CASE NOT YET SCHEDULED FOR ORAL ARGUMENT
RECORD NO. 09-1095

In The
United States Court of Appeals
For The District of Columbia Circuit

LEWIS L. BONIFACE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TRANSPORTATION SECURITY ADMINISTRATION,

Respondents.

ON PETITION FOR REVIEW FROM THE TRANSPORTATION SECURITY ADMINISTRATION

REPLY BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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GLOSSARY

ALJ	Administrative Law Judge
HME	Hazardous Materials Endorsement
IAD	Interstate Agreement on Detainers
IDTA	Initial Determination of Threat Assessment
J.A.	Joint Appendix
PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act"). Pub. L. No. 107-56, 115 Stat. 272.
TSA	Transportation Security Administration

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addenda to *Amicus*' opening.

SUMMARY OF ARGUMENT

I. TSA's regulation is impermissibly retroactive. TSA argues that the regulation has no retroactive effect because, TSA says, the agency merely takes into account prior disqualifying convictions as evidence in evaluating whether a trucker poses a security threat. As Boniface's case shows, however, TSA's regulation does something quite different. The cases TSA cites in support of its non-retroactivity argument are inapposite, because they do not involve an automatic occupational-license disqualification and branding as a security threat based on past actions. TSA's argument that Boniface's case is a "poor vehicle" for demonstrating the retroactivity of TSA's regulation is misplaced; he has standing to challenge the regulation. TSA's policy argument does not cure the retroactivity problem, and it does not withstand analysis.

II. The IAD should be enforced. TSA relies in part on cases enunciating an inapplicable waiver principle: a defendant waives his IAD right if he requests in advance to a pretrial return to the sending state, in which case there is no IAD violation. Boniface did not request a pretrial transfer back to Arizona state custody in 1975. Nor does his guilty plea waive his IAD claim. First, Boniface fits within

the *Blackledge/Menna* exception to that general waiver rule. Second, TSA does not persuasively refute Boniface's separate jurisdictional argument against waiver, namely that the district court in 1975 was without jurisdiction to adjudicate his criminal case and enter a judgment of conviction.

III. TSA's waiver-ineligibility order is procedurally flawed. TSA does not dispute that it failed to follow its own regulations when it converted Boniface's appeal into a waiver request. Instead, TSA argues that the Court should not consider the conversion argument advanced by *Amicus*. But the conversion argument is appropriately before this Court because Boniface raised TSA's failure to abide by its own regulations in his brief and through *Amicus*, who was appointed to support his position and whose arguments Boniface explicitly incorporated. Furthermore, Boniface sufficiently exhausted his administrative remedies, and even if the "new evidence" rule cited by TSA is a remedy that must be exhausted for judicial review, non-exhaustion would be excusable under the circumstances.

As for *Amicus*'s specific arguments against the substance of TSA's waiver-ineligibility order, Boniface did raise at least some of these arguments below, and he had reasonable grounds for not raising specific objections to the agency. At any rate, if the Court agrees that the order is procedurally flawed based on the improper conversion, the Court can vacate the order and remand for a waiver proceeding without addressing the substance of TSA's order.

ARGUMENT

I. TSA'S REGULATION IS IMPERMISSIBLY RETROACTIVE

A law is retroactive when it "attaches new legal consequences to events completed before its enactment," including by "attach[ing] a new disability in respect to transactions or considerations already past" or "giv[ing] a quality or effect to acts or conduct which they did not have . . . when they were performed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994). TSA's regulation attaches a new disability with a new legal effect to Boniface's past guilty plea: permanent disqualification from holding an occupational license. The regulation also gives a new quality to his conduct by branding him a "security threat" in the context of terrorism, even though his conviction carried no such branding when it occurred. Therefore, the regulation is retroactive.

1. TSA argues that its regulation has no retroactive effect because the agency merely "take[s] into account" prior disqualifying convictions as evidence in evaluating whether a trucker poses a security threat. Br. for Resp'ts ("TSA Br.") 38-39. As Boniface's case shows, however, TSA's regulation does something quite different: it provides categorically that certain past convictions are "permanent disqualifying offenses" and that an individual with such a conviction is a "security threat." 49 C.F.R. §§ 1572.5(a), 1572.103(a)(1). TSA did not merely use Boniface's 1975 conviction as a piece of evidence. TSA applied a categorical

rule under which that conviction automatically branded Boniface a security threat and disabled him from holding an HME. The government added a disability and attached a new legal consequence to events completed long before the law's enactment. Hence the retroactive effect.[1]

