ORAL ARGUMENT SCHEDULED FOR APRIL 6, 2018

No. 16-5373

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATTHEW SLUSS,
Plaintiff – Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant – Appellee.

Appeal from the United States District Court
for the District of Columbia, No. 1:14-cv-00759-CRC
(Hon. Christopher R. Cooper)

REPLY BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLANT MATTHEW SLUSS

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GLOSSARY OF ABBREVIATIONS

APA: Administrative Procedure Act

EEOC: Equal Employment Opportunity Commission

ICJ: International Court of Justice

IPTU: International Prisoner Transfer Unit

Section 6: Art. III, § 6 of the U.S.-Canada Treaty

U.S.-Canada Treaty: Treaty on the Execution of Penal Sentences, Can.-U.S.

SUMMARY OF THE ARGUMENT

For the first time in four years of litigation, the government argues that the U.S.-Canada Treaty, on which Mr. Sluss has consistently relied, is non–self-executing. As the issue of self-execution is not jurisdictional, this Court has discretion to find the argument forfeited.

It should. The issue of self-execution is a highly complex question in an underdeveloped area of law. It involves in-depth analysis of the intentions of the U.S.-Canada Treaty's drafters; intentions which are rarely recorded and rely more on inference than evidence. As such, this Court should not address the government's new argument.

Even if this Court reaches this issue, a textual analysis of Article III, Section 6 of the U.S.-Canada Treaty ("Section 6") demonstrates that its drafters intended the provision to be self-executing. The government misses a basic tenet of treaty law: Courts determine self-execution on a provision-by-provision basis. Looking at the text of the provision—in particular its mandatory command—and its context within the Treaty, there is ample evidence to conclude that the drafters intended to bind the parties to a particular process in determining whether or not to approve transfers. As such, the Section 6 is self-executing.

Just as Section 6's mandatory language makes it self-executing, so too that language creates a manageable standard for judicial review under the APA. The government's arguments that Section 6 of the U.S.-Canada Treaty does not create a manageable standard miss the mark. The government offers no response to the argument that courts can review the *process* of the Attorney General's decision—whether or not best interests were considered. Instead, it responds to an argument neither Amicus nor Mr. Sluss made: That Mr. Sluss is entitled to substantive review of the IPTU's decision to ensure that it reached the correct result.

Because there is a manageable standard for judicial review, this Court should remand to the district court with directions to examine whether the administrative record adequately confirms that the Attorney General, in denying transfer, considered Mr. Sluss's best interests. The district court did not have the benefit of the full administrative record and therefore could not properly find that the Attorney General considered Mr. Sluss's best interests when denying his transfer request. Without further evidentiary development, the district court lacked sufficient evidence to reach a conclusion on this issue.

ARGUMENT

I. ARTICLE III, SECTION 6 OF THE U.S.-CANADA TREATY IS SELF-EXECUTING, AND MR. SLUSS HAS STANDING.

For the first time in the four years this case has been pending, the government argues that the U.S.-Canada Treaty is non–self-executing.[1] Because the government neither explained nor justified its belated presentation, this Court should decline to consider this argument. And even if it reaches the argument, Section shows all the hallmarks of a self-executing treaty provision and contrary to the government's argument, the district court correctly concluded that Mr. Sluss has standing under 28 U.S.C. § 1331.

A. The Government Forfeited the Self-Execution Argument.

The issue of self-execution—one the government never raised below—does not affect subject matter jurisdiction, and this Court should not

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[1] Self-execution is a distinct inquiry from whether a treaty or statute provides privately enforceable rights. *See Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (distinguishing self-execution from a presumption against the creation of private rights and private causes of action); *see also Cornejo v. County of San Diego*, 504 F.3d 853, 856–57 (9th Cir. 2007) (finding that the Vienna Convention is self-executing before proceeding to the question of private right of action). The government raised the privately enforceable rights issue in the district court, *see* J.A. 71–73; 138–39, and as discussed *infra* Part IB, the district court ruled correctly on that issue, *see* J.A. 96–97, n. 2.

consider it. Because this is a complex issue for which the government has offered no "extraordinary circumstances" to justify consideration, this Court should decline the government's invitation to consider its forfeited argument. *See Lesesne v. Doe*, 712 F.3d 584, 588 (D.C. Cir. 2013).

