[CASE NOT YET SCHEDULED FOR ORAL ARGUMENT]

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, ET AL.,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF
THE TRANSPORTATION SECURITY ADMINISTRATION

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties And Amici. The petitioner in this case is Lewis L. Boniface. The named respondents are the United States Department of Homeland Security, the Transportation Security Administration (TSA), and the United States. By appointment of the Court, Sean L. Andrussier has appeared as Amicus Curiae in support of petitioner.

B. Rulings Under Review. The ruling under review is a TSA final order denying petitioner a waiver of his initial threat assessment. TSA's decision is unpublished, and is available at page JA-90 of the Joint Appendix. TSA upheld the decision of an Administrative Law Judge (ALJ), whose opinion is also unpublished. The ALJ's decision is available at page JA-72 of the Joint Appendix. The ALJ in turn upheld TSA's initial decision denying petitioner a waiver. The initial decision is unpublished, and available at page JA-43 of the joint appendix.

C. Related Cases. This case has not previously come before this Court or any other court. However, petitioner has previously attempted to collaterally attack his underlying conviction by means of a petition for a writ of habeas corpus. The Ninth Circuit denied the petition in a published opinion. See United States v. Boniface, 601 F.2d 390 (9th Cir. 1979).

/s/ Benjamin M. Shultz
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GLOSSARY

ALJ	Administrative Law Judge
CDL	Commercial Driver's License
HME	Hazardous Materials Endorsement
IAD	Interstate Agreement on Detainers
IDTA	Initial Determination of Threat Assessment
JA	Joint Appendix
SA	Supplemental Appendix
TSA	Transportation Security Administration

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STATEMENT OF JURISDICTION

This case arises from a decision of the Transportation Security Administration (TSA), which found that petitioner was a security threat and thus ineligible to transport hazardous materials. SA-1.[1] Petitioner challenged that decision, and after several levels of administrative review, sought relief from TSA's Final Decision Maker. The Final Decision Maker issued a decision on January 7, 2009, finding no basis to disturb the agency's action. See JA-90.

On March 6, 2009, petitioner filed a petition for review in this Court, within the time prescribed by 49 U.S.C. § 46110(a). This Court has jurisdiction under 49 U.S.C. § 46110(a).

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[1] Citations to pages in the Joint Appendix will be abbreviated as "JA-_." Citations to pages in the Supplemental Appendix will be abbreviated as "SA-_."

STATEMENT OF THE ISSUES

TSA deemed petitioner a security threat, and denied his administrative challenge, in part because of his 1975 conviction for possession of explosives. The questions presented are:

1. Whether TSA properly determined that petitioner has an explosives "conviction," despite petitioner's claim that the conviction is invalid, where the conviction has never been overturned or expunged by a court of law.

2. Whether TSA's decision was reasonable and supported by substantial evidence.

3. Whether petitioner is entitled to relief based on an argument, raised only by Amicus, that the agency improperly treated petitioner's administrative "appeal" as a "waiver request."

4. Whether TSA's threat assessment program, as applied to petitioner, is impermissibly retroactive and/or in violation of the Constitution's Ex Post Facto Clause.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF THE CASE

This case concerns TSA's procedures for deeming an individual a "security risk," 49 U.S.C. § 5103a(a)(1), and therefore ineligible to hold a hazardous materials endorsement

(HME) on a commercial driver's license (CDL). Under 49 C.F.R. § 1572.5(a)(1), TSA will deem an individual ineligible for an HME if the individual has one of several disqualifying convictions. In this case, petitioner was deemed a security threat because of his prior conviction for possession of an explosive device, a permanently disqualifying conviction. See id. § 1572.103(a)(7); SA-1 to 2.

After TSA issued petitioner an "Initial Determination of Threat Assessment" (IDTA), petitioner elected to challenge TSA's decision. JA-6, 38. TSA treated petitioner's challenge as a request for a waiver of his disqualification, see 49 C.F.R. § 1515.7(a)(i), (b), and it denied the request due to the severity of petitioner's conviction and his other criminal history. JA-43. Petitioner sought review from an Administrative Law Judge, who sustained TSA's decision. JA-76. Petitioner then appealed to the TSA Final Decision Maker, who upheld TSA's decision. JA-90. This petition for review followed.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Security Threat Assessments For HME Applicants

Certain materials, such as flammable, explosive, or radioactive materials, are designated as "hazardous" because "transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or

property." 49 U.S.C. § 5103(a). Truck drivers may only transport hazardous materials if they pass a specialized knowledge test, and then subsequently obtain a hazardous materials endorsement (HME) for their commercial driver's license (CDL). 49 C.F.R. §§ 383.93(b)(4), (c)(4). HMEs are issued directly by individual states. Id. § 383.93(a); see also, e.g., Cal. Veh. Code § 15275.

In October 2001, in the aftermath of the September 11th terrorist attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. Pub. L. No. 107-56, 115 Stat. 272. Section 1012 of the Act, codified as amended at 49 U.S.C. § 5103a, requires the Department of Justice to conduct background checks on HME applicants when requested to do by an issuing state. The Department of Justice then transmits the results to TSA, who must then look at this information, assess if the individual is a security risk, and communicate its conclusion to the requesting state.[2] 49 U.S.C. § 5103a(a)(1). A requesting State may not issue an HME unless it has received notification

[2] As originally enacted, the statute delegated this assessment responsibility to the Secretary of Transportation. See USA PATRIOT Act § 1012(a)(1). Subsequently, the Secretary delegated this power to the Under Secretary for Transportation for Security. 68 Fed. Reg. 10988 (Mar. 7, 2003). TSA, which is now part of the Department of Homeland Security, exercises the security responsibilities delegated to the Under Secretary. See 49 U.S.C. § 114(d)(2). The current version of 49 U.S.C. § 5103a refers to the "Secretary of Homeland Security" rather than the Secretary of Transportation.

from TSA that the applicant "does not pose a security risk."[3] Id.

TSA has promulgated regulations that govern its threat assessments. Among other things, TSA will conclude that an individual is a security threat if the individual has a disqualifying criminal conviction. See 49 C.F.R. § 1572.5(a)(1). Some crimes are disqualifying if the applicant was convicted of the crime within seven years of applying for the HME, or released from imprisonment on the conviction within five years of applying for the HME. See id. § 1572.103(b). Certain other crimes, such as crimes involving a transportation security incident, crimes involving improper transportation of a hazardous material, and crimes involving explosives, are permanently disqualifying. See id. § 1572.103(a). The list of disqualifying crimes was developed after significant opportunities for public comment. See 68 Fed. Reg. 23852, 23852 (May 5, 2003) (promulgating an initial list as an interim final rule, and calling for public comment); 69 Fed. Reg. 68720, 68723-24 (Nov. 24, 2004) (modifying the list in response to comments); 72 Fed. Reg. 3492, 3500-02 (Jan. 25, 2007) (making additional modifications).

TSA's regulations further explain how the agency determines if someone has been "convicted" of a disqualifying offense:

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[3] As an alternative to asking the federal government to conduct a background check and make a threat assessment, states are given some flexibility to develop their own procedures for making threat assessments. See 49 U.S.C. § 5103a(g)(2).

> Convicted means any plea of guilty or nolo contendere, or any finding of guilt, except when the finding of guilt is subsequently overturned on appeal, pardoned, or expunged. * * *. In addition, where an individual is allowed to withdraw an original plea of guilty or nolo contendere and enter a plea of not guilty and the case is subsequently dismissed, the individual is no longer considered to have a conviction * * *.