TSA's reliance on *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30 (2006), is misplaced. That illegal-immigration case involved new legislation requiring removal of immigrants who reentered the country unlawfully after previously having been removed. *Id.* at 33-35. The Court held that the new legislation was not retroactive because the conduct that triggered the law (continuing to remain in the country illegally) *post-dated* the new legislation's effective date. *Id.* at 44-45. That is not true here: Boniface's 1975 conviction, which triggered his disqualification, *pre-dated* the enactment of TSA's regulation and the PATRIOT Act. Moreover, *Fernandez-Vargas* emphasized that because of a lengthy delay between the new legislation's enactment and its effective date, the petitioner had warning and "ample opportunity to avoid" the new law by ceasing his illegal

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[1] The availability of a discretionary waiver process does not alter the analysis. That process puts the burden on an already-disqualified trucker who has had his license denied or withheld to demonstrate eligibility for a discretionary waiver under a process lacking meaningful standards—a process that TSA itself says does *not* "restrict TSA's ability . . . to *deny* a waiver" for almost any reason it chooses. TSA Br. 29 (emphasis in original). Boniface's case demonstrates the emptiness of the waiver process: TSA initiated the waiver process for him (by converting his appeal into a waiver request), and then quickly denied a waiver with one arbitrary line, the lead of which was his 1975 conviction. (J.A. 43)

conduct, *id.* at 45; it was "not a past act that he [was] helpless to undo," *id.* at 44. In contrast, Boniface was helpless to undo his 1975 conviction upon enactment of TSA's regulation.

TSA also likens its regulation to the statute in *Kansas v. Hendricks*, which took past criminal behavior into account "solely for evidentiary purposes." 521 U.S. 346, 371 (1997). But the rationale of *Hendricks* demonstrates the fallacy in TSA's position. *Hendricks* involved a Kansas statute providing for involuntary civil commitment of sexually violent predators, based on legislative findings that they generally have "anti-social personality features" with a "high" likelihood they will repeat acts of sexual violence. *Id.* at 351. Under the regime, evidence of past sexually violent behavior is necessary but not sufficient for civil commitment. The state must prove to a jury beyond a reasonable doubt, after a psychological evaluation, that the person "'suffers from a mental abnormality or personality disorder,'" with "mental abnormality" defined as a "'congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.'" *Id.* at 352-53 (citation omitted). Thus, the Kansas statute "unambiguously requires a finding of dangerousness . . . as a prerequisite to involuntary confinement." *Id.* at 357. Accordingly, the statute has no retroactive effect because it requires "a determination that the person *currently*

both suffers from a 'mental abnormality' or 'personality disorder' and is likely to pose a future danger to the public." *Id.* at 371 (emphasis in original). "To the extent that past behavior is taken into account, it is used . . . solely for evidentiary purposes," *id.*, in the context of an evidentiary proceeding featuring proof of current and future dangerousness before the disability attaches.

If TSA operated a regime like the one in the *Hendricks*, there would be no retroactivity concern. But TSA's regime operates to brand truckers as security threats and disqualifies them in the absence of any current evidence indicating a clinical disposition or desire to commit or aid acts of terrorism. TSA did not simply take Boniface's conviction into account "solely for evidentiary purposes."

TSA also cites two pre-*Landgraf* decisions involving federal-funding regulations: *Adm'rs of Tulane Educ. Fund v. Shalala*, 987 F.2d 790 (D.C. Cir. 1993) ("*ATEF*") and *Ass'n of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859 (D.C. Cir. 1992) ("*AACS*"). In both cases the economic regulations provided for the use of recent and directly relevant data (default rates in *AACS*; cost data in *ATEF*) to assess the government's funding exposure. Ultimately, the retroactivity inquiry "demands a commonsense, functional judgment" about the true consequences of the law regarding "'events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf*, 511 U.S. at 280). Here, a common sense, functional judgment reveals that using long-past criminal

convictions to automatically brand citizens as security threats and bar them (permanently) from holding an occupational license is fundamentally different than using past economic data to assess funding exposure.[2]

TSA's regulation is more analogous to laws disqualifying individuals from occupations based on past convictions or based on their failure to swear under oath that they had not committed certain past conduct. The Supreme Court has characterized such laws as retroactive. In *Hawker v. New York*, 170 U.S. 189 (1898), for example, the Court confronted a law that disqualified individuals from practicing medicine based on past felony convictions. *Id.* The Court quoted an earlier case that said, "'Though not an ex post facto law [because it was not punitive], *it is retrospective* in so far as it determines from the past conduct of the party his fitness for the proposed business.'" *Id.* at 197 (citation omitted; emphasis added).[3] And in *Cummings v. Missouri*, 71 U.S. 277 (1866), which involved a law requiring an oath to hold office and practice certain occupations, the Court concluded that the law was "retrospective" because it was not "limited to an affirmation of present belief, or present disposition," but instead was "exacted with

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[2] Similarly inapposite is *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996), which involved an FCC economic regulation prospectively modifying price cap formulas for regulating rates charged by local exchange carriers.