Whether a treaty is self-executing is not a jurisdictional matter. *See Jogi v. Voges*, 480 F.3d 822, 825–26 (7th Cir. 2007) (upholding subject matter jurisdiction over a complaint claiming a violation of Article 36 of the Vienna Convention on Consular Relations under 28 U.S.C. § 1331). In *Jogi*, the Seventh Circuit distinguished the inquiry regarding the existence of a valid cause of action from subject matter jurisdiction, confirming that a claim arising under a treaty—whether self-executing or not—"is enough to support subject matter jurisdiction unless the claim is so plainly insubstantial that it does not engage the court's power." *Id.* at 825.

Jogi's conclusion aligns with both Supreme Court precedent, which has long held that "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover," *Bell v. Hood*, 327 U.S. 678, 682 (1946),

and this Court's precedent, *see, e.g.*, *John Doe v. Metro. Police Dep't of D.C.*, 445 F.3d 460, 466–67 (D.C. Cir. 2006) (holding that dismissal for failure to state a constitutional claim under Section 1983 should be dismissed under Rule 12(b)(6), not Rule 12(b)(1)). As Mr. Sluss's argument is not so frivolous as to question subject matter jurisdiction, this Court has jurisdiction regardless of the self-executing nature of the treaty provisions. *See* 28 U.S.C. § 1331 (providing jurisdiction for cases "arising under the Constitution, laws, or treaties of the United States").

Because self-execution does not affect jurisdiction, this Court should not consider the issue. Appellate courts ordinarily do not consider issues not raised below. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see also District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal."). This Court usually exercises its discretion to consider new arguments only where there are "extraordinary circumstances." *Lesesne*, 712 F.3d at 588. Such circumstances include where a "novel, important, and recurring question of federal law" is presented or where only a "straightforward legal question" is at issue that "both parties have fully addressed." *Id.*

The government has not argued there are any such "extraordinary circumstances," likely because no circumstances warrant a departure from the general rule of forfeiture. *See id.* Instead, offering no justification for having failed to raise this argument at any point in four years of litigation, the government asserts a highly complex new argument for this Court to consider in the first instance. Even scholars immersed in treaty law recognize that "there is significant debate and uncertainty with respect to the considerations that should govern this determination" of whether a treaty provision is self-executing or not. Curtis A. Bradley, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 42 (2d ed. 2015) [hereinafter *Bradley*]. Allowing the government to substitute a self-execution argument for its flawed committed-to-agency-discretion argument would be patently unfair to Mr. Sluss. As such, this Court should not consider the government's forfeited self-execution argument.

B. Article III, Section 6 Is a Self-Executing Provision that Protects Individual Rights.

Even if this Court considers the self-execution argument, the government misses a critical point in treaty law. The self-executing nature of a treaty is determined on a provision-by-provision basis, not as a whole. *See Medellin v. Texas*, 552 U.S. 491, 508 (2008) (holding that

Article 94 of the U.N. Charter—rather than the entire U.N. Charter—was non–self-executing); *see also* Restatement (Third) of Foreign Relations Law § 111, cmt. h (1987) ("Some provisions of an international agreement may be self-executing and others non–self-executing"); Restatement (Fourth) of Foreign Relations Law: Jurisdiction Treaties § 110 Tentative Draft No. 2 (March 2, 2017) ("Section 111 of the Restatement Third . . . made clear that self-execution is to be determined on a provision-by-provision basis"); *Bradley* at 41.

Self-execution should be addressed at the provision level because treaties consist of numerous commitments, some of which address themselves to future action in the form of contract between the political branches while others address themselves to the courts as binding commitments. *See Medellin*, 552 U.S. at 508–09 (distinguishing self-executing and non–self-executing provisions based on their character as either addressing themselves to domestic courts with immediate legal effect or as addressing themselves to future action by the political branches). Thus, although the government may be correct that some provisions of the U.S.-Canada Treaty are non–self-executing, Section 6 demonstrates all the hallmarks of a self-executing treaty provision.

The text of Section 6 demonstrates that its drafters intended it to be self-executing. Most tellingly, it affirmatively binds the United States and Canada in mandatory terms. Mandatory language matters. It demonstrates the drafter's intent to give a commitment "immediate legal effect in domestic courts." *See Medellin*, 552 U.S. at 508. In *Medellin*, the Supreme Court concluded that the *absence* of any mandatory language like "'shall' or 'must'" in Article 94 of the U.N. Treaty provided evidence that its drafters did not intend the provision to be self-executing. *Id.* at 508. Instead, Article 94 states that each Member State "undertakes to comply" with the decisions of the International Court of Justice ("ICJ"), which the Court concluded "reads like 'a compact between independent nations' that 'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" *Id.* at 508–09 (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)); *see also Al-Bihani v. Obama*, 619 F.3d 1, 20–21 (Mem) (D.C. Cir. 2010) (Sentelle, J.) (in denying rehearing *en banc*, stating that the 1949 Geneva Conventions are non–self-executing because they merely "undertake[] to comply" similar to Article 94 in *Medellin* and do not include "shall" or "must.").