49 C.F.R. § 1570.3.

TSA's concern with disqualifying offenses also extends beyond individuals who have formally been adjudged guilty of disqualifying crimes. Consistent with TSA's focus on security, the agency will deem an applicant a security threat if the applicant "is wanted, or under indictment in any civilian or military jurisdiction for" any of the disqualifying felonies. Id. § 1572.103(c). That assessment will persist "until the want or warrant is released or the indictment is dismissed." Id.

B. HME Appeal And Waiver Proceedings

Once TSA determines that an HME applicant presents a security threat, TSA will serve the applicant with its Initial Determination of Threat Assessment (IDTA). See id. § 1572.15(d)(2). If the applicant disagrees, he has the option of taking an "appeal" and/or seeking a "waiver." See id. §§ 1515.5, 1515.7.

In an appeal, the sole issue is whether TSA correctly applied the standards for threat assessment. Id. § 1515.5(b). When an applicant has been deemed a threat because of a

disqualifying conviction, that showing can only be made if the applicant demonstrates he does not have a conviction listed in 49 C.F.R. § 1572.103. See id. § 1572.5(a)(1). Appeals are adjudicated by the Assistant Administrator, who issues a Final Determination of Threat Assessment if she denies the appeal. Id. § 1572.5(c)(1)(i). The appeal process is separate from a waiver proceeding, and an applicant may initiate a waiver proceeding by sending a "written request to TSA at any time, but not later than 60 days after the date of service of the Final Determination of Threat Assessment." Id. § 1515.7(c)(iii). TSA will then grant the waiver if it determines that, notwithstanding the applicant's disqualifying condition, the applicant "does not pose a security threat" in light of his individual circumstances. Id. § 1515.7(b). In the case of an applicant with a disqualifying conviction, factors that TSA can examine include the circumstances of the underlying crime, the extent of any restitution made, federal and state mitigation remedies, and "[o]ther factors that indicate the applicant does not pose a security threat warranting denial of the HME." Id. § 1515.7(c)(2).

TSA's waiver decision is initially made by the Assistant Administrator. Id. § 1515.7(d). If the Assistant Administrator denies the waiver request, the applicant may seek further review from an Administrative Law Judge (ALJ). Id. §§ 1515.7(e), 1515.11(b). The ALJ can only look at "evidence or information"

that was "presented to TSA in the [initial] request for a waiver." Id. § 1515.11(b)(1)(i). Oral testimony can be given if the ALJ grants a request for an in-person hearing, but such testimony is limited to the evidence or information already presented to TSA. See id. § 1515.11(e)(2). TSA's factual findings are to be upheld if supported by substantial evidence. See id. § 1515.11(e)(4).

Although the ALJ is limited in the information and evidence he can consider, TSA recognizes that individuals sometimes have new evidence or information that can bolster their case. If an applicant wants to present such new material to the agency, the regulations direct him to "file a new request for a waiver * * * and the pending request for review of a denial of a waiver will be dismissed." Id. § 1515.11(b)(1)(i).

If a case progress to an ALJ decision, and the ALJ denies relief, the applicant can obtain still further review from the TSA Final Decision Maker. Id. § 1515.11(f)(3)(ii). The Final Decision Maker determines only if the ALJ's decision is supported by substantial evidence, see id. § 1515.11(g)(1)(i), and if the ALJ's decision is sustained, TSA issues the applicant a Final Order Denying a Waiver. Id. § 1515.11(g)(3)(i). The applicant may thereafter seek judicial review in a court of appeals by filing a petition for review in accordance with 49 U.S.C. § 46110. See 49 C.F.R. § 1515.11(h).

II. PROCEEDINGS BELOW

Petitioner Lewis Boniface is a commercial truck driver. SA-1. Boniface applied for an HME, and in accordance with TSA's regulations, see 49 C.F.R. § 1572.15(a), he submitted to a fingerprint-based criminal history records check. JA-31. From this, TSA learned that Boniface has a lengthy criminal history, including a 1966 conviction for carrying a concealed weapon, a 1970 conviction for a drug-related offense, a 1980 parole violation, a 1983 conviction for robbery with a weapon and carrying a concealed firearm, and a 1995 conviction for a drug distribution offense. See JA-33 to 37. The background check also revealed numerous arrests that were not associated with a final judicial disposition. See JA-33 to 37.[4] Of particular relevance here, petitioner's records further revealed that he has a 1975 conviction, in federal court in Arizona, for possession of an unregistered explosive device. See JA-34 to 35. The conviction occurred as a result of Boniface's own guilty plea, see JA-17; United States v. Boniface, 601 F.2d 390, 392 (9th Cir. 1979), and Boniface received a 10-year prison sentence. Boniface, 601 F.2d at 392.

TSA concluded that Boniface was a security threat, and it issued him an IDTA on May 13, 2008. SA-1 to 2. Pointing to the

[4] At least one of these arrests appears to have led to a conviction, in the early 1980s, on kidnaping and armed robbery charges. See JA-35; Boniface v. Carlson, 856 F.2d 1434, 1435 (9th Cir. 1988).

1975 explosives conviction, TSA explained that Boniface had been convicted of a permanently disqualifying offense, which rendered him ineligible to hold an HME. Id. The IDTA instructed Boniface that if he wished to obtain the materials that TSA had relied upon for its threat assessment, Boniface should fill out a request using an enclosed Cover Sheet. SA-2, SA-8. The IDTA further informed Boniface that "[a]ll correspondence to TSA should have the TSA * * * Cover Sheet attached to the front of your correspondence. * * * You should check one of the request boxes on this cover sheet * * *." SA-2 (emphasis removed).

Boniface submitted the Cover Sheet to TSA on May 19th, checking the appropriate box to request the information TSA relied on. JA-3.

Roughly one month later, before TSA had completely processed Boniface's request for information, Boniface mailed a further pro se submission to TSA. Contrary to TSA's explicit instructions, Boniface did not attach any Cover Sheet to his submission, see JA-5 to 23, and thus he failed to check either the box for an "appeal" or for a "waiver." Instead, without any indication that Boniface understood the difference between "appeal" and "waiver" proceedings, Boniface referred to his submission as an "appeal." JA-5 to 6.

In this submission, Boniface argued that his federal explosives conviction was "legally and constitutionally invalid." JA-11. More specifically, he alleged he had been in state prison

before being indicted in federal court, and he maintained that over the course of several months, federal marshals used "detainers" to shuttle him between state and federal custody while bringing him to pretrial proceedings. JA-7 to 12. Boniface therefore argued that his federal conviction had been obtained in violation of the "antishuttling" provision of the Interstate Agreement on Detainers (IAD),[5] an interstate compact that places some limits on the federal government's ability to remove a prisoner from state custody during the pendency of federal charges. JA-12; see also IAD § 2, art. 4(e);[6] Alabama v. Bozeman, 533 U.S. 146, 150 (2001); United States v. Mauro, 436 U.S. 340, 349 (1978). As supporting documentation, Boniface included: (1) a copy of his IDTA; (2) a copy of the IAD; (3) a copy of a published Ninth Circuit decision from 1979, denying his attempt to obtain habeas relief from his explosives conviction; and (4) a copy of a published opinion from the Court of Appeals of Arizona, overturning a separate state conviction Boniface had earned for receiving stolen property. JA-14 to 23. Boniface submitted no evidence that his 1975 explosives

[5] The IAD is codified at 18 U.S.C. Appendix 2, and its relevant sections are reproduced in the addendum to this brief. Citations to IAD provisions will be abbreviated as "IAD §_," where "_" refers to the relevant section of 18 U.S.C. Appendix 2.

