and is not over; the parties are now in the middle of briefing the fourth (but almost certainly not final) motion to compel.

Interlocutory appeal will also advance the ultimate termination of this case because, although Khalid could seek review of his No Fly List related claims in the D.C. Circuit by filing a Section 46110 petition, Khalid does not believe that the D.C. Circuit would have jurisdiction to review that petition. There would be significant procedural awkwardness posed by Khalid filing a Section 46110 petition in the D.C. Circuit and then notifying that court that Khalid does not believe that it has jurisdiction over it. But, if Khalid chooses not to file such a petition and to wait until this Court enters an appealable final order to challenge this Court's interpretation of Section 46110, he risks running afoul of Section 46110's time limitation. The statute requires Khalid to file his petition in the court of appeals within 60 days of the issuance of the TSA Administrator's order—which has long since run—unless he has "reasonable grounds for not filing by the 60th day." 49 U.S.C. § 46110(a).

Courts "have rarely found 'reasonable grounds' under section 46110(a)." *Save Our Skies LA v. FAA*, 50 F.4th 854, 862 (9th Cir. 2022). And, in general, "a delay caused by filing a petition or complaint in the wrong court by itself is not a reasonable ground for failing to meet the statutory sixty-day deadline." *Nat'l Fed. of the Blind v. U.S. Dept. of Transp.*, 827 F.3d 51, 58 (D.C. Cir. 2016); *see also Corbett v. TSA*, 767 F.3d 1171, 1178-79 (11th Cir. 2014); *Americopters, LLC v. FAA*, 441 F.3d 726, 734 (9th Cir. 2006). As the Government has previously acknowledged, it is reasonable for a plaintiff to initially file a complaint in district court bringing challenges related to his placement on the No Fly List. *See Kashem*, 941 F.3d at 391. But it's far less clear whether the D.C. Circuit would deem it reasonable for Khalid to wait years for an appealable final order to issue from this Court, appeal the Section 46110 issue to the D.C. Circuit for resolution and then, upon the D.C. Circuit's affirmance, file a Section 46110 petition in the D.C. Circuit. In other words, by waiting for an appealable final

order, Khalid will have exposed himself to a possible determination by the D.C. Circuit that he unreasonably delayed filing that petition, which would leave Khalid without a forum for his No Fly List claims.

In sum, amending this Court's opinion to certify that permissive interlocutory review of the Section 46110 issue is appropriate would ensure that discovery proceeds efficiently, avoid piecemeal litigation, and avoid the unjust possibility that Khalid is ultimately unable to litigate his No Fly List claims at all.

II. Alternatively, this Court should transfer the No Fly List claims to the D.C. Circuit because the transfer would be in the interest of justice.

28 U.S.C. § 1631 allows any court that has found "want of jurisdiction" to "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" if such a transfer "is in the interest of justice." When a court does so, "the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred." *Id.* Determining whether a transfer "is in the interest of justice" is within the discretion of the transferring court, which considers, "*inter alia*, whether the claims would be time-barred upon refiling, whether transfer would prejudice the defendants' position on the merits, and whether transfer would save the plaintiff the time and expense of refiling in a new district." *Does 1-144 v. Chiquita Brands Int'l, Inc.*, 285 F. Supp. 3d 228, 235 (D.D.C. 2018).

Each of those factors weighs in favor of transfer here. A Section 1631 transfer of Khalid's No Fly List-related claims would avoid the possibility, discussed above, of Section 46110's 60-day deadline barring adjudication of his claims altogether. A transfer would also impose no prejudice on the Government and would save Khalid the time and expense of

drafting and filing a new petition before the D.C. Circuit or, alternatively, waiting years for an appealable final order from this Court. Moreover, as a fundamental matter, a transfer would avoid the patent unfairness (and procedural oddity) of requiring Khalid to file a Section 46110 petition seeking D.C. Circuit review when, as already explained, Khalid does not believe that the D.C. Circuit would have jurisdiction to consider such a petition. Similarly, if Khalid waited to appeal a final order, he would need to undertake the difficult and unusual task of getting his own appeal transferred to where Khalid believes it belongs: this Court.

Other courts have used 28 U.S.C. § 1631 to transfer No Fly List-related claims to the courts of appeals when they have determined that Section 46110 applies. *See Long v. Barr*, 451 F. Supp. 3d 507, 530 (E.D. Va. 2020); *Mohamed*, Ex. A at 1. If this Court declines to authorize a permissive interlocutory appeal under 28 U.S.C. § 1292(b), it should follow the *Long* and *Mohamed* courts' lead and transfer the No Fly List-related claims over which it has held there is no jurisdiction to the D.C. Circuit. In *Long*, for example, Long also disagreed with the Court's Section 46110 ruling. But because Judge O'Grady transferred the case to the Fourth Circuit sua sponte, Long was able to file papers suggesting lack of jurisdiction and requesting a transfer back to the district court. *Long v. Pekoske*, 38 F.4th 417, 419 (4th Cir. 2022). Khalid would do the same here.

To be clear, interlocutory appeal is the best approach because it cleanly delineates each courts' jurisdiction over Khalid's claims. A Section 1631 transfer leaves it to the D.C. Circuit to resolve how to approach possibly concurrent, rather than exclusive, jurisdiction over the No Fly List claims. Ordinarily, of course, when concurrent jurisdiction exists, the plaintiff may choose where to file his case. *Cf. Patsy v. Board of Regents of* Fla., 457 U.S. 496, 506–507 (1982); *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016). How that ultimately

would be accomplished after a Section 1631 transfer is yet to be seen. But overall, either vehicle would be preferrable to the current posture.

CONCLUSION

The Court should amend its Order to allow for interlocutory appeal. In the alternative, the Court should transfer the parts of the case it believes outside its jurisdiction to the D.C. Circuit.

Dated: April 5, 2023

Respectfully Submitted,

/s/ Lena F. Masri
Lena F. Masri (DC 100019)
Gadeir I. Abbas (VA 81161) β
Justin Sadowsky (DC 977642)
Hannah Mullen (DC 1725228)*
CAIR Legal Defense Fund
453 New Jersey Ave, SE
Washington, DC 20003
Phone: (202) 742-6420
Email: ldf@cair.com

Attorneys for Plaintiff

β Licensed in VA, not in DC. Practice limited to federal matters.

**Application for admission to the Bar of this Court pending.*