By casting Section 6 in mandatory terms, the U.S.-Canada Treaty drafters sent a clear signal that they intended to bind the parties to the provision's commitment. This commitment—that the parties "shall bear in mind" the transferee's best interests—is a directive to adhere to a certain process when making a decision. Treaty on the Execution of Penal Sentences, Can.-U.S., Mar. 2, 1977, 30 U.S.T. 6263 (the "U.S.-Canada Treaty"), art. III, § 6. By prescribing a certain process, the commitment mirrors the APA's manageable standard requirement, obligating the parties to first consider the transferee's best interests before making a decision on whether or not to approve a transfer. *See infra* Part IIA. In this way the drafters ensured that the U.S.-Canada's main purpose, the social rehabilitation of transferees, could not be ignored. *See* Amicus Br. at 22–25; Appellee Br. at 28–29 (agreeing that social rehabilitation is an underlying purpose of the U.S.-Canada Treaty).

Further evidence of the intent to make Section 6 self-executing is that it has no alternative enforcement mechanism, demonstrating that the drafters intended it to be enforced in the normal manner through a suit in the offending government's courts. In *Medellin*, by contrast, the

Supreme Court noted that the U.N. Charter included its own enforcement mechanism—resort to the Security Council—to enforce compliance, which provided evidence that Article 94 was not meant to be enforceable in the signatories' courts. *Medellin*, 552 U.S. at 509–10. The lack of an alternative enforcement mechanism in Section 6 (or anywhere in the U.S.-Canada Treaty, for that matter) is further evidence the drafters intended that those aggrieved by a state's violation of the provision would be able to raise their claim before the offending nation's judiciary.

To be sure, the government points to sources arguably demonstrating that some provisions of the Treaty were meant to be non–self-executing. But evidence about other provisions is irrelevant to the character of Section 6. All of the text, ratification, and implementation materials the government cites as evidence actually address the accompanying bureaucracy needed to handle transfer requests.

For example, the sole textual support the government cites for its argument that the entire U.S.-Canada Treaty is non–self-executing is Article III, Section 9. Appellee Br. at 15–16. Section 9's terms—in which the parties commit to establish by "legislation or regulation the

procedures necessary and appropriate to give legal effect within its territory to sentences pronounced by courts of the other Party"—display the commitment to future action that would normally be the hallmark of non–self-execution. U.S.-Canada Treaty, art. III, § 9. But that *Section 9* is non–self-executing says nothing about the self-executing nature of either the entire U.S.-Canada Treaty or Section 6. Instead, Section 9 demonstrates that the drafters knew each country's penal system would require future legislation and regulation to legally recognize and implement sentences imposed by the other State's government. What Section 9 does not do is negate previous self-executing substantive commitments—like Section 6—made by the parties.

Turning in a new direction, the government next asserts that Mr. Sluss lacks standing because the Treaty does not create privately enforceable rights. Appellee Br. at 15. But not only does the private cause of action issue not affect standing,[2] Section 6 does create privately enforceable rights. First, although the government points to dictum suggesting that a treaty that does not confer private rights deprives

[2] Indeed, the district court found Mr. Sluss had standing. J.A. 96–97 n.2.

parties of standing, *see Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988), this Court has since concluded that parties have standing even where the treaty decisions they sought to enforce did not give rise to a private cause of action. *See Nat. Res. Def. Council v. EPA*, 464 F.3d 1, 11 (D.C. Cir. 2006) (holding that plaintiff organizations had standing but that international decisions reached under the Montreal Protocol did not provide a cause of action). Mr. Sluss, moreover, has standing because the denial of his transfer request meets standing's "irreducible constitutional minimum" by alleging an injury-in-fact, fairly traceable to the denial of his transfer request, which is likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Second, Section 6 also creates a privately enforceable right. The United States has a long history of recognizing individual rights in treaties dating back to *United States v. Rauscher*, 119 U.S. 407, 418 (1886). As the Supreme Court announced in *Rauscher*, a treaty "is a law of the land, as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." 119 U.S. at 419. The Supreme Court has also instructed

that "[t]reaties are to be construed in a broad and liberal spirit" favoring a construction protective of individual rights. *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