[3] The Supreme Court has used "retrospective" and "retroactive" interchangeably. *See United States v. Reynard*, 473 F.3d 1008, 1014 n.3 (9th Cir. 2007); *Landgraf*, 511 U.S. at 268-71.

reference to particular instances of past misconduct." *Id.* at 318. In these cases, the states argued, as TSA does here, that the laws simply used past misconduct to assess an individual's current qualification or fitness to hold a license or perform an occupation. But the Court indicated that the laws were retroactive.

These cases belie TSA's assertion that a law that operates prospectively cannot have retroactive effect. So does *Smith v. Doe*, 538 U.S. 84 (2003), which involved an Alaska law prospectively requiring persons previously convicted of sex offenses to publicly register and provide certain notifications. *Id.* at 89. The Court said that the law, though not punitive, applied retroactively. *Id.* at 105-06. *See also id.* at 90 ("The Alaska law . . . contains two components: A registration requirement and a notification system. Both are retroactive.").

2. TSA argues that Boniface's case is "a poor vehicle" for demonstrating the retroactivity of TSA's regulation because there is no "indication in the record" that Boniface would have "altered his conduct" had he known it would permanently disqualify him from holding an occupational license, given that he was not already "deterred . . . by the threat of lengthy imprisonment." TSA Br. 40-41. This argument is flawed. Boniface has standing to challenge TSA's regulation as impermissibly retroactive; and insofar as TSA suggests that a law cannot be retroactive if the predicate conduct was already unlawful when committed, that is incorrect. *See* Opening Amicus Br. 23.

TSA does not argue that Boniface had to actually rely in 1975 on the state of the law to establish the retroactivity of TSA's regulation. The Supreme Court has never held that actual reliance is required to establish a law's impermissible retroactive effect. In *Landgraf*, the Court noted that "upsetting expectations" is a "concern[]" in retroactivity analysis, but the Court reached its impermissible-retroactivity holding by reasoning that unfairness results "*whenever* the law imposes additional burdens on conduct that occurred in the past." 511 U.S. 283 n.35 (emphasis added). The Court's retroactivity analysis did not turn on the discriminatory conduct of Landgraf's employer or on any reliance by the employer on the state of the law when the discrimination occurred. Instead, the Court found retroactivity because the amendment would attach a new burden to previously proscribed conduct. *See id.* at 282-84. Post-*Landgraf*, the Court has treated reliance either as a policy rationale explaining the presumption against retroactivity or as an alternate basis for finding impermissible retroactivity; the Court has not included reliance among the basic elements required to establish retroactivity.

Finally TSA ignores the penalty of being branded a terrorism-related "security threat" by the federal government. Presumably citizens would be less likely to engage in misconduct or plead guilty knowing that it would have the effect of branding them "security threats" under a notorious antiterrorism law.

3. TSA concludes with a policy argument, contending that Boniface's position would make the law less effective. TSA Br. 41-42. But this does not cure the retroactivity problem. "It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity." *Landgraf*, 511 U.S. at 285. Moreover, contrary to TSA's premise, accepting Boniface's argument would not compel the government to grant HMEs to dangerous applicants with past convictions. Nothing stops TSA from considering prior offenses when evaluating contemporary evidence of current disposition to commit or aid acts of terrorism—i.e., making an individualized security-threat assessment—rather than using past convictions as automatic disqualifiers. Congress evidently envisioned such an individualized assessment when it required the agency to "determine[] . . . that the *individual* does not pose a security risk warranting denial of [an HME]." 49 U.S.C. § 5103a(a)(1) (emphasis added).

In conclusion, TSA's position would render illusory the time-honored protection against unauthorized retroactive rulemaking. By semantically couching the use of past conduct as mere evidence of "current" risk or unfitness, the government could tack any new consequence, disability, or liability onto past conduct and avoid a finding of retroactivity. The Court should reject TSA's position and find the regulation to be impermissibly retroactive.

II. THE COURT SHOULD ENFORCE THE IAD

The United States violated the IAD in securing Boniface's conviction. The IAD is federal law, and its sanction is absolute. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). The IAD violation voided Boniface's indictment by rendering it without "further force or effect" and mandating its dismissal "with prejudice," 18 U.S.C. App. 2, § 2, art. IV(e), yet the United States prosecuted and convicted Boniface on the void indictment. Now the United States, through TSA, is using the conviction to deprive Boniface of an occupational license. This should be stopped.

