ORAL ARGUMENT NOT YET SCHEDULED

Case No. 16-5373

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATTHEW D. SLUSS,
Plaintiff – Appellant,

v.

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

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

BRIEF OF APPELLANT MATTHEW D. SLUSS

Matthew D. Sluss
Reg. No. 52455-037
FCI Petersburg Medium
P.O. Box 1000
Petersburg, VA 23804

Plaintiff-Appellant
Pro Se

CERTIFICATE OF PARTIES AND *AMICI*

The Appellant is Matthew D. Sluss, who is the plaintiff in the judgment from which appeal is taken.

The Appellee is the United States Department of Justice, International Prisoner Transfer Unit, which agency was the defendant in the judgment from which appeal is taken.

This Court appointed Erica J. Hashimoto, Esq., of the Georgetown University Law Center Appellate Litigation Program as *Amicus Curiae* in support of Appellant.

CERTIFICATE OF RULINGS UNDER REVIEW

This appeal is taken from an *Order* and *Memorandum Opinion*, entered November 18, 2016, of the United States District Court for the District of Columbia, the Honorable Christopher R. Cooper, United States District Judge, granting the motion of Defendant-Appellee to dismiss Plaintiff's *Complaint* for failure to state a claim. The *Order* and *Memorandum Opinion* is found in the Appendix at JA 95.

CERTIFICATE OF RELATED CASES

This matter was previously before this Court in Case No. 15-5075. In that case, this Court *sua sponte* vacated the District Court's order granting Defendant's *Motion to Dismiss* and remanded the case to the District Court for further proceedings.

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GLOSSARY

IPTU	–	International Prisoner Transfer Unit
US-Canada Treaty	–	Treaty between the United States of America and Canada on the Execution of Penal Sentences
US-Bolivia Treaty	–	Treaty between the United States of America and Bolivia on the Execution of Penal Sentences
Us-Mexico Treaty	–	Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences
US-Panama Treaty	–	Treaty between the United States of America and The Republic of Panama on the Execution of Penal Sentences
US-Peru Treaty	–	Treaty between the United States of America and The Republic of Peru on the Execution of Penal Sentences
US-Thailand Treaty	–	Treaty on cooperation in the Execution of Penal Sentences between the Government of the United States of America and the Government of the Kingdom of Thailand
US-Turkey Treaty	–	Treaty on Enforcement of Penal Sentences between the United States of America and the Republic of Turkey
Inter-American Treaty	–	Inter-American Convention on serving Criminal Sentences Abroad

Transfers Act	–	Transfers to and from Foreign Countries Act (18 U.S.C. § 4100, *et seq.*)
COE Convention	–	Council of Europe's Convention on the Transfer of Sentenced Persons

JURISDICTIONAL STATEMENT

This action is brought pursuant to the *Administrative Procedure Act* of 1946, as amended, 5 U.S.C. § 500 *et seq.* The district court from which this appeal is taken had jurisdiction over the action pursuant to 28 U.S.C. § 1331.

This Court has jurisdiction over the subject matter of this appeal pursuant to 28 U.S.C § 1291. Territorial jurisdiction is proper pursuant to 28 U.S.C. § 88 because this appeal is of a final judgment rendered by United States District Court for the District of Columbia.

This appeal is timely under *F.R.App.P.* 4(a)(1)(B)(ii), because final judgment was entered on November 18, 2016, and the *Notice of Appeal* was filed on December 5, 2016.

This judgment appealed is 'final' within the meaning of 28 U.S.C § 1291 because it disposed of all claims of the parties to this action.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Matthew D. Sluss, Petitioner-Appellant herein ("Sluss") raises the following issues for review:

1. May a person state a claim for arbitrary and capricious review under the *Administrative Procedure Act* by applying the standard of review found in the *US-Canada Treaty* at Article III, 6, providing "[i]n deciding upon the transfer of an Offender, the Authority of each Party shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender?"
2. Does this same article sufficiently limit the Agency's discretion to only 'the best interests of the Offender'?

