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 REPLY IN SUPPORT OF MOTION TO AMEND OR TRANSFER

In Khalid's Motion, Khalid explained that while the District Court ultimately disagreed with Khalid about the reach of Section 46110 to Khalid's claims against the No Fly List, including Khalid's claims against the Terrorist Screening Center reasonable people might come to a different conclusion. Khalid detailed the significant prejudice that Khalid would suffer as a result of having to wait until the end of this litigation (in which his claims against the broader watchlist, to which No Fly List is simply an annotation, Dkt. 17 (Amended Complaint) at ¶¶ 44-45, would proceed in the meantime), in order to challenge this Court's decision. And Khalid also laid out the additional duplicative discovery efforts and disputes that will necessarily occur if the parties are to proceed to discovery only as it relates to the watchlist claims, and then after final judgment have the Court of Appeals determine that Khalid should have been entitled to pursues his No Fly List claims in discovery as well.

For the most part, the Government's response rejects the premise, insisting that no reasonable mind could disagree with this Court's jurisdictional ruling. Respectfully, Khalid

emphatically (and reasonably) disagrees. Beyond that, the Government does nothing to suggest that there would be no prejudice from the Court failing to certify for appeal or transfer Khalid's No Fly List claims. Nor does the Government deny that reversal on appeal would lead to substantial duplication of significant discovery efforts. Instead, other than suggesting this case is too easy to permit transfer or interlocutory appeal, the Government makes a handful of legal arguments suggesting such transfer or appeal is prohibited. None of those arguments have any merit.

ARGUMENT

I. The District Court should certify the question of jurisdiction over the No Fly List claims for interlocutory appeal

A. Reasonable minds can differ over the Court's holding.

The Government's argument against permitting an interlocutory appeal mostly relies upon both old and new arguments that this Court's Section 46110 holding was correct. *See* Dkt. 19 at 15-20 (Govt Motion to Dismiss for Lack of Jurisdiction) (making Section 46110 jurisdictional arguments); Dkt. 20 at 6-15 (Pl. Resp. to Govt Motion to Dismiss for Lack of Jurisdiction) (responding to those arguments). In order to avoid duplicative briefing, Khalid will focus on the new arguments the Government makes.

The Government insists that there are no substantial grounds to conclude that Section 46110 permits this Court's review of Khalid's initial placement on the No Fly List (as distinct from the final order maintaining him on that list). The Government now suggests the D.C. Circuit's recent decision in *Busic v. TSA*, 62 F.4th 547 (D.C. Cir. 2023), clearly establishes that Section 46110 removes jurisdiction from challenges to the No Fly List. The Government goes so far to suggest that after *Busic* there is no reasonable argument that jurisdiction might

possibly exist in the District Court over any of Khalid's No Fly List claims, even those against non-TSA defendants. *See* Dkt. 36 at 6.

The Government oversells the relevance of *Busic* to this Court's determination of its jurisdiction in light of Section 46110. *Busic* did not decide whether Section 46110 jurisdiction is exclusive in the context of a No Fly List removal, much less whether that jurisdiction extended to prohibit concurrent district court jurisdiction over other defendants or claims other than the decision not to remove an individual from the No Fly List at the end of the DHS TRIP process. *See, e.g., Fikre v. FBI*, 35 F.4th 762, 775 (9th Cir. 2022) (contrasting a challenge to the TSA Administrator's decision not to remove someone and a challenge to placement on the No Fly List in the first instance). Instead, *Busic* arose in the context of a former hijacker undertaking the DHS TRIP process and then challenging the Administrator's decision. 62 F.4th at 549. Busic then filed a direct appeal under Section 46110 in the D.C. Circuit. With nobody challenging jurisdiction, the Court confirmed for itself that jurisdiction existed. *Id.* But it did not say that a challenge to the actions of, for instance, the TSC would also reside initially (much less exclusively) in the Courts of Appeal. Of course, if Khalid had undertaken the entirety of the DHS TRIP process before suing, and then challenged the administrator's final decision (and only that decision), the D.C. Circuit would have jurisdiction over that challenge. Nobody disputes that. But that does not resolve whether Khalid's No Fly List claims against the non-TSA defendants are outside the District Court's jurisdiction here.