[6] A 1988 amendment to the IAD modified the antishuttling provision, making it less restrictive when the United States removes a prisoner from state custody. See Pub. L. No. 100-690 § 7059, 102 Stat. 4181, 4403 (codified at 18 U.S.C. app. 2 § 9). We take no position on whether the amendment applies retroactively to Boniface's conviction.

conviction had been overturned, expunged, or otherwise declared invalid by a court.

Shortly thereafter, on June 12, 2008, TSA responded to Boniface's records request by providing him a copy of his criminal history report. JA-25 to 37. As before, TSA informed Boniface that all his correspondence with TSA should have the Cover Sheet attached. JA-28. TSA also provided Boniface with another blank Cover Sheet, which included separate check-off boxes for an "appeal" and a "waiver." JA-30.

Once again, however, Boniface responded without including this Cover Sheet. JA-38 to 48. Instead, he submitted what he titled an amended "Appeal." JA-38. This filing added an assertion that TSA had violated the Constitution's Ex Post Facto Clause. JA-39. Boniface also offered additional IAD-related arguments. JA-39 to 40. As before, Boniface did not introduce evidence that a court had actually invalidated his explosives conviction.

In processing Boniface's pro se filings, which had failed to submit the TSA Cover Sheet and which had not challenged the fact that Boniface was convicted of a disqualifying offense, TSA treated the filings as a waiver request. JA-43, 90. The Assistant Administrator denied the waiver request on August 6, 2008, explaining that her decision was based on the severity of the underlying conviction, Boniface's pattern of recidivism, and the absence of adequate documentation demonstrating his rehabilitation. JA-43.

Boniface next sought review from an ALJ. JA-47. In his submission, Boniface repeated his arguments about the Ex Post Facto Clause and the IAD. JA-48 to 53. Boniface also added several other arguments, including an argument about impermissible retroactivity. See id. Boniface did not request an in-person hearing. JA-47. And although Boniface suggested he had access to additional evidence of rehabilitation, see JA-48 to 49, Boniface failed to file any new waiver request, and instead proceeded with his challenge before the ALJ.

The ALJ affirmed TSA's waiver denial. JA-75 to 80. After explaining that his review was limited by the deferential substantial evidence standard, JA-76, the ALJ concluded that TSA's waiver denial was adequately supported. JA-79. The ALJ also noted Boniface's legal and constitutional arguments, but concluded that they fell outside the scope of the administrative proceeding. JA-78 to 79.

Boniface then appealed to the TSA Final Decision Maker. JA-85. In a short submission, Boniface explained that he sought review because that ALJ's decision was "not * * * supported by substantial evidence in the record[.] [S]pecifically the 1975 case being used by TSA to deny the [HME] is unsupported by * * * [s]tatutes and U.S. Supreme Court decisions." JA-85.

On January 7, 2009, the TSA Final Decision Maker issued a Final Order Denying a Waiver. The Decision Maker explained that she had reviewed Boniface's materials, and had concluded that he

was "not eligible to hold an HME and TSA's waiver denial is supported by substantial evidence." JA-90.

SUMMARY OF ARGUMENT

Neither petitioner nor his Amicus offers any viable basis for disturbing TSA's decision. TSA's waiver denial must be sustained if supported by substantial evidence, and if it was not arbitrary or capricious. In an attempt to overcome this deferential standard, petitioner mounts a collateral attack on his 1975 conviction, arguing that it was obtained in violation of the antishuttling provision of the Interstate Agreement on Detainers. But to the extent petitioner is arguing that he does not have a disqualifying conviction, the argument is foreclosed by the governing regulations, which require him to first obtain a court order vacating or expunging his conviction. See 49 C.F.R. § 1570.3. Further, Boniface and Amicus erroneously suggest that the IAD is a "self-executing" compact, and that its violation amounts to a "jurisdictional" or similar defect capable of collateral attack. Such arguments are foreclosed by the IAD's plain language, inconsistent with a host of precedents, waived in light of Boniface's guilty plea, and barred by the principles of claim preclusion after the rejection of Boniface's habeas petition.

Boniface also cannot plausibly contend that he was entitled to a waiver notwithstanding the existence of a disqualifying

conviction. The IAD violation he alleges is wholly unrelated to the conduct underlying his conviction that caused TSA to deem him a security threat. In these circumstances, TSA properly denied Boniface's waiver request, invoking the severity of his underlying offense, his substantial criminal history, and his lack of evidence of rehabilitation. To the extent Amicus offers additional attacks on the agency's reasoning, the arguments are forfeited because Boniface failed to articulate them at any stage of administrative review. See 49 U.S.C. § 46110(d). In any event, Amicus's arguments lack merit because the agency's decision was adequately reasoned and supported by substantial evidence.

Amicus--but not petitioner--also challenges the agency's decision to treat Boniface's "appeal" as a waiver request. But this Court ordinarily does not consider arguments raised only by an amicus, and that rule is especially applicable here, as Boniface may be aware of extra-record facts that undermine Amicus's claim. Further, Amicus ignores the fact that Boniface could have initiated a new waiver proceeding if he had additional evidence to present. 49 C.F.R. § 1515.11(b)(1)(i). Because of this opportunity, TSA's procedures satisfied due process requirements and Boniface suffered no prejudice from any TSA errors. Moreover, because Boniface failed to avail himself of this opportunity, Amicus's claim is barred for lack of exhaustion.

Petitioner and Amicus further contend that the HME regulations are impermissibly retroactive. But the HME regulations are not retroactive at all: they deny petitioner an HME based on his current status as a security threat. TSA may have considered petitioner's prior conviction in making its threat assessment, but a regulation is not retroactive simply because it uses past facts to assess an individual's current status. See, e.g., Ass'n. of Accredited Cosmetology Schs. v. Alexander, 979 F.2d 859, 865 (D.C. Cir. 1992).

Finally, petitioner errs in suggesting that the HME regulations violate the Ex Post Facto Clause. The regulations do not implicate the Clause at all, because they deny petitioner an HME solely based on his current status as a security threat; to the extent that the regulations rely on his prior conviction, they do so only as an evidentiary matter. See Kansas v. Hendricks, 521 U.S. 346, 371 (1997). In any event, even if the HME regulations could be understood as imposing a "sanction" for past conduct, the sanction is plainly a civil one, rendering the Ex Post Facto Clause inapplicable. See Smith v. Doe, 538 U.S. 84 (2003); Hudson v. United States, 522 U.S. 93 (1997).

STANDARD OF REVIEW

Because Boniface's petition arises under 49 U.S.C. § 46110, TSA's factual findings must be sustained if they are supported by substantial evidence. 49 U.S.C. § 46110(c). Any asserted non-

factual errors are reviewed only to determine if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see also Boca Airport, Inc. v. FAA, 389 F.3d 185, 189 (D.C. Cir. 2004). TSA's interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation[s]." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (internal quotation marks omitted).

ARGUMENT

I. TSA PROPERLY DETERMINED THAT PETITIONER HAS A DISQUALIFYING CONVICTION

1. Boniface argues that he does not have a disqualifying conviction because his explosives conviction was illegally obtained. Boniface acknowledges that he pled guilty to the relevant offense, see Pet. Br. at 7, and he further acknowledges that the Ninth Circuit denied his habeas petition when he attempted to vacate his conviction. See Pet. Br. at 9; see also United States v. Boniface, 601 F.2d 390, 394 (9th Cir. 1979). Nonetheless, Boniface contends that he can collaterally attack his conviction as part of his attack on TSA's decision.