The "social rehabilitation of prisoners" is one of the U.S.-Canada Treaty's goals, which confirms that the U.S.-Canada Treaty addresses the rights of individuals. S. REP. NO. 95-10, at 1. Against this backdrop and read in the context of the purpose of the Treaty, Section 6 is most naturally understood as prescribing a rule of process protecting transferees from arbitrary or vindictive denials. In other words, a holistic look at the circumstances of the U.S.-Canada Treaty leads to the conclusion that Section 6 was meant to protect the rights of transferees by ensuring that the parties would adhere to the Treaty's underlying goal: social rehabilitation. Finding such a right is indicative of its self-executing nature, since the Supreme Court has tended to treat mandatory, present-tense provisions in bilateral treaties as self-executing, "especially if the provisions concern the rights of individuals." *Bradley* at 42 (citing *Clark v. Allen*, 331 U.S. 503, 507–08 (1947); *Asakura*, 265 U.S. at 341–43; *Rauscher*, 119 U.S. at 418–19).

Overall, the United States has bound itself to protecting the transferee's right to the process mandated by Section 6 when deciding transfer requests to Canada. The APA guarantees that, when making an administrative decision like the transfer of a prisoner, the government must do so in a non-arbitrary manner. It provides the vehicle to enforce the guarantee of process in the U.S.-Canada Treaty's commitment to bear in mind the best interests of the transferee.

II. THE U.S.-CANADA TREATY PROVIDES A MANAGEABLE STANDARD FOR A COURT TO REVIEW THE PROCESS BY WHICH THE ATTORNEY GENERAL MADE ITS TRANSFER DECISION.

The U.S.-Canada Treaty provides a manageable standard for a court to review whether the Attorney General considered Mr. Sluss's best interests. *See* Amicus Br. at 14–22. Nothing in the government's brief undermines that conclusion. And the government's argument on appeal that it considered Mr. Sluss's best interests[3] does nothing to remedy the

[3] The government asserts that it "moved to dismiss Mr. Sluss's complaint … because, among other reasons … the existing record … conclusively show[s] that the IPTU bore [Mr. Sluss's] best interests in mind when denying his transfer application," Appellee Br. at 29–30. This sentence fails to cite to its motion to dismiss or any other document filed below, because the government never argued that it considered Mr. Sluss's best interests when denying his transfer application.

fact that the evidence was insufficient for the district court to reach that conclusion. This Court should therefore remand to the district court with directions to examine whether the administrative record confirms that the Attorney General, in denying transfer, considered Mr. Sluss's best interests.

A. Article III, Section 6 Creates a Manageable Standard for Judicial Review.

The government has no persuasive response to the argument that Section 6 of the U.S.-Canada Treaty creates a manageable standard. Mr. Sluss, in his *pro se* brief, and Amicus each argued the Treaty creates a manageable standard by which the court can review the *process* by which the Attorney General made the transfer decision.[4] *See* Amicus Br. at 14–22; Appellant Br. at 8–13. The government argues that Section 6 does not permit review of the *substance* of the Attorney General's decision to

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[4] Although the standards advocated by Mr. Sluss and amicus differ slightly, both ask the court to review the Attorney General's decision-making process. Amicus argued the court should evaluate whether the Attorney General considered Mr. Sluss's best interests when making the transfer decision. *See* Amicus Br. at 14–22. Mr. Sluss argued that the court should look to whether the Attorney General considered *only* Mr. Sluss's best interests when making the transfer decision. *See* Appellant Br. at 8–12.

"compel the official to grant transfer" and "curtail an authorized official's discretion in implementing it." Appellee Br. at 22–23. But neither amicus nor Mr. Sluss argued that he was entitled to review of the substance of the Attorney General's decision.[5]

Mach Mining demonstrates that courts can review whether an agency has followed a mandatory process. *See Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645, 1651 (2015). The government argues that *Mach Mining* "involve[d] a very different situation" and therefore does not control this case. Appellee Br. at 24. It is wrong. Just as Title VII required the EEOC in *Mach Mining* to first "endeavor" to use informal methods to resolve the case before proceeding to more formal charges, the U.S.-Treaty required the Attorney General to consider whether transfer to Canada would be in Mr. Sluss's best interests in making its transfer decision.