The Government also provides a stringcite of cases it claims indicate that challenges a listee's initial placement on the watchlist are preempted by the exclusive jurisdiction provision of Section 46110. *See* Dkt. 36 at 7-8. But only two of those cases even purport to hold as much.

One, *Scherfen v. DHS*, 2010 WL 456784 (M.D. Pa. Feb. 2, 2010), was "decided many years prior to the Sixth Circuit's decision in *Mokdad*," coming to a contrary conclusion, and thus has little persuasive value. *Kovac v. Wray*, 363 F. Supp. 3d 721, 744 n.7 (N.D. Tex. 2019) (rejecting Government's Section 46110 exclusive jurisdiction argument in No Fly List case). A second, *Tooley v. Bush,* 2006 WL 3783142, at *26 (D.D.C. 2006), was, according to the Government, reversed in part on other grounds. *See* Dkt. 38 at 8. But that's not ***entirely*** true. Rather, the D.C. Circuit reversed the district court's finding that Section 46110 preempted the watchlist claims in that case, specifically because the watchlists there, like, were not exclusively maintained by the TSA. *Tooley v. Napolitano*, 556 F.3d 836, 841 (D.C. Cir.), *reh'g granted, judgment vacated* (July 1, 2009), *on reh'g*, 586 F.3d 1006 (D.C. Cir. 2009). As a result, the claims were not exclusively concerning final orders of the TSA Administrator. *Id.* Then, on panel rehearing, the D.C. Circuit affirmed dismissal of the district court's claims, not because of Section 46110, but because the panel found the claims to be insubstantial. 586 F.3d at 1009.

The Government maintains (at 8-10) that reasonable people could not disagree with this 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 Administrator's order. *See* Dkt. 36 at 8-10. In so arguing, the Government attacks three cases in which Courts have rejected at least in part the Government's argument that Section 46110 completely strips district courts from hearing No Fly List challenges.

The first of those cases is *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019), which held that procedural due process challenges to the use of DHS TRIP as a No Fly List redress process may proceed in district court. The Government speculates that *Kashem* only found jurisdiction over those procedural due process claims because the case was brought prior to the Government's decision to rout No Fly List DHS TRIP decisions through the TSA Administrator, so the case might come out differently if it was filed as a new action today.[1] *See* Dkt. 36 at 10. But that's not what *Kashem* said. *Kashem* held "that § 46110 grants the courts of appeals, rather than the district courts, exclusive jurisdiction over the plaintiffs' substantive due process claims" in that case. 941 F.3d at 391. *Kashem* also had procedural due process claims, just like this one did. The Government's argument that maybe the jurisdictional analysis would change if brought anew ignores that the Court itself made clear the difference between the substantive due process claims outside district court jurisdiction and the procedural due process claims within the district court's jurisdiction: "Those [jurisdictionally appropriate] claims challenge the sufficiency of the revised DHS TRIP procedures administered by the TSC, not the substantive decision in the final TSA order." *Id.* at 391 n.16. It had nothing to do with the timing of the lawsuit.

Likewise, the Government's suggestion that *Fikre v. FBI* only found district court jurisdiction over No Fly List claims because Fikre had already been removed from the list not only does not make sense, it is inconsistent with why the Court found jurisdiction existed: that Fikre was not challenging "the TSA Administrator's decision made at the end of the DHS

[1] Here, of course, Khalid filed his Complaint before any order of the TSA of Administrator was even made. *See* Minute Order (Feb. 2, 2022) (suspending briefing until Khalid completed DHS TRIP process to completion). DHS TRIP exhaustion is not a prerequisite for bringing suit. *See* Dkt. 20 at 6-13.

TRIP process" but "the Screening Center's role in assigning him to the No Fly List in the first place." 35 F.3d 762, 775 (9th Cir. 2022); *compare with Busic*, 62 F.4th at 549 (Section 46110 jurisdiction existed over Busic's claims against TSA because TSA was challenging the decision of the TSA Administrator not to remove Busic). Reasonable minds, at minimum, could think *Fikre*, not *Busic*, applies here.[2]

The Government similarly tries (at 10) to handwave away *Mohamed v. Holder,* 11-1924 (May 28, 2013) (Dkt. 34-2), as unpublished and because it occurred before the Government rerouted DHS TRIP through the TSA Administrator for No Fly List cases. *See* Dkt. 36 at 9. But the reasoning of *Mohamed* was not that the TSA Administrator was uninvolved, it was that the Court of Appeals did "not fairly discern from" the statutory scheme any "congressional intent to remove" No Fly List challenges "from review in the district court" in the first instance. Dkt. 34-2 at 4-5. The Government again substitutes an arbitrary basis for distinguishing the facts of that case for a distinction of the actual reasoning of the opinion. And that *Mohamed* is unpublished is of no moment, as the point is that a reasonable person (such as a Fourth Circuit judge) might disagree with this Court's decision, not that the Court's decision was wrong, contradicting binding precedent.