This challenge is foreclosed by TSA's regulations, which provide that an applicant "has a permanent disqualifying offense if convicted" of one of several listed crimes. 49 C.F.R. § 1572.103(a). The regulations precisely define the meaning of the word "convicted":

> Convicted means any plea of guilty or nolo contendere, or any finding of guilt, except when the finding of guilt is subsequently overturned on appeal, pardoned, or expunged. * * * [A] conviction is expunged when the conviction is removed from the individual's criminal history record and there are no legal disabilities or restrictions associated with the expunged conviction, other than the fact that the conviction may be used for sentencing purposes for subsequent convictions. In addition, where an individual is allowed to withdraw an original plea of guilty or nolo contendere and enter a plea of not guilty and the case is subsequently dismissed, the individual is no longer considered to have a conviction * * *.

49 C.F.R. § 1570.3. Accordingly, it is not enough for an HME applicant to show that he was entitled to have his conviction overturned. Instead, unless the applicant has received a pardon, the applicant must demonstrate that a court has already overturned or expunged his conviction.

This understanding of the regulation is eminently sensible. TSA is an administrative agency responsible for identifying and preventing security threats. Unlike a court of law, it is not well suited to the legally- and factually-intensive inquiries necessary to resolve collateral attacks on underlying convictions. Accordingly, it is entirely reasonable for TSA to consider a conviction as disqualifying unless and until the conviction has been overturned.

Boniface and Amicus nonetheless insist that the conviction is "void," and they rest their argument on the antishuttling

provision of the Interstate Agreement on Detainers. See Pet. Br. at 16; Amicus Br. at 28-31. The antishuttling provision states that once the federal government uses a "detainer" to remove someone from state custody to face federal charges, that individual must be brought to trial before he is returned to the state. See United States v. Mauro, 436 U.S. 340, 351-53 (1978); see also IAD § 2, art. 4(e) (explaining that if the individual is returned before trial, the pending "indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice)." Boniface asserts that federal officials violated this provision by returning him to Arizona custody twice before trial, see Pet. Br. at 4-5, and further claims that because the IAD's language is "self-executing," it bars TSA from relying on his conviction despite TSA's regulations. Amicus makes a similar argument, suggesting that the government is committing an independent IAD violation by continuing to give effect to Boniface's conviction.

These arguments are incorrect, in several respects. First, although the relevant IAD language may be mandatory, it is neither self-executing nor directed towards administrative agencies. Rather, if an IAD violation occurs, the prescribed remedy is for the court trying the individual to "enter an order dismissing the [criminal proceeding] with prejudice." IAD § 2, art. 4(e). Nothing in the IAD requires an agency to deem a

conviction invalidated in the absence of a judicial order throwing out the conviction. Cf. Custis v. United States, 511 U.S. 485, 497 (1994) (holding that even when a prior conviction was obtained without the effective assistance of counsel, nothing in Sixth Amendment guarantees a right to collaterally attack that conviction in a non-habeas proceeding).

Second, the IAD says only that a given "indictment, information, or complaint" shall have no further force or effect in the event of an antishuttling violation. IAD § 2, art. 4(e). Here, TSA did not give any "effect" to Boniface's "indictment." Rather, it denied Boniface an HME on the basis of his conviction. Cf. Carchman v. Nash, 473 U.S. 716, 724 (1985) (explaining that the words "indictment," "information," and "complaint" are most naturally read as referring only to pre-conviction documents).

Moreover, the "indictment" referred to in the antishuttling provision is "any indictment * * * contemplated hereby"--i.e., an indictment within the scope of the IAD's Article IV. IAD § 2, art. 4(e). And Article IV only pertains to an "untried" indictment. See IAD § 2, art. 4(a). TSA thus acted consistently with the IAD because it did not give effect to any "untried" indictment.

Fourth, numerous courts of appeals have held that a prisoner may waive the government's antishuttling violation. See, e.g., Webb v. Keohane, 804 F.2d 413, 414-15 (7th Cir. 1986); United

States v. Rossetti, 768 F.2d 12, 18 (1st Cir. 1985); United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979); Gray v. Benson, 608 F.2d 825, 827 (10th Cir. 1979) (per curiam); United States v. Eaddy, 595 F.2d 341, 346 (6th Cir. 1979); Camp v. United States, 587 F.2d 397, 399-400 (8th Cir. 1978); United States v. Palmer, 574 F.2d 164, 167-68 (3d Cir. 1978); cf. New York v. Hill, 528 U.S. 110, 114 (2000) (noting the general presumption that procedural rights are waiveable, and finding that a different IAD provision could be waived). Allowing for waiver of a violation is inconsistent with petitioner's contention that the antishuttling provision is self-executing.

Indeed, petitioner's argument is particularly weak where, as here, the defendant has pled guilty to the relevant offense. A defendant's guilty plea will ordinarily waive all procedural defects in the underlying proceeding, aside from certain categories of defects that are obvious from the face of the indictment. United States v. Delgado-Garcia, 374 F.3d 1337, 1341, 1343 (D.C. Cir. 2004). Any alleged antishuttling violation would not be apparent from the face of an indictment, but would instead need to be established by the introduction of extrinsic evidence (such as testimony about being moved between two prison systems under detainers). See also Mauro, 436 U.S. at 349 (explaining that certain kinds of transfers do not count as operating under "detainers"). This need for additional factual

development also underscores why the IAD is not self-executing, but instead requires at least some judicial involvement.

Amicus appeals to the "Blackledge/Menna" exception to the waiver rule, suggesting that petitioner's plea could not waive an antishuttling violation because it is a "jurisdictional" defect and because Boniface had a right "not to be haled into court at all." Amicus Br. at 34 (citing Blackledge v. Perry, 417 U.S. 21 (1974), and Menna v. New York, 423 U.S. 61 (1975)). But the Blackledge/Menna exception cannot be invoked unless an indictment is facially invalid. Delgado-Garcia, 374 F.3d at 1343. This forecloses Amicus's arguments, which rely on extrinsic evidence.

Further, the Blackledge/Menna exception does not apply on its own terms. A right "not to be haled into court at all" goes merely to the power of a court to initiate criminal proceedings. Blackledge, 417 U.S. at 30-31; see also Delgado-Garcia, 374 F.3d at 1343. Here, there is no dispute that the government validly "initiated" proceedings against Boniface when it indicted him; petitioner claims only that post-indictment conduct required dismissal of his charges.[7]

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[7] Amicus implies that "initiation" of proceedings is not the proper test, and that instead one must determine if the "practical result" of a claim is that it would prevent trial. Amicus Br. at 34. But if that were true, it would encompass any claim that could be asserted in a motion to dismiss. This Court's cases are inconsistent with such a reading of the Blackledge/Menna exception. See, e.g., United States v. Drew, 200 F.3d 871, 876 (D.C. Cir. 2000) (exception did not apply to (continued...)