STATEMENT REGARDING NEED FOR ORAL ARGUMENT

Sluss joins and incorporates by reference the *Statement on Oral Argument* set out in the *Brief* filed herein by Erica Hashimoto, Esq., *amicus curiae* appointed by the Court.

STATEMENT OF THE CASE AND FACTS

Sluss joins and incorporates by reference the *Statement of the Case* of Erica Hashimoto, set out in the *Brief* filed herein by Erica Hashimoto, Esq., *amicus curiae* appointed by the Court.

SUMMARY OF ARGUMENT

Sluss appeals the District Court's *Order* and *Memorandum Opinion* (hereinafter collectively "*Order*") granting the *F.R.Civ.P.* 12(b)(6) motion filed by Defendant-Appellee U.S. Department of Justice, International Prisoner Transfer Unit (hereinafter "IPTU"). Sluss, a federal prisoner, requested an international transfer to Canada pursuant to the self-executing *Treaty between the United States of America and Canada on the Execution US-Canada Treaty of Penal Sentences*, March 2, 1977, 32 UST 6263 (hereinafter *US-Canada Treaty"* or sometimes "*Treaty*"). The *Treaty* directs that "[i]n deciding upon the transfer of an Offender, the [IPTU] shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender."

In deciding Sluss's transfer request, the IPTU looked beyond the factors annunciated in the *US-Canada Treaty*, denying the transfer request based on the seriousness of Sluss's offense, his alleged criminal history, his alleged domicile in the United States, and his alleged lack of social contacts with Canada. The Agency's

decision letter in no way connects its rationale to the standard set out in the *US-Canada Treaty*.

Supporting legislation intended by Congress to implement the *US-Canada Treaty* provided that a transfer must be made pursuant to a treaty, *i.e.*, the *US-Canada Treaty*. Legislative history indicates that Congress intended any limitations on the IPTU's discretion would derive from the treaty, and did not seek to preclude judicial review of the IPTU's discharge of its obligations under the *Treaty*.

IPTU advanced no argument below that it connected the factors it considered in denying Sluss to the "best interests" standard in the *US-Canada Treaty*. IPTU's reasoning appears to be that it did not need to consider Sluss's best interests because it has unfettered discretion to approve or deny transfer requests under the *Transfers to and from Foreign Countries Act*, 18 U.S.C. § 4100, *et seq.* (hereinafter "*Transfers Act*"). The supplemental memoranda Sluss obtained through the *Freedom of Information Act*, 5 U.S.C. § 552 (hereinafter "*FOIA*") starkly illustrates the lack of any IPTU effort to derive the factors it considered from the requirements of the *US-Canada Treaty*. Even if the *Treaty's* standard permits a

broad inquiry by IPTU, the standard nonetheless is judicially manageable.

This Circuit has found standards such as "necessary for safety" and "in the interests of justice" – considerably more ambiguous than Art. III, § 6, of the *Treaty* – are judicially manageable. Precedent dictates that when treaty provisions are subject to differing constructions, the construction in favor of individual rights is preferred. IPTU has a legal duty to transfer a person who meets the treaty's criteria. That those criteria relate to inmates and must be weighed in favor of the inmates' rights, does not give IPTU a legal basis for ignoring the *Treaty's* standards.

The District Court erred in granting IPTU's *F.R.Civ.P.* 12(b)(6) motion, inasmuch as Sluss sets forth a *prima facie* claim that the *Treaty* establishes a judicially manageable standard to review whether the IPTU adequately considered factors consistent with the standard. Additionally, by not ordering that an administrative record be filed, the District Court deprived itself of the evidence required to determine IPTU compliance with the *Treaty's* standard.

Sluss asks this Court to vacate the opinion of the District Court and find that the *US-Canada Treaty* includes a meaningful standard for grant or denial of transfer requests that is judicially manageable, and that such standard cabins the IPTU's discretion in approving or denying a transfer to whether the transfer would be in the offender's best interests.