* * *

The Government separately suggests (at 18) that "Plaintiff knew or should have known" that this Court would have ruled that there was no district court jurisdiction over the No Fly List claims because a different ruling in the Eastern District of Virginia "had exclusive jurisdiction over the plaintiff's claims under Section 46110." (Citing *Long v. Barr*, 451 F. Supp.

[2] *Busic* relied on *Kashem*, 62 F.4th at 549, making the possibility of a split between the D.C. Circuit and the Ninth Circuit on this issue remote.

3d 507, 529 (E.D. Va. 2020), *vacated and remanded sub nom. Long v. Pekoske*, 38 F.4th 417 (4th Cir. 2022). But in playing fast and loose with the rulings of other Courts, the Government misstates the holding of *Long*. *Long* expressly only sent Khalid's "as applied" claims to the 4th Circuit under Section 46110. While the District Court here found Khalid's Complaint (which in all meaningful respects was similar to the one in *Long*) did not raise any facial challenges, Dkt. 32 at 8-9, as Khalid noted in his Motion (at 7), that was inadvertent, and Khalid can (and will) simply move to amend his Complaint to add a facial challenge. While the Government strenuously defends the Court's determination here that no facial claims apply, it provides no reason why Khalid should not be permitted to simply amend his Complaint under Rule 15 to properly include a facial challenge to the No Fly List. While the Government complains that courts should disfavor facial challenges, such disfavoring provides no basis for holding the Court having no jurisdiction over those claims. And while the Government suggests there should be no difference between facial and as applied challenges in the first instance, that is not what the District Court in *Long* found, further showing how much reasonable people can disagree over the jurisdictional scope of Section 46110.

In any event, the Ninth Circuit vacated that decision without deciding if the District Court was correct, expressly "declin[ing] to decide whether § 46110 deprives the district court of jurisdiction over Long's remaining as-applied challenges." 38 F.4th at 427.

The Government's argument that the jurisdictional questions in this case are not subject to reasonable disagreement ultimately spans 8 pages. Khalid respectfully suggests if the Government thinks even after winning at the Motion to Dismiss stage, it needs eight additional pages of arguments at the wall to see if any of them stick, the Court's opinion is more susceptible to reasonable disagreement than it claims.

B. An interlocutory appeal would avoid delay and duplication of efforts.

The Government does not deny the prejudice of denying Khalid's Motion, suggesting instead that the prejudice is good, and Khalid's fault. In addition to again suggesting that the jurisdictional questions raised by Khalid's Complaint are simple, *see* Dkt. 36 at 12, the Government argues that interlocutory appeal is ***only*** "appropriate where ***the entire case*** would be resolved." Opp. At 14 (emphasis Government's). But the Government cites no case stating such a proposition exists—they only cite cases saying that when an interlocutory appeal could resolve the entire case, that provides another reason to permit it. And if it were true, the ability to seek interlocutory appeals would be expressly limited to defendants. *But see, e.g., Laura Secord Candy Shops Ltd. v. Barton's Candy Corp.*, 368 F. Supp. 851, 854 (N.D. Ill. 1973) (allowing plaintiff interlocutory appeal despite inability of appeal to resolve case, to avoid potential for two trials).

The Government also suggests (at 14), that if Khalid is wrong, the efficiencies of appeal "may never materialize." But that is, of course, true for every interlocutory appeal. That is the whole reason an appeal must also be over an issue for which reasonable minds might disagree.

II. In the alternative, the Court should sever the No Fly List claims and transfer them to the D.C. Circuit.

The Government's argument against a transfer under 28 U.SC. § 1631 is twofold. But both prongs of the Government's argument fall under scrutiny.