1. TSA is correct that numerous courts have held that a prisoner may waive the IAD's anti-shuttling right. TSA Br. 20-21. But a number of the cases in TSA's string cite involved prisoners who affirmatively requested to be treated at odds with their IAD rights—e.g., by requesting a pretrial return to the sending state. There is no dispute that a prisoner waives his anti-shuttling right by affirmatively requesting, in advance, to be treated at odds with that right. Indeed, the Supreme Court has suggested this in *dicta*. *See Bozeman*, 533 U.S. at 156-67; *cf. New York v. Hill*, 528 U.S. 110, 115-16 (2000) (holding that a prisoner may waive his qualified IAD right to a speedy trial by assenting to a trial date beyond the 180-day time period set by IAD Article III(a)). A receiving state's assent to a prisoner's request to be treated at odds with his IAD rights should not be deemed

an IAD violation at all. *Cf. Sassoon v. Stynchombe*, 654 F.2d 371, 374 n.7 (11th Cir. 1981) (stating in *dicta*, "[I]t seems that a prisoner returned at his own request would not have waived a violation of the [IAD], but rather waived his rights thereunder[;] in other words, there would have been no violation."). This waiver rule has no bearing here, however, because TSA does not contend that Boniface affirmatively requested a pretrial return to Arizona state prison in 1975. In Boniface's case, the United States' IAD violation was complete, and the indictment thus was without "further force or effect," *before* he switched his plea to guilty.

2. TSA also argues that Boniface waived the IAD violation by pleading guilty, citing *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004). TSA Br. 21. As noted in *Amicus*'s opening brief, however, *Delgado-Garcia* recognized two exceptions to the general rule that a guilty plea waives claims of error. 374 F.3d at 1341. The first exception is the defendant's right "'not to be haled into court at all,'" known as the *Blackledge/Menna* exception[4]; the second exception concerns jurisdictional defects. *Id.* (citation omitted).

a. The *Blackledge/Menna* exception did not apply in *Delgado-Garcia* because "because there was no arguable *facial* constitutional infirmity in the

[4] *See Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974); *Menna v. New York*, 423 U.S. 61, 62-63 (1975) (*per curiam*)).

indictment." *Id.* at 1343. Drawing on that holding, TSA argues that the *Blackledge/Menna* exception cannot apply here, contending that an IAD anti-shuttling violation does not involve a facial infirmity. TSA Br. 22. But TSA overplays the facial-infirmity concept. That concept is rooted in *Menna*'s statement that "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Menna*, 423 U.S. at 63 n.2. The requirement that the claimed defect be apparent from a charge "judged on its face" means that the claim can be "resolved without any need to venture beyond [the] record" before "the presiding judge at the time the plea was entered." *United States v. Broce*, 488 U.S. 563, 575 (1989).

Here, the court that accepted Boniface's ill-advised guilty plea could have resolved the IAD matter on the same record, at or before the plea hearing. That court (which authorized the writ of habeas corpus ad prosequendum under which Boniface was transferred from Arizona state prison to federal court) simply had to ask the prosecutor whether a detainer had been lodged.[5] Boniface's claim is no less "facial" than was the claim in *Blackledge*, where the Court rejected waiver. In *Blackledge*, the defendant pleaded guilty to a felony indictment in a North Carolina

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[5] Boniface's IAD claim thus is distinguishable from the one in *Broce*. The defendant in *Broce* made a factually nuanced double jeopardy claim which could not be established without an evaluation of extrinsic evidence relating to the nature of the underlying conspiracy, evidence developed at a coconspirator's later jury trial. *See Broce*, 488 U.S. at 575-76.

superior court; his due process claim, based on the likelihood of prosecutorial vindictiveness, was determined not only from the face of the indictment but also from the extrinsic fact that the indictment was obtained after the defendant appealed a state district court's misdemeanor conviction on an earlier indictment arising from the same conduct. 417 U.S. at 22-23.

Contrary to TSA's assertion, the *Blackledge/Menna* exception should not be limited to "the power of a court to *initiate* criminal proceedings." TSA Br. 22 (emphasis in original). *Blackledge* and *Menna* focused on the government's power to prosecute, i.e., the power to require a defendant to answer to a charge and be convicted. *See Blackledge*, 417 U.S. at 31 (holding that the defendant's guilty plea did not preclude his due process claim on appeal because his claim was "'that North Carolina simply could not permissibly require [the defendant] *to answer to the felony charge*"; the "'practical result [of the right invoked] is *to prevent a trial from taking place at all'*" (emphases added; citation omitted)); *Menna*, 423 U.S. at 63 n.2 ("[T]he claim is that the State *may not convict* petitioner no matter how validly his factual guilt is established. The guilty plea, therefore[,] does not bar the claim." (emphasis added)). Likewise, Boniface's claim is that, because of its IAD violation, the United States lacked the power to bring him back to federal court to answer the charge on the merits and convict him.

As *Menna* explained, the waiver rule for guilty pleas naturally is based on the proposition that "a counseled plea of guilty is an admission of *factual guilt* so reliable that . . . it *quite validly* removes the issue of factual guilt from the case." *Menna*, 423 U.S. at 63 n.2 (first emphasis added).[6] Conversely, a guilty plea "does not bar the claim" where "the claim is that the State may not convict petitioner no matter how validly his factual guilt is established." *Id.* Here, Boniface's IAD claim is that the United States could not lawfully convict him after the IAD rendered his indictment without further force or effect and required its dismissal with prejudice. He fits within the *Blackledge/Menna* exception.

b. Boniface separately argues that he satisfies the jurisdictional exception to the waiver-by-plea rule, contending that the IAD violation rendered the court without jurisdiction to convict him in 1975. As *Amicus* has explained, once an anti-shuttling violation occurs, the IAD voids the indictment, leaving no case to adjudicate. This power-stripping sanction may be viewed as going to the jurisdiction of the court to adjudicate the merits and enter a judgment of conviction. Opening Amicus Br. 35-36.