Nor is there any basis to conclude that an IAD violation is "jurisdictional." A statutory violation will operate as a "jurisdictional" defect only if the statute speaks in jurisdictional terms. Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006); see also Delgado-Garcia, 374 F.3d at 1342. Here, while the IAD's terms may be mandatory, nothing in the antishuttling provision uses jurisdictional language. Cf. United States v. Wild, 551 F.2d 418, 421-22 & n.4 (D.C. Cir. 1977) (holding that a statute of limitations was not jurisdictional, even though it directed that "'[n]o person shall be prosecuted * * * unless the indictment is found'" within a prescribed period of time (quoting 2 U.S.C. § 455(a))). And even if the IAD is jurisdictional, principles of claim preclusion bar Boniface from raising the issue here, as the argument should have been raised in his earlier habeas petition. See NRDC v. EPA, 513 F.3d 257, 261 (D.C. Cir. 2008) (explaining that claim preclusion prevents parties from litigating matters that could have been raised in earlier proceedings); 28 U.S.C. § 2255(a) (explaining that federal habeas relief is available when the sentencing court "was without jurisdiction to impose" a sentence).[8]

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[7](...continued)
defendant who asserted he was prosecuted under an unconstitutional statute).

[8] If Boniface did actually raise this jurisdictional argument in the earlier litigation, the argument might be barred (continued...)

Amicus suggests that Boniface's guilty plea is irrelevant to this proceeding because Boniface is not seeking to "overturn" his conviction. See Amicus Br. at 37. But that is a pure semantic difference, as Boniface is still challenging the validity of his conviction: he is trying to "deprive [it] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgment[]." Parke v. Raley, 506 U.S. 20, 30 (1992). Indeed, if Boniface's IAD claim succeeds, he will necessarily have shown that his prior conviction is invalid. Accordingly, Boniface is mounting a collateral attack on his conviction, and the judicial system retains its normal interest in preserving the finality of a guilty plea. See Custis, 511 U.S. at 497; cf. Heck v. Humphrey, 512 U.S. 477, 484-87 (1994) (barring damages actions under 42 U.S.C. § 1983 if judgment for an individual would "necessarily imply the invalidity of his conviction or sentence"); Haring v. Prosise, 462 U.S. 306, 320-21 (1983) (allowing a § 1983 action to proceed where the individual was not challenging the validity of

[8](...continued)
by principles of issue preclusion as well. In rejecting Boniface's habeas petition, the Ninth Circuit rested on its earlier decision in Hitchcock v. United States, 580 F.2d 964 (9th Cir. 1978), which had held that an antishuttling violation is not cognizable in a 2255 motion. See Boniface, 601 F.2d at 394. Hitchcock, in turn, appears to have implicitly recognized that an antishuttling violation is not a "jurisdictional" defect. See 580 F.2d at 965-66.

his conviction, and was only challenging the legality of an antecedent search).

2. As a secondary argument, Boniface appears to suggest that he does not have a disqualifying conviction because his conviction took place more than seven years before he sought an HME. Pet. Br. at 15. But Boniface is misreading the regulations. The regulation he cites, 49 C.F.R. § 1572.9(b), simply contains a list of the information that an HME applicant must provide to TSA. The provision says nothing about which offenses are disqualifying offenses, and for how long. Such information is provided by 49 C.F.R. § 1572.103, which makes clear that possession of an explosive device is a permanently disqualifying conviction. See id. § 1572.103(a)(7). In any event, the application information required by section 1572.9 is consistent with the list of disqualifying offenses. See id. § 1572.9(b)(4) (explaining that an HME applicant must, inter alia, provide a statement that he has not been "convicted * * * of a disqualifying criminal offense identified in 49 C.F.R. 1572.103(a), * * * or is applying for a waiver").

II. TSA'S WAIVER DENIAL WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

A. TSA Acted Reasonably In Denying Petitioner's Waiver Request

1. Petitioner might be understood to argue that TSA erred in denying his waiver request, even if he is precluded from

collaterally attacking his conviction. If so, that argument lacks merit.

In a waiver proceeding, the question facing the agency is whether the applicant poses a "security threat" in light of his individual circumstances. 49 C.F.R. § 1515.7(b). TSA can examine such factors as the circumstances of the underlying offense, the extent of any restitution, and other factors that "indicate the applicant does not pose a security threat warranting denial of the HME," id. § 1515.7(c)(2), such as an applicant's rehabilitation.

Here, TSA properly applied the governing standard, and its waiver denial was entirely correct. Boniface's explosives conviction was a highly serious offense, and one that indicated he posed a particularly serious security risk if allowed to transport flammable, explosive, radioactive, and other hazardous materials. Cf. 46 U.S.C. § 70105(c)(1)(A)(vii) (recognizing that possession of an explosive device is a serious enough offense, and sufficiently indicates that an individual is a security risk, such that it is grounds for permanently denying someone unescorted access to sensitive areas in ports and shipping vessels). Moreover, Boniface's lengthy criminal history included numerous past convictions, and he submitted no evidence of

rehabilitation to the Assistant Administrator.[9] And although Boniface alleged that his explosives conviction was obtained in violation of the IAD, any such violation was wholly unrelated to Boniface's underlying criminal conduct, and thus had little to no bearing on whether Boniface currently presents a security threat. Accordingly, TSA acted reasonably, and its waiver denial was supported by substantial evidence.

2. Amicus (but not Boniface) attacks the agency's reasoning by claiming that TSA failed to consider the age of petitioner's conviction, the circumstances of his offense, the fact that petitioner is now in his sixties, and the fact that petitioner has not been charged with any crimes since his release from prison in 2002. Amicus Br. at 50-56. Amicus also suggests that the agency erred by relying on Boniface's lengthy criminal history. See id. at 52-53.

This Court is statutorily barred from considering these arguments. Under 49 U.S.C. § 46110(d), the Court may "consider an objection to an order of the [Under Secretary of Transportation for Security] only if the objection was made in the proceeding conducted by the * * * Under Secretary, * * * or

[9] Amicus observes that Boniface possessed an HME for several years before 2008, without apparent incident, and asserts that this was "evidence" of rehabilitation. Amicus Br. at 55-56. But it is difficult to see how a silent record is equivalent to a submission of evidence, particularly where Boniface never actually asked TSA to take note of this "evidence" in adjudicating his waiver request.

if there was a reasonable ground for not making the objection in the proceeding." See also KPMG, LLP v. SEC, 289 F.3d 109, 117 (D.C. Cir. 2002) (recognizing that statutory provisions like section 46110(d) exist to give agencies "a chance to address claims before being challenged on them in court") (internal quotation marks omitted); Cronin v. FAA, 73 F.3d 1126, 1134 (D.C. Cir. 1996). Boniface never advanced any of these arguments, at any stage of review, see JA-5 to 24; JA-38 to 41; JA-47 to 53; JA-85 to 88, and neither Amicus nor Boniface has attempted justify this failure.[10]

In any event, Amicus's arguments are incorrect. TSA implicitly considered the age of Boniface's conviction, as the agency looked to see if Boniface had committed further crimes since 1975, and if he had submitted evidence of rehabilitation. See JA-43. Boniface's long criminal record, and the absence of evidence of rehabilitation, explain why the agency reasonably deemed petitioner a threat despite the passage of time.