A. A part of an action can be severed and transferred under 28 U.S.C. § 1631.

First, citing only to dicta in a series of D.C. Circuit and District court cases, the Government claims that the D.C. Circuit only allows transfer of entire actions, not parts of a case. The Government suggests that the language of 28 U.S.C § 1631 only speaks to actions,

not claims, and so part of an "action" cannot be transferred. *See* Dkt. 36 at 15-16. The Government is wrong.

For starters, the Government's argument ignores the plain language of Federal Rule of Civil Procedure 21. That rule permits the Court to "sever" any 'claim against a party" from the action. By doing so, the District Court creates two actions. *See Strandlund v. Hawley*, 532 F.3d 741, 744 (8th Cir. 2008) (stringcite omitted); *Third Degree Films, Inc. v. Does 1-152*, 2012 WL 13070994, at *4 (D.D.C. Jan. 4, 2012) (same); *see also United States v. Ray*, 234 F. Supp. 371, 372 (D.D.C 1964) (severing part of a complaint and transferring that part to another district); And, as the Government admits, its argument is contrary to the holding of several circuit courts. *See D'Jamoos ex rel. Est. of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 110 (3d Cir. 2009); *United States v. Cnty. of Cook, Ill.*, 170 F.3d 1084, 1089 (Fed. Cir. 1999); *F.D.I.C. v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996). The Government also ignores that severance-and-transfer of partial claims was permitted by another court in this district in *Does 1-144 v. Chiquita Brands Int'l, Inc.*, 285 F. Supp. 3d 228, 239 (D.D.C. 2018).

For support, the Government primarily looks to *Hill v. Air Force*, 795 F.2d 1067, 1070 (D.C. Cir. 1986). But *Hill* held only that the district court did not abuse its discretion in not transferring the case to New Mexico, not that the district court would have abused its discretion had it transferred the case to New Mexico. And *Hill* makes no attempt to discern whether the ability of a District Court to sever claims under Federal Rule of Civil Procedure 21 resolves any concern with the use of the phrase "action" instead of "claim" in Section 1631. *Compare with D'Jamoos*, 566 F.3d at 110. Later, in *Murthy v. Vilsack*, 609 F.3d 460, 463-64 (D.C. Cir. 2010), the D.C. Circuit accepted appeal of yet another case in which a district court transferred part of the case to another court. The Government also relies on *ITServe*

Alliance, Inc. v. Cuccinelli, 502 F. Supp. 3d 278, 290 (D.D.C. 2020). There, the court incorrectly assumed that part of a case cannot be transferred under Section 1631, but did so only in deferring a ruling on that motion to transfer. The District Court also did not address Rule 21, which provides the solution to the "action" versus "claim" problem.[3]

B. There is meaningful, reasonable confusion over the proper forum for review.

Second, the Government says (at 16) that Khalid 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." Putting aside that Khalid is represented not by CAIR and all of its chapters but by the CAIR Legal Defense Fund, which employs seven lawyers, it is simply false that Section 1631 only applies to pro se litigants. [cite?] And rightly or wrongly, Khalid's counsel is, contrary to the Government's assertion, "confused about the proper forum for review." *Id.* (quoting *American Beef Packers, Inc. v. Interstate Commerce Commission*,711 F.2d 388, 390 (D.C. Cir. 1983)).

Khalid and his counsel, who filed substantially similarly Complaints in *Fikre* and *Long*, have now had three entirely different conclusions from different judges about whether or not there is district jurisdiction over constitutional challenges to No Fly List placement. In *Fikre*, the Ninth Circuit found the District Court had jurisdiction over all of the No Fly List claims. [cite] In *Long*, the Fourth Circuit refused to decide what claims the District Court had jurisdiction over after the District Court found that it had jurisdiction over some but not all of the No Fly List claims in that case. *See generally* § I(A), above. And here, the Court found that it had jurisdiction over none of the claims in the case. The Government's suggestion that

[3] In any event, as Khalid itself noted, certification would be cleaner than transfer, avoiding the surmountable textual problem in Section 1631 that the Government raises.

Khalid's nonprofit pro bono counsel knows that the District Court lacks jurisdiction over Khalid's No Fly List claims but is playing games for some unexplained reason is baseless.

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 28, 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.*