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[6] Thus, the defendants in *Delgado-Garcia* could not benefit from the *Blackledge/Menna* exception because they contested factual guilt by raising a due process claim about the substantive reach of the elements of the crime. 374 F.3d at 1339, 1343. Even if their due process claim was correct, they still would have been required to answer to the charge in court. *Id.*

TSA argues that a statutory violation will operate as a "jurisdictional" defect only if the statute speaks in jurisdictional terms. TSA Br. 23. Elsewhere in its brief, however, TSA makes a jurisdictional argument under a statute (49 U.S.C. § 46110(d)) that does not mention jurisdiction. TSA Br. 27-28. Indeed, a statute need not mention jurisdiction to be jurisdictional. *See Bowles v. Russell*, 551 U.S. 205, 208-13 (2007) (holding that an untimely civil notice of appeal is a jurisdictional defect even though the statute prescribing the time limit, 28 U.S.C. § 2107, neither mentions jurisdiction nor falls within the part of Title 28 dealing with jurisdiction). TSA cites *United States v. Arbaugh*, 546 U.S. 500 (2006), which held that Title VII's employee-numerosity requirement is an element of a Title VII claim, not a jurisdictional requirement. *Id.* at 516. That holding is unsurprising because Title VII has a jurisdictional section and the numerosity requirement is not part of it. *See id.* at 515. Unlike Title VII, the IAD does not contain a separate jurisdictional section; and unlike the numerosity requirement, the IAD's anti-shuttling requirement cannot be characterized as an element of a claim.

TSA also cites *United States v. Wild*, 551 F.2d 418 (D.C. Cir. 1977), which held that a statute of limitations was not a jurisdictional bar to prosecution but instead was tantamount to an affirmative defense. *Id.* at 421. The holding is unremarkable, since statutes of limitations traditionally are affirmative defenses, and since "time prescriptions, however emphatic, are not properly typed

jurisdictional." *Arbaugh*, 546 U.S. at 510 (internal quotation marks omitted). *Wild* relied on an old Supreme Court case, which *Wild* read as holding that a statute of limitations "bar[s] prosecution . . . only if the government could not prove any applicable exception." *Wild*, 551 F.2d at 422. But unlike a statute of limitations, there is no applicable exception that the government may prove once the IAD's anti-shuttling right is violated. *See Bozeman*, 533 U.S. at 153 ("[T]he language of the [IAD] militates against an implicit exception, for it is absolute."). Instead, the IAD provides categorically that an anti-shuttling violation shall render the indictment without "further force and effect" and requires the court to dismiss the prosecution's case with prejudice.

For these reasons, the Court should reject TSA's waiver arguments and enforce the categorical terms of the IAD. The United States, be it the Department of Justice or TSA, should not be permitted to disregard this federal law.

III. TSA'S WAIVER-INELIGIBILITY ORDER IS FLAWED

A. TSA's Order Is Procedurally Flawed Because The Agency Improperly Converted Boniface's Appeal Into a Waiver Request

TSA does not dispute that it failed to follow its own regulations when it converted Boniface's appeal into a waiver request while failing to issue a Final Determination of Threat Assessment. TSA Br. 31-38. Nor does TSA establish that it gave Boniface any advance notice of the conversion before the waiver-denial order. To be sure, TSA speculates that "it is at least possible that TSA

orally told Boniface." TSA Br. 33 (emphasis in original). Putting aside whether an oral statement to a *pro se* litigant on a matter this serious could qualify as adequate notice, there is no competent proof of this communication, much less its content, and Boniface refutes it. He says he was told in a phone call that "*his Appeal* would be heard on July 30, 2008, and it would be another 'two weeks' before there would be any decision." Pet'r Br. 13 (emphasis added).

Rather than contesting that it failed to follow its own regulations by improperly converting Boniface's appeal into an unsuccessful waiver request, TSA contends that the Court should not consider the argument. TSA Br. 32-38. We address TSA's contentions below.

1. The conversion argument advanced by *Amicus* is appropriately before the Court

TSA's contention that "this Court cannot consider the [improper-conversion] argument because it is raised only by Amicus" (TSA Br. 32) ignores relevant language in Boniface's filings and misconstrues the role of a court-appointed *amicus*. Boniface raised TSA's failure to abide by its own regulations in his own brief and through the undersigned *Amicus* appointed to support his position.