Amicus implies that Boniface's other crimes are irrelevant, and that they do not show Boniface to be a security threat. But Boniface's pattern of recidivism demonstrates a long career of

[10] Although an ALJ can only consider "evidence and information" that was presented in the initial waiver request, 49 C.F.R. § 1515.11(b)(1)(i), that does not preclude the ALJ from hearing arguments claiming that the Assistant Administrator's reasoning was flawed, and that she improperly weighed the evidence before her.

deception, of engaging in potentially dangerous behavior, and of not showing respect for the law. The agency thus reasonably thought that he could not be trusted to haul hazardous materials--either because he himself might be motivated to do something harmful, or because of a possibility that he could be used by others to do something harmful. In fact, TSA regulations recognize that a criminal record can be lengthy enough to make someone a security threat, even when an individual has no disqualifying convictions. See 49 C.F.R. §§ 1572.5(a)(3); 1572.107(b) ("TSA may also determine that an applicant poses a security threat" if a criminal records search "reveals extensive foreign or domestic criminal convictions * * *.").

Amicus observes that a "pattern of recidivism" is not mentioned in the waiver regulations. Amicus Br. at 52. But that does not mean that recidivism is irrelevant to threat assessment, and that the agency cannot rely on such factors. Indeed, although the waiver regulations list factors the agency will consider, that list does not purport to be exclusive. See 49 C.F.R. § 1515.7(c)(2). The regulations restrict TSA's ability to grant a waiver, not its ability to deny a waiver. See id. § 1515.7(b) ("TSA may issue a waiver * * * if TSA determines that an applicant does not pose a security threat based on a review of [certain information]."). Moreover, the regulations were plainly designed to give TSA flexibility in making waiver decisions. See id. § 1515.7(c)(2) (explaining that in "determining whether to

grant a waiver, TSA will consider" certain listed factors as well as "[o]ther factors that indicate the applicant does not pose a security threat"). There is no basis to preclude TSA from examining the background check in its files, and then denying a waiver after drawing reasonable conclusions from that data.[11]

Amicus also posits that the agency may have improperly relied on arrests, rather than convictions, in concluding that Boniface had a "pattern of recidivism." Amicus Br. at 53. But even assuming such reliance would be improper, Amicus's argument is based on sheer speculation; nothing in the record suggests that the agency relied on these arrests. See JA-43, JA-78, JA-90. If Boniface was concerned about this possibility, it was incumbent on him to raise the matter during administrative proceedings, where the agency could have clarified its position (if any clarification was needed). In any event, Boniface's numerous convictions span four decades and are themselves adequate to demonstrate his pattern of recidivism.

Amicus also faults the agency for not accounting for the specific "circumstances" of Boniface's explosives conviction. Amicus Br. at 52. But Boniface failed to introduce such evidence

[11] To the extent there is any ambiguity in the regulation, TSA's interpretation is entitled to deference unless "plainly erroneous or inconsistent with the regulation." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (internal quotation marks omitted).

into the record. It was not the agency's responsibility to seek out new evidence and make Boniface's case for him.

Nor was the agency's decision in error in because Boniface is over 60 years old. Boniface's most recent conviction (for which he was only released in 2002) came while Boniface was in his mid to late 40s, see JA-32, 37, indicating that Boniface's disrespect for the law continued well past his youth. And no evidence in the record required the agency to conclude that Boniface was too old to be a threat.

Finally, Amicus relies on Boniface's "clean" record since 2002. But while Boniface was not arrested in the six years since 2002, that fact had to be juxtaposed with Boniface's quite lengthy criminal history. The evidence did not compel a conclusion that Boniface had been rehabilitated. And Amicus's reliance on a law review article that was never cited during agency proceedings, see Amicus Br. at 55, does not alter that result.

B. TSA Did Not Commit Reversible Error When It Processed Petitioner's Filings As A Waiver Request, Rather Than As An Appeal

Apart from challenging the substance of TSA's decision, Amicus spends considerable time attacking TSA's procedures. Amicus argues that Boniface submitted an administrative "appeal," and Amicus posits that his evidentiary submissions were premised

on that understanding. In Amicus's view, TSA therefore erred when it processed petitioner's filings as a waiver request.

Amicus then contends that this "conversion" was done without adequate notice, prejudicing Boniface by preventing him from introducing favorable evidence. Accordingly, Amicus submits that TSA violated its own regulations and the Due Process Clause, entitling Boniface to a remand. See Amicus Br. at 38-50.[12]

1. As an initial matter, this Court cannot consider the argument because it is raised only by Amicus. See Eldred v. Reno, 239 F.3d 372, 378 (D.C. Cir. 2001), aff'd sub. nom. Eldred v. Ashcroft, 537 U.S. 186 (2003); 16A Charles Alan Wright, Arthur

[12] As a preface to this argument, Amicus spends several pages implying that TSA's HME regulations are overbroad. See Amicus Br. at 38-42. Amicus draws a parallel to certain aviation security regulations, see 49 C.F.R. §§ 1542.209(d)(2), 1544.229(d)(20), and suggests that it would be more sensible for the HME regulations to treat explosives possession as a temporarily disqualifying conviction. See Amicus Br. at 38-42. But see 46 U.S.C. § 70105(c)(1)(A)(vii) (making explosives possession a permanently disqualifying offense for individuals seeking unescorted access to secure areas of ports and vessels). Nonetheless, Amicus does not appear to argue that the regulation itself is invalid, as Amicus recognizes that the waiver process allows TSA to account for any potential overbreadth. Cf. 69 Fed. Reg. at 68724 (discussing how TSA developed its list of disqualifying felonies, and explaining that the waiver program had to be kept in mind "[a]s part of th[is] discussion"). Moreover, Boniface only petitioned for review of a TSA order denying a waiver, and the certified administrative record is the agency's adjudicative record, not its rulemaking record. See City of Benton v. Nuclear Regulatory Comm'n, 136 F.3d 824, 826 (D.C. Cir. 1998) (per curiam) (recognizing that a petition for review must specify the exact order being reviewed); Fed. R. App. P. 15(a), 16(a). Given the lack of a rulemaking record, this is not an appropriate proceeding in which to evaluate the evidentiary basis for TSA's rule.

R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3975.1 & n.4 (4th ed. 2009). That rule is particularly appropriate here, as petitioner may be aware of extra-record facts that could undermine this claim. Indeed, although Amicus suggests that petitioner was not given adequate notice of the agency's "conversion," it is at least possible that TSA orally told Boniface about the "conversion" before the Assistant Administrator first ruled on the waiver request. See JA-48 (statement from Boniface, submitted to the ALJ, suggesting that Boniface had a phone discussion about his case with a TSA employee); JA-56 (handwritten notes from Boniface, submitted to the ALJ, listing names and phone numbers of TSA employees); JA-90 (statement from the Final Decision Maker, expressing her belief that in "July 2008, TSA informed [Boniface] that [his] appeal would be processed as a waiver").

2. In any event, Boniface is not entitled to relief because he failed to exhaust his administrative remedies.

Once the Assistant Administrator denied Boniface's waiver request, and it had become clear to Boniface that the agency wanted him to submit evidence of rehabilitation, Boniface should have instituted a new waiver proceeding in which he could introduce additional evidence. See 49 C.F.R. § 1515.11(b)(1)(i) ("If the applicant has new evidence or information, the applicant

must file a new request for a waiver * * *.").[13] Boniface bypassed that option, choosing instead to proceed with ALJ review despite the fact that the ALJ "may consider only evidence or information that was presented to TSA" in a waiver request. Id.

Because petitioner had a clear remedy available to him, his failure to use that remedy automatically triggers an exhaustion inquiry. See Avocados Plus, Inc. v. Veneman, 370 F.3d 1243, 1248 (D.C. Cir. 2004); see also McCarthy v. Madigan, 503 U.S. 140, 144-45 (1992) (explaining the "general rule" that parties must "exhaust prescribed administrative remedies before seeking relief from the federal courts"). Thus, at a minimum, Boniface's claim will be barred unless his "interest in an immediate judicial forum clearly outweighs the institutional interests underlying the exhaustion requirement." Ass'n of Flight Attendants v. Chao, 493 F.3d 155, 159 (D.C. Cir. 2007).