ARGUMENT

Sluss joins and incorporates by reference the *Argument* of Erica Hashimoto, set out in the *Brief* filed herein by Erica Hashimoto, Esq., *amicus curiae* appointed by the Court.

I. *Standard of Review*

In a case such as this one, in which the district court granted a defendant's motion to dismiss filed pursuant to *F.R.Civ.P.* 12(b)(6), this Court reviews the dismissal *de novo*. *Banneker Ventures v. Graham*, 798 F.3d 1119, 1128 (D.C. Cir. 2015). Such *de novo* review is without deference to the district court's determinations; rather, this Court must review all relevant findings of fact and

conclusions of law anew. *HCA Health Services. of Oklahoma, Inc. v. Shalala,* 27 F.3d 614, 616 (D.C. Cir. 1994).

A plaintiff's complaint should survive an *F.R.Civ.P.* 12(b)(6) motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," that is, if the complaint sets forth enough "factual content that it allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).[1]

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[1] In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court held that a complaint should be allowed to proceed if it presents "enough facts to raise a reasonable expectation that discovery will reveal evidence" to support the claim." *Id.* at 550 U.S. 556. A complaint "survives a motion to dismiss even [if] there are two alternative explanations, one advanced by [the] defendant and the other advanced by [the] plaintiff, both of which are plausible." *Banneker, supra* at 798 F.3d 1129 (*quoting Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). A complaint should not be dismissed "even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and that a recovery is very remote and unlikely." *Twombly, supra.*

II. *The Treaty Between the United States and Canada on the Execution of Penal Sentences Provides a Standard to Apply for Review Under the Administrative Procedure Act*

A. The US-Canada Treaty Provides a Judicially Manageable Standard Under the ADMINISTRATIVE PROCEDURE ACT

To adjudicate a claim under the *Administrative Procedure Act* (hereinafter "*APA*") a reviewing court must first find there is "law to apply." *Heckler v. Chaney,* 470 U.S. 821, 830 (1985). Whether there is "law to apply" depends on whether statutes or, as here, treaties are extant. Courts look at whether these contain any "meaningful standard against which to judge the Agency's exercise of discretion." *Webster v. Doe*, 486 U.S. 592, 600 (1989).

The plain text of Article III, 6, of the *US-Canada Treaty* imposes a mandatory on the United States, delegated to the IPTU, commanding that

> [i]n deciding upon the transfer of an Offender, the Authority of each Party shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender.

(hereinafter "Art III, § 6"). While this standard does not require transfer in all circumstances, it does provide "law to apply" under the *APA* for review of a denial by the Agency. The *APA* carries a "strong presumption" of judicial review absent express language to the contrary. *Mach Mining, LLC v. EEOC*, 575 U.S. --, 135 S.Ct. 1645, 191 L.Ed.2d 607, 614 (2015), *citing Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

The Art III, § 6 standard directs that the agency *shall* consider only the best interests of an offender, and *shall* approve a transfer where it finds that transfer to be in the best interests of the applicant. Under this standard, the agency may not deny a request because of the United States' penal interest, such as its perception of the seriousness of the offense or of the offender's criminal history, unless it can somehow show that these factors possess a strong objective connection to the offender's best interests. The focus of the IPTU's inquiry must be on what would be the best for the offender, not what would be best for law enforcement or society's interest in retribution. If the IPTU's objective review finds

transfer in the best interests of the offender, it must consent to the transfer.