Before the ALJ below, Boniface contested TSA's reliance on his failure to submit evidence to support a waiver, emphasizing that TSA had never asked for this information and that he had such information available. (J.A. 48-49) In effect, he was objecting to the conversion—objecting that, in the absence of a

request by TSA, his pursuit of an *appeal* did not require him to submit waiver-related evidence. In his opening brief, Boniface argues that TSA disregarded "violations of its own rules," and for support he cites TSA's appeal rule, 49 C.F.R. § 1515.5(b)(3), which provides that TSA may request additional information to process *an appeal*. Pet'r Br. 13. Boniface is objecting to the conversion. Because Boniface is a *pro se* litigant, his filings should be construed "liberally." *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999); *see also Fletcher v. Reilly*, 433 F.3d 867, 877 (D.C. Cir. 2006).[7]

Further, arguments advanced by *Amicus* should be treated as if they were advanced by Boniface. The first paragraph of Boniface's brief emphasizes, "PETITIONER JOINS AND INCORPORATES ALL . . . POINTS, AUTHORITIES, AND ARGUMENTS SET FORTH IN THE BRIEF OF *AMICUS CURAIE* [sic]." He wrote this knowing that this Court appointed *Amicus* "to present arguments *in favor of petitioner's position*" (Order, Sept. 16, 2009) (emphasis added); the Court did not appoint *Amicus* to merely repeat arguments raised by Boniface. This Court has treated arguments raised by appointed *amici* as arguments raised by the parties themselves. *See Boyd v. Criminal Div. of U.S. Dept. of Justice*, 475 F.3d 381, 384 (D.C. Cir. 2007) (noting that the party

[7] This standard applies to filings in circuit courts, *see, e.g.*, *Cummings v. Evans*, 161 F.3d 610, 613 (10th Cir. 1998), and before agencies, *see, e.g.*, *Fernandez-Cruz v. Attorney General of U.S.*, 262 F. App'x 447, 448-49 (3d Cir. 2008).

"contend[ed] through court-appointed amicus" that the lower court made various errors).[8] Thus, arguments advanced by *Amicus* should be treated as Boniface's arguments. *Cf. Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality) (addressing the retroactivity issue that was "raised only in an *amicus* brief"). And, of course, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs*., 500 U.S 90, 99 (1991).

TSA relies on *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), but that case did not involve a court-appointed *amicus*, and many of the Court's concerns there are not present here. *See id.* at 378. In *Eldred*, the *amicus* raised a constitutional issue, and the Court based its decision in part on its duty to "avoid, not seek out, a constitutional issue the resolution of which is not essential to the disposition of the case before it." *Id.* Here, however, the conversion argument is based primarily on an agency's arbitrary failure to follow its own rules. In addition, *Eldred* noted that the plaintiffs (whom the *amicus* supported) had "conspicuously failed to adopt the argument of the amicus" and "rejected" it, *id.*; the plaintiffs took a position "diametrically opposed to that of the amicus." *Eldred v. Ashcroft*, 255 F.3d 849,

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[8] Even non-appointed *amici* are exhorted by this Court's rules to "avoid repetition" of the parties' legal arguments and instead to make arguments "not made or adequately elaborated upon" by the parties themselves. D.C. Cir. R. 29(a).

851 (D.C. Cir. 2001) (on petition for rehearing). Here, in contrast, Boniface has explicitly adopted all of *Amicus*'s arguments. Further, *Eldred* expressed concern about ruling on an argument to which the government had not been alerted and did not brief. *See id.*; *Eldred*, 239 F.2d at 378. Here, TSA had the opportunity to brief the conversion argument. The argument is properly before the Court.

2. TSA'S exhaustion argument is unavailing

Invoking the doctrine of non-jurisdictional exhaustion, TSA argues that Boniface failed to exhaust administrative remedies to challenge TSA's improper conversion.[9] TSA Br. 34. This non-jurisdictional exhaustion argument is based on TSA's contention that Boniface had "available" the "option" of dismissing his ALJ petition and commencing "a *new* waiver proceeding in which he could introduce additional evidence." TSA Br. 33-34 (emphasis in original). Specifically, TSA relies on the following rule governing ALJ review of TSA waiver denials:

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[9] TSA does not contend that the conversion argument is jurisdictionally barred under 49 U.S.C. § 46110(d). Boniface had a "reasonable ground for not making the objection in the proceeding" that was "conducted by" TSA. *See* 49 U.S.C. § 46110(d). He did not know about the conversion until after the Assistant Administrator completed the conversion and denied a waiver. As noted, Boniface then complained to the ALJ (who was with the Coast Guard) that TSA had not told him he needed to submit the waiver-related evidence. (J.A. 48-49) After the ALJ upheld TSA's order on the ground that it was made in accordance with TSA's regulations (J.A. 76), Boniface went to the Final Decision Maker before whom Boniface could "only address whether the decision [was] supported by substantial evidence on the record." 49 C.F.R. § 1515.11(g)(1)(i).