Boniface cannot come close to meeting this standard. The exhaustion rule protects interests of judicial efficiency and agency autonomy. McCarthy, 503 U.S. at 145; see also Flight Attendants, 493 F.3d at 159. Exhaustion helps ensure that agencies are given primary responsibility for policing the programs that Congress has charged them with administering, and gives them the opportunity to correct their mistakes before being

[13] In 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.

hauled into federal court. Boivin v. U.S. Airways, Inc., 446 F.3d 148, 155 (D.C. Cir. 2006). And an exhaustion requirement discourages litigants from flouting agencies' rules, which over time could "weaken the effectiveness of an agency by encouraging people to ignore its procedures." McKart v. United States, 395 U.S. 185, 195 (1969). Moreover, exhaustion affords the agency the opportunity to correct its own errors, potentially obviating the need for federal court action. Boivin, 446 F.3d at 155. Additionally, even if a controversy survives agency review, exhaustion may produce a useful record for later judicial review. McCarthy, 503 U.S. at 145.

All of those interests are implicated here. Had Boniface simply initiated a new waiver proceeding, TSA could have considered any new evidence of rehabilitation Boniface wanted to offer. If TSA had then granted a waiver, it would have prevented the need for this Court's involvement. Moreover, if in fact TSA erroneously treated Boniface's "appeal" as a waiver, TSA should have been given the opportunity to correct such an error itself. Even if the agency would have nonetheless denied a waiver, the evidentiary record would be more developed, facilitating this Court's review. And TSA clearly has a legitimate interest in encouraging litigants to abide by the agency's reasonable procedural rules.

By contrast, any interest Boniface has in obtaining immediate judicial review does not "clearly outweigh[]," Flight Attendants, 493 F.3d at 159, TSA's concerns. In fact, the remedy Amicus seeks for Boniface--a remand so the agency can institute a new waiver proceeding, see Amicus Br. at 57--could have been achieved in August 2008 if Boniface had simply requested a new waiver proceeding at that time. And while pursuing a new waiver might have slightly delayed Boniface from pressing his other claims in this court, Amicus believes that Boniface intended to separately pursue both appeal and waiver proceedings, which would have resulted in at least a similar delay.[14]

3. Because Boniface had the option to institute a new waiver proceeding, Amicus's argument also should be rejected because of a failure to establish prejudice. See, e.g., First Am. Discount Corp. v. CFTC, 222 F.3d 1008, 1015 (D.C. Cir. 2000); Air Canada v. DOT, 148 F.3d 1142, 1154 (D.C. Cir. 1998); see also 5 U.S.C. § 706 ("[d]ue account shall be taken of prejudicial error."). The sole prejudice Amicus identifies is an alleged denial of "a meaningful opportunity to submit evidence showing"

[14] Initiating a new waiver proceeding would not have precluded Boniface from continuing to assert his IAD, retroactivity, and ex post facto arguments. When an applicant files a new waiver request his pending ALJ proceeding "will be dismissed." 49 C.F.R. § 1515.11(b)(1)(i). But during the new proceeding, nothing prevents the applicant from submitting new evidence alongside old materials, and then arguing that the record as a whole establishes his entitlement to a waiver.

Boniface was entitled to a waiver. As explained above, Boniface in fact had such an opportunity and simply declined to institute a new waiver proceeding.

Nor can Boniface claim prejudice from the fact that his "appeal" was not adjudicated under appeal standards. When TSA concludes that an applicant has a permanently disqualifying conviction, and the applicant appeals, the appeal can only be successful if the applicant does not actually have a permanently disqualifying conviction within the meaning of TSA's regulations. See 49 C.F.R. §§ 1515.5(b), 1572.5(a)(1). Here, there is no dispute that Boniface was actually convicted of an explosives offense. And there is no question that this qualifies as a "conviction" that is "permanently disqualifying" under TSA's regulations. See id. § 1570.3 (explaining that a conviction includes any finding of guilt, unless the conviction is judicially overturned or the individual is pardoned); see also id. § 1572.103(a)(7).

4. Finally, because Boniface had the ability to institute a new waiver proceeding, TSA also did not violate due process requirements.

The "basic elements of constitutional due process [are] notice and the opportunity to be heard." Yates v. Dist. of Columbia, 324 F.3d 724, 726 (D.C. Cir. 2003). After the Assistant Administrator sent Boniface a waiver denial in August

2008, Boniface was on notice that the agency had treated his "appeal" as a waiver request. See JA-43. And at that point, Boniface had the opportunity to institute a new waiver proceeding and introduce new evidence. Thus, TSA gave Boniface adequate notice and an opportunity to be heard.

III. TSA DID NOT ACT IN AN IMPERMISSIBLY RETROACTIVE MANNER

Petitioner argues that TSA's regulations operate retroactively because they take into account a conviction he earned before the regulations were promulgated. Relying on Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), which held that a statutory grant of rulemaking must expressly convey the power to regulate retroactively, see id., petitioner contends that TSA's regulations exceed the authority delegated in 49 U.S.C. § 5103a. Pet. Br. at 15-16; see also Amicus Br. at 21-28.

As the Supreme Court has explained, however, a regulation does not operate retroactively "merely because it draws upon antecedent facts for its operation." Landgraf v. USI Film Prods., 511 U.S. 244, 269 n.24 (1994) (internal quotation marks omitted); see also Bell Atl. Tel. Cos. v. FCC, 79 F.3d 1195, 1207 (D.C. Cir. 1996). Instead, for purposes of applying's Bowen's presumption against retroactive rulemaking, a regulation is retroactive only when its application "'would impair rights a party possessed when he acted, increase a party's liability for

past conduct, or impose new duties with respect to transactions already completed.'" Bergerco Canada v. United States Treasury Dep't, 129 F.3d 189, 193 (D.C. Cir. 1997) (quoting Landgraf, 511 U.S. at 280). Even when a regulation relies on past actions as a predicate to its application, the regulation is not retroactive when the underlying conduct it regulates is conduct that post-dates the regulation. See Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 37, 43-44 (2006).

Here, the HME regulations are not retroactive because the regulated conduct is not past criminal activity. Instead, TSA is denying Boniface an HME because of his current status as a security threat. Cf. id. at 44 (finding that even though an immigration law increased the consequences of illegal reentry after an alien's return to the United States, the law was not retroactive because the regulated conduct was properly understood to be the alien's continuing failure to leave the country). TSA made its threat assessment by looking to Boniface's past actions. But TSA merely applied an evidentiary presumption that Boniface is a security threat because of his prior explosives conviction. If Boniface had presented sufficient evidence that, despite his conviction, he is not currently a security threat (whether because of rehabilitation or other reasons), TSA would have reversed its threat assessment during the waiver proceedings.

See 49 C.F.R. § 1515.7(b). There is simply no retroactivity here.