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[5] To the extent that the government construed Mr. Sluss's argument to require the authorized official to grant transfer if it is in his best interests, that proposition is not necessary for his otherwise process-based manageable standard asking the court to review whether the Attorney General considered only his best interests in making the transfer decision. *See* Appellant Br. at 9–10.

And although *Mach Mining* recognized that the scope of judicial review was "relatively barebones," 135 S.Ct. at 1656, it still found a court could determine that the EEOC had violated the statute if it failed to use the informal methods prescribed by the statute, *see id.* at 1652 ("Without any 'endeavor' at all, the EEOC would have failed to satisfy a necessary condition…"). The Court held that the statute's command that the EEOC "shall endeavor" to first attempt informal methods permitted judicial review to ensure that the EEOC had: (1) informed the employer about the specific allegation, (2) communicated specific descriptions of what the employer had done and which employees had suffered as a result, and (3) engaged the employer in a discussion, giving the employer the opportunity to remedy the allegedly discriminatory practice. *Id.* at 1656. Thus, judicial review ensured that the EEOC followed the required process.

So too here. Just as whether the EEOC endeavored to resolve the complaint with informal methods was a manageable standard in *Mach Mining*, the U.S.-Canada Treaty's requirement that the Attorney General consider Mr. Sluss's best interests is a manageable standard for a court to review whether the Attorney General did so.

The government next argues that there is no review because Canada and the United States understood the Treaty to give "broad discretion" to officials deciding transfer applications and because the "nature of the administrative action"—transfer of a prisoner to another country—militates in favor of deference. *See* Appellee Br. at 25–27. But that conflates judicial deference to agency decisions with full preclusion of judicial review. Providing deference to an agency does not preclude judicial review. *See, e.g.*, *Mach Mining*, 135 S.Ct. at 1652–53; *Menkes v. Dep't of Homeland Sec.*, 486 F.3d 1307, 1313 (D.C. Cir. 2007); *Dickson v. Sec'y of Defense*, 68 F.3d 1396, 1401–02 (D.C. Cir. 1995). And the agency's decision is afforded a "strong presumption" favoring judicial review. *See, e.g.*, *Mach Mining*, 135 S.Ct. at 1651.[6]

The government also invokes *Bagguley v. Bush*, 953 F.2d 660 (D.C. Cir. 1991), and *Marquez-Ramos v. Reno*, 69 F.3d 477 (10th Cir. 1995), to argue that these types of prisoner transfers provide the Attorney General

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[6] The government has not argued that any of the "narrow categories" that serve as an exception to this presumption apply. *See Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007) (listing the narrow categories as second-guessing executive branch decisions in national security matters, an agency's refusal to undertake an enforcement action, or an agency's determination about how to spend a lump-sum appropriation).

with broad discretion. *See* Appellee Br. at 25–26. But neither considered the U.S.-Canada Treaty's mandatory language. *Bagguley* only addressed the Council of Europe's Convention on the Transfer of Sentenced Persons, T.I.A.S. No. 10824, 22 I.L.M. 530 (1983) (the "Convention"), and *Marquez-Ramos* only considered the U.S.-Mexico Treaty, neither of which has a provision similar to Section 6. Appellant Br. at 29–30.

Perhaps recognizing that *Mach Mining* controls the result here, the government turns to *Webster v. Doe*, 486 U.S. 592 (1988), to argue that the U.S.-Canada Treaty does not provide a manageable standard. Appellee Br. at 23–24. But this Court has repeatedly emphasized that *Webster* only applies to instances when the government has claimed that its decision is "so imbued with national security concerns as to require bypassing regular review procedures." *See*, *e.g.*, *Dickson v. Sec'y of Defense*, 68 F.3d at 1403 (noting the national security context in which the statute in *Webster* operated was key to the decision because the CIA had to "protect[] intelligence sources and methods from disclosure"); *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1513–15 (D.C. Cir. 1989) (same). *Webster* is thus inapplicable because the government has never

asserted that the decision-making process for transfer decisions requires ultimate secrecy to protect national security interests.