> The ALJ may consider only evidence or information that was presented to TSA in the waiver request. If the applicant has **new evidence** or information, the applicant must file a **new request** for a waiver under § 1515.7 and the pending request for review of a denial of a waiver will be dismissed.

49 C.F.R. § 1515.11(b)(1)(i) (emphasis added). Putting aside whether the last sentence applies to an applicant who never initiated a waiver request in the first place but instead was thrust involuntarily and prematurely into a waiver proceeding by an agency that failed to follow its own rules, TSA's exhaustion argument fails.

Boniface exhausted all of the administrative steps required by TSA regulations to obtain judicial review: he challenged the IDTA, sought ALJ review, and then sought review by the Final Decision Maker. TSA's regulations make clear that "[a] person may seek judicial review of a final order of the TSA Final Decision Maker." 49 C.F.R. 1515.11(h). *Cf. Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (holding that, under the APA, a court cannot require a party to exhaust administrative remedies that neither a statute nor a regulation requires as a precondition for judicial review). Boniface satisfied all steps.

Further, even if an applicant should invoke the "new evidence" regulation to exhaust administrative remedies, his failure to do so should be excused where, as here, he lacked reasonable notice that the procedure was even available in his case. It is "well-recognized . . . that the doctrine of exhaustion is 'not inflexible,'" *Althone Indus., Inc. v. Consumer Prod. Safety Comm.*, 707 F.2d 1485, 1488 (D.C.

Cir. 1983) (citation omitted), and a court may properly consider the facts surrounding a failure to exhaust in deciding whether to excuse non-exhaustion, *EEOC v. Lutheran Social Servs.*, 186 F.3d 959, 964 (D.C. Cir. 1999). In *Lutheran*, the Court excused non-exhaustion because a party contesting an agency subpoena was apparently unaware of an agency rule requiring the party to object within five days. *Id.* The Court concluded that the recipient's failure to exhaust "was hardly unreasonable," because the subpoena itself "did nothing to alert the recipient to the [agency's] procedures," and the subpoena "may well have misled" the recipient to believe it had no obligation to file a petition with the agency. *Id.*

Boniface's case presents similar circumstances. When TSA informed him that it had converted his appeal into an unsuccessful waiver request, TSA also provided materials informing him of (only) two options: he could challenge the order by requesting review by an administrative law judge with the Coast Guard; or he could decline ALJ review, in which case the decision would become final in 30 days. (J.A. 43-44, 45) The letter did not mention that Boniface could supply additional evidence in a new waiver proceeding—even though TSA's order had cited Boniface's failure to provide evidence of rehabilitation as a reason for its denial. *Id.*

Not only did TSA's notice fail to apprise Boniface of the remedy the agency now says he failed to exhaust, the agency actually may have misled him to believe

(after the waiver denial) he did not have the option of obtaining a hearing on previously available information. The materials TSA furnished to him ("How to Seek Review of a Waiver Denial") provided the following response to the question "Can I Provide Additional Evidence That Was Not Supplied to TSA?": "No. You may not include evidence or information that was not presented to TSA in your original waiver request for review before the ALJ." (J.A. 45) While this was correct, TSA never advised (as it now contends in arguing non-exhaustion) that Boniface had an alternative remedy, much less a mandatory one, to submit additional evidence that was *previously available* to him but not furnished to TSA. TSA's failure to so advise him suggested that no such avenue was available.

Given that Boniface pursued every route of appeal of which the agency notified him, the most reasonable explanation for his failure to institute a new waiver request is that, like the subpoena recipient in *Lutheran*, he was unaware that the option was available. The lack of adequate notice weighs even more strongly in favor of excusing exhaustion here than it did in *Lutheran*, where the subpoenaed party had counsel. *See Lutheran*, 186 F.3d at 964.

Moreover, even if Boniface had been represented by counsel, it hardly would have been evident that the "new evidence" regulation would apply in Boniface's case. The regulation applies only if the applicant has "*new* evidence" and does not define "new evidence" to include evidence that was *previously*

available during the original proceeding. 49 C.F.R. § 1515.11(b)(1)(i) (emphasis added). The more natural meaning of "new evidence" is newly available evidence that was *not* previously available. *Cf. Sullivan v. Finkelstein*, 496 U.S. 617, 626 (1990) (observing that under a provision of the Social Security Act, "new evidence" means "evidence not in existence or available to the claimant at the time of the administrative proceeding"); *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989) (holding that "*newly raised* evidence is not the same thing as *new* evidence"; evidence is not "new" if it was "*available at the time*"; while the statute did "not define new evidence, 'in an administratively final case it is only fair that 'new evidence' be in fact *new*," and therefore "'evidence that was reasonably available to the parties before the proceeding is not new evidence for purposes of the statute'") (emphases in original; citations omitted); *Union Mechling Corp. v. United States*, 566 F.2d 722, 726-27 (D.C. Cir. 1977) (suggesting that evidence was not "new" when it was available "well before the record was closed"). Absent an agency rule or order to the contrary, one would reasonably conclude that a "new evidence" provision does not cover previously available evidence.