That conclusion also follows from this Court's repeated recognition that a regulation is not retroactive simply because it relies on past facts to make an inference about a person's current status. See, e.g., Bell Atlantic, 79 F.3d at 1206-07; Admrs. of the Tulane Educ. Fund v. Shalala, 987 F.2d 790, 797-98 (D.C. Cir. 1993); Ass'n of Accredited Cosmetology Schs. v. Alexander ("AACS"), 979 F.2d 859, 865 (D.C. Cir. 1992). Just as a government lender does not engage in retroactive rulemaking when it refuses to "extend[] credit to applicants with negative credit histories," AACS, 979 F.2d at 865, TSA did not engage in retroactive rulemaking when it refused to extend an HME to certain applicants with troubling criminal histories. See also Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (explaining that a statute allowing for civil commitment of sexually violent criminals did not have retroactive effect, and pointing out that "[t]o the extent * * * past [criminal] behavior is taken into account, it is used * * * solely for evidentiary purposes").

Moreover, the circumstances of Boniface's case present a particularly poor vehicle for asserting a retroactivity argument. At base, an inquiry into retroactivity is often "informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" Martin v. Hadix, 527 U.S.

343, 358 (1999) (quoting Landgraf, 511 U.S. at 270). Such considerations hardly militate in Boniface's direction. The underlying conduct that resulted in Boniface's conviction was possession of an explosive device, a federal felony that at the time carried a substantial prison term. It is particularly inappropriate to conclude that even though Boniface was not deterred from his actions by the threat of lengthy imprisonment, he might have altered his conduct if he knew that possessing an unregistered explosive would affect his ability to hold an HME 28 years later. That seems especially implausible considering the lack of any indication in the record that Boniface was even engaged in the trucking business in 1975, let alone that he was in the business of transporting hazardous materials.

Finally, it bears noting that if this Court were to adopt Boniface's arguments, the result would create a serious gap in the regulatory scheme that could not easily be squared with congressional intent. Section 5103a, which was enacted in the wake of the September 11 terrorist attacks, requires TSA to conduct threat assessments by examining an applicant's criminal history. See 49 U.S.C. §§ 5103a(a)(1), (d)(1)(B), (d)(2)(A). If Boniface's position were correct, TSA would have to examine these criminal histories, but then ignore a substantial portion of the revealed information because it predated enactment of the HME regulations. Under Boniface's reasoning, TSA might even be

required to grant HMEs to persons who had committed serious acts of terrorism, so long as those acts predated issuance of the governing regulations. Such a result is at odds with the purpose of the USA PATRIOT Act.

IV. TSA'S RELIANCE ON PETITIONER'S CONVICTION DID NOT VIOLATE THE EX POST FACTO CLAUSE

Petitioner also contends that the denial of his HME constitutes additional "punishment" for his 1975 explosives conviction and therefore violates the Ex Post Facto Clause. This argument is mistaken.

As a threshold matter, the Ex Post Facto Clause is not implicated here because petitioner did not lose his HME as a penalty for his prior crime. Instead, as explained above, petitioner was denied an HME because of his current status as a security threat. "To the extent that past [criminal] behavior is taken into account, it is used * * * solely for evidentiary purposes." Hendricks, 521 U.S. at 371.

Even if the HME denial could be deemed some sort of penalty, it would still not constitute an ex post facto violation. Although the Clause applies to criminal punishment, it does not apply to civil penalties. See Smith v. Doe, 538 U.S. 84, 92 (2003); Johnson v. Quander, 440 F.3d 489, 500 (D.C. Cir. 2006). Here, if the loss of an HME is a "penalty" at all, it is plainly a civil one.

For ex post facto purposes, this Court applies a two-part test to determine if a given regulatory scheme is "civil" in nature. First, the Court examines the statute to determine whether the legislature intended to impose punishment, or if it instead intended to enact a scheme that was civil and nonpunitive. Smith, 538 U.S. at 92. If the intent was to impose punishment, the inquiry ends. Id. If the intent was otherwise, the Court proceeds to examine whether the "statutory scheme is so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil." Id. (internal quotation marks omitted). Because a court must ordinarily defer to the legislature's intent, "only the clearest proof will suffice to override legislative intent and transform what has has been denominated a civil remedy into a criminal penalty." Hudson v. United States, 522 U.S. 93, 100 (1997) (internal quotation marks omitted).[15]

Under the first step, it is clear that Congress intended to create a civil and nonpunitive scheme. Section 5103a lacks any of the indicators of a criminal or punitive statute. Instead, it simply authorizes TSA to determine whether individuals pose a security threat warranting denial of an HME. See 49 U.S.C.

[15] Although Hudson is a case about the Double Jeopardy Clause, rather than the Ex Post Facto Clause, the Supreme Court has made clear that the clauses trigger the same test to determine whether a penalty is "criminal." See Hendricks, 521 U.S. at 369.

§ 5103a(a)(1). Such an administrative delegation is "prima facie evidence that the legislature intended to provide for a civil" regulatory scheme, Hudson, 522 U.S. at 103, and petitioner identifies nothing in the statute that compels an alternate conclusion.

Turning to the second step, the question becomes whether petitioner has presented the "clearest proof" that the HME scheme is so punitive in purpose or effect as to override the legislature's intent. Factors relevant to this inquiry include:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (internal footnotes omitted); see also Johnson, 440 F.3d at 502.

These factors demonstrate that the threat assessment program is nonpunitive. The supposed sanction here, which involves denial of an occupational license, does not involve an affirmative disability or restraint, and has not historically been regarded as "punishment." See Hudson, 522 U.S. at 104. Additionally, denial of an HME does not depend on a particular

level of criminal scienter, but instead depends merely on an assessment that a given individual poses a security threat.

Nor does the HME denial appear tied to the traditional aims of punishment--retribution and deterrence. The administrative scheme "does not affix culpability for prior criminal conduct" and instead merely uses that conduct "for evidentiary purposes." Hendricks, 521 U.S. at 362. Also, an HME can be denied for a number of reasons beyond criminal conviction, see, e.g., 49 C.F.R. §§ 1572.103(a), (b); id. § 1572.103(c); id. § 1572.5(a)(2); id. § 1572.5(a)(4), which further dispels the idea that an HME denial is criminal punishment. Hendricks, 531 U.S. at 362. And while it is theoretically possible that the HME regulations will have a marginal deterrent effect on crime, such a deterrent effect is likely to be exceedingly small in relation to the criminal penalties that already exist for the disqualifying offenses. In any event, the fact that an HME denial could have a deterrent effect, and the fact that it can be triggered by actions that constitute a crime, are insufficient to transform it into a "criminal" punishment. See Hudson, 522 U.S. at 105.

Finally, the HME regulations are rationally related to an alternative purpose because they seek to promote public safety. See 68 Fed. Reg. at 23856, 23861; see also Smith, 538 U.S. at 102-103 (explaining that public safety is a legitimate non-

punitive purpose). Moreover, denial of an HME is not excessive in relation to this purpose. The list of disqualifying offenses is tailored to reflect the agency's judgment about what is likely to pose a security risk for transporting hazardous materials. And to the extent that the list might sweep in applicants who are not actually security threats, the waiver process allows TSA to grant those individuals an HME, notwithstanding their disqualifying conviction.

In sum, to the extent that the HME regulations can even be said to impose a sanction at all, that sanction is plainly a civil one beyond the scope of the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a) that the foregoing brief contains 10541 words, according to the count of Corel WordPerfect X4.

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CERTIFICATE OF SERVICE

I certify that on December 23, 2009, I caused a copy of the foregoing brief to be filed electronically with the Court using the Court's CM/ECF system, and also caused eight copies to be delivered to the Clerk of the Court by hand delivery within two business days. Service will be made automatically on the following CM/ECF participants:

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