Because the district court had a manageable standard to apply—whether the Attorney General considered best interests—the only remaining question is how to enforce that standard. This Court has two options. This Court could decide, as Mr. Sluss advocates in his *pro se* brief, that the Treaty requires courts to review whether the Attorney General considered *only* his best interests. Alternatively, it could be read to require that the Attorney General consider Mr. Sluss's best interests as a factor in making the transfer decision. Either way, Section 6 of the U.S.-Canada Treaty provides a manageable standard for reviewing the Attorney General's transfer decision.

B. Because the District Court Did Not Have the Full Administrative Record of the Transfer Denial, It Could Not Conclude that the Attorney General Considered Mr. Sluss's Best Interests.

The district court erred in concluding, without the administrative record, that the Attorney General considered Mr. Sluss's best interests. *See* Amicus Br. at 28–41. The agency has never asserted that it considered Mr. Sluss's best interests in making the transfer decision. The government's novel argument on appeal therefore is an

impermissible post-hoc rationalization. *See, e.g.*, *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 738 (D.C. Cir. 2001) ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action" but instead look to the "contemporaneous explanation of the agency decision") (internal citations omitted).

It is not clear from any of the evidence before the district court that the agency believed the factors it considered related to Mr. Sluss's best interests. The IPTU letters made no mention of best interests. It was error for the district court to supply a reasoned basis for its decision that the agency had not given. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("a court is not to substitute its judgment for that of the agency"). And it is similarly unpersuasive that the government now argues the letters show that the IPTU "bore [Mr. Sluss's] best interests in mind," Appellee Br. at 27, when the agency never supplied that reasoning itself at the time it denied transfer. *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984) (rejecting the use of post hoc rationalizations by the parties because the only relevant evidence was the information the agency had at the time of its decision). Without the IPTU connecting the

factors considered to Mr. Sluss's best interests, it is far from clear that the agency believed it considered Mr. Sluss's best interests when denying his transfer. This Court should therefore remand to the district court, with instructions for the agency to provide the full administrative record so the court can then review whether it considered best interests.

The government asserts that allowing either Mr. Sluss or the district court access to the full administrative record in compliance with the APA and district court rules "would have been unnecessary." Appellee Br. at 29. But the APA requires courts reviewing agency action to either "review the whole record" or "those parts of it cited" once all the parties have had the opportunity to review the complete administrative record, 5 U.S.C. § 706, and the district court has comparable local rules that require the agency to "file a certified list of the contents of the administrative record with the Court … simultaneously with the filing of a dispositive motion[,]" D.D.C. R. 7(n)(1). These measures are required regardless of the scope of judicial review the court is undertaking. To be sure, a court's review of the administrative record here should examine only *whether* the Attorney General bore in mind Mr. Sluss's best interests (not *how* best interests were considered, as the government has asserted).

See Appellee Br. at 30. But this review permits courts to protect against outlier cases where an agency either refuses or utterly fails to comply with its mandate.

To prevent those rare instances from occurring, the court needs access to the full administrative record, because otherwise there is "asymmetry in information" that precludes any "check upon the failure of the agency to disclose information adverse to it[.]" *Boswell*, 749 F.2d at 792–93 (warning that review of less than the full administrative record leaves room for the agency to "withhold evidence unfavorable to its case"). For instance, if the government had an internal policy to deny all sex offender transfer applications, that would be a clear failure to consider best interests. If the agency gets to pick and choose the information presented from the administrative record, a court cannot ensure that the agency actually complied with its mandate to consider best interests.

Finally, the government improperly conflates consideration of potential motivations underlying Mr. Sluss's transfer request with the decision to grant or deny his transfer. *See* Appellee Br. at 29. Mr. Sluss's reasons for seeking transfer are irrelevant to whether the government considered his best interests. Indeed, the U.S.-Canada Treaty fully

anticipates that there may be discrepancies between the Sending and Receiving States' parole or conditional release policies and insists that the shorter of the two be used. U.S.-Canada Treaty, art. IV, § 3 ("No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have been terminated according to the court of the Sending State.").

CONCLUSION

The U.S.-Canada Treaty's mandatory language—that the Attorney General shall consider whether transfer is in the best interests of the transferee—provides a manageable standard for judicial review. The government's new theory four years into litigation regarding self-execution does not change that calculous. This Court should find that argument was forfeited. But even if it chooses to reach the issue, the mandatory language in the U.S.-Canada Treaty illustrates the drafters' intention that Section 6 be self-executing. This Court should therefore remand to the district court with instructions to review the full administrative record to ensure Mr. Sluss's best interests were considered when his transfer request was decided.

Respectfully Submitted,

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March 5, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4925 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

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