TSA's brief asserts in a footnote that, "[i]n TSA's view, 'new' evidence includes evidence that was previously known to an applicant, but which an applicant was precluded from submitting because of TSA's mistakes." (TSA Br.

34 n.13) But TSA fails to cite authority for this purported "view," and appellate counsel's litigation position is not entitled to deference unless it "reflects the 'agency's fair and considered judgment on the matter.'" *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (citation omitted). It is difficult to conclude from counsel's footnote that TSA has made a fair and considered judgment, and it is doubtful the agency will indeed allow applicants (after waiver denials) to reopen or commence new evidentiary proceedings whenever they wish to file *previously available* evidence. Indeed, there is a "strong" policy against allowing litigants to seek agency rehearings on the basis of additional evidence: "there would be little hope that the administrative process could ever be consummated." *Union Mechling*, 566 F.2d at 726 (internal quotation marks and citations omitted). TSA does not appear to have weighed this policy, calling into doubt whether the agency has made a considered judgment.

Without clear direction that "new evidence" includes previously available evidence, an applicant in Boniface's position should not be forced to roll the dice by abandoning ALJ review—thus risking a true failure to exhaust remedies, at the expense of judicial review—on the hope that the agency will adopt a liberal interpretation of "new evidence" and allow a new evidentiary proceeding.

For these reasons, TSA's exhaustion argument should be rejected. TSA's cited interest in enforcing the exhaustion requirement to discourage litigants from

"flouting agencies' rules" is not implicated. TSA Br. 35. Boniface proceeded to the ALJ not on a desire to defy the agency, but on a reasonable belief that he had no means to present additional evidence. *See* J.A. 48-49 (Boniface discussing some of the information he would have presented if he had the opportunity). Far from trying to "flout" TSA's rules, Boniface has made a dedicated effort to pursue the remedies and review that he understood to be available.[10]

B. TSA's Waiver-Ineligibility Order Is Substantively Flawed

Amicus demonstrated that the substance of TSA's waiver-ineligibility order is arbitrary and capricious and lacking in substantial evidence. Opening Amicus Br. 50-56. TSA contends that the Court is jurisdictionally barred under § 46110(d) from considering these arguments because Boniface did not raise these arguments below. Section 46110(d) provides that "the court may consider an objection to an order . . . only if the objection was made in the proceeding conducted by the [TSA Administrator] *or* if there was a reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 46110(d) (emphasis added).

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[10] For the reasons the exhaustion argument should be rejected, the Court should reject TSA's prejudice and due process arguments, both of which presuppose that Boniface should have invoked the "new evidence" rule rather than taking the steps TSA told him to take. Boniface *was* prejudiced: the agency's improper conversion left him without an adequate evidentiary submission to support a waiver, which the agency used against him, and he was uninformed and unaware of any opportunity to correct this. Due process requires that a party be given "adequate and timely notice of the issues it must address and the manner in which it can raise those issues." Richard J. Pierce, 2 Admin. Law Treatise § 9.5, 832 (2010).

Boniface did not raise all of these specific arguments below, although he did raise some, and the ALJ reviewed the agency's substantive rationale. Boniface maintained below that he had not had recent trouble with the law, an argument bearing on the agency's rehabilitation and recidivism findings. (J.A. 49) Clearly he challenged TSA's finding that he failed to comply with the agency's purported request to submit rehabilitation-related information. (J.A. 48-49) Moreover, there was "a reasonable ground" for this *pro se* litigant not making specific substantive objections regarding TSA's waiver-ineligibility order. *See* 49 U.S.C. § 46110(d). There was confusion below when TSA failed to follow its rules and improperly converted his appeal into an unsuccessful waiver request, and then told him that his submission to the ALJ could "not include evidence or information that was not presented to TSA in [his] original waiver request" (J.A. 45), even though he had made no "original waiver request." At any rate, if the Court agrees that the order is flawed on procedural grounds based on the improper conversion, the Court need not address the substance of TSA's order: the Court can vacate the order, remand for a waiver proceeding, and instruct the agency to reconsider its decision.

CONCLUSION

TSA's order should be vacated and relief should be granted consistent with the request in *Amicus*'s opening brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND VOLUME LIMITATIONS

Pursuant to Fed. R. App. P. 32(A)(7)(C) and D.C. Circuit Rule 32(a)(3)(C):

I certify that this brief complies with the volume limitation in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 6,997 words.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), as varied by D.C. Circuit Rule 32(a)(1), because it has been prepared in a proportionally spaced, typeface, 14-point Times New Roman, using Microsoft Word.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of January, 2010, I caused this Reply Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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