That the Art III, § 6 standard is set out in a treaty rather than a statute is immaterial. *Whitney v. Robinson*, 124 U.S. 190, 194 (1888) ("By the Constitution, a treaty is placed on the same footing and made of like obligation with an act of legislation").[2]

Thus, IPTU does not begin with unfettered discretion. The provenience of the IPTU's discretion is the *US-Canada Treaty*, not the *Transfers Act.* That *Treaty* defines the agency's discretion to approve or deny a transfer on "the probability that transfer will be in the best interests of the Offender." It is because the *US-Canada Treaty* provides this standard that there is "law to apply." *Heckler, supra.*

While the "best interests of the offender" standard may not define every specific factor the IPTU is required to analyze, it is not without judicially discernable limits, especially considering the

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[2] The *Transfers Act,* which is legislation that supports transfer treaties such as the *Treaty,* specifically defers to a treaty. 18 U.S.C. § 4100(a).

"strong presumption that Congress intends judicial review of administrative action." *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1401 (D.C.Cir. 1995).

This Court has found judicially manageable standards have been adequately defined in phrases such as "necessary for safety," "provides adequate protection," "in the interest of justice," "reasonable possibility," "high quality and cost-effective health care," "economically sound," "satisfactory assurances," and "serve[s] the best interests of the child."[3] If such standards can guide federal

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[3] *See, e.g., Safe Extensions v. FAA*, 509 F.3d 593, 601 (D.C.Cir. 2007) ("necessary for safety" judicially manageable); *Cody v. Cox*, 509 F.3d 606, 610-11 (D.C.Cir. 2007) ("The COO 'shall' provide 'high quality and cost effective health care' is judicially manageable); *Union of Concerned Scientists v. United States Nuclear Regulatory Commission*, 824 F.2d 108, 113 (D.C.Cir. 1987) ("provides adequate protection to the health and safety of the public" judicially manageable); *Dickson*, *supra* at 68 F.3d 1401-03 ("in the interests of justice" judicially manageable); *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1223-25 (D.C.Cir. 1993) ("as the secretary deems appropriate" is judicially manageable); *American Petroleum Tankers Parent, LLC v. United States*, 943 F.Supp.2d 59, 69 (D.D.C. 2013) ("here, the court can review... [whether] Plaintiff's applications were not 'economically sound'" is judicially manageable); *see also Concerned Residents of Buck Hill Falls v. Grant*, 53 F.2d 29, 35-36 (3rd Cir. 1976) ("'satisfactory assurances' furnishes law to apply"); *M.B. v. Quarantillo*, 301 F.3d 109, 113 (3rd Cir. 2002) (finding the Attorney

courts as judicially manageable standards, then surely "in the best interests of the Offender" is also judicially manageable. After all, treaties are to be construed in a broad and liberal spirit, favorable to rights claimed under them. *Asakura v. Seattle*, 265 U.S. 332, 342 (1924), *citing Hauenstein v. Lynham*, 200 U.S. 483, 487 (1880).

B. The US-Canada Treaty's Requirements that IPTU Only Consider Whether Transfer is in the Best Interests of an Offender is not Inconsistent with the TRANSFERS ACT

(i) Circuit Precedent is Inapposite to the US-CANADA TREATY

In the court below, IPTU cited *Bagguley v. Bush*, 953 F.2d 660, 662 (D.C.Cir. 1991) for the proposition that the IPTU has unfettered discretion in *all* transfer decisions because the *Transfers Act* provides no "law to apply." J.A. 072. However, *Bagguley* is distinguishable from the *Treaty* inasmuch as *Bagguley* was decided upon the Council of Europe's *Convention on the Transfer of Sentenced Persons*, TIAS 10824, which is devoid of any standards

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General should consent to certain INS proceedings where "if doing so served the best interests of the child..." supplied "some law to apply").

for the court to apply (which is noted in its drafting history). In the instant case, the *US-Canada Treaty* provides a meaningful standard that courts across the country apply on a daily basis: whether or not a particular action or abstention is in a person's best interests.[4]

(ii) THE TRANSFERS ACT *Defers to a Treaty*

The *Transfers Act* is procedural legislation intended to make the administration of international prisoner transfer treaties more convenient. It provides no guidance as to what the IPTU must consider when an applicant seeks a transfer to or from the United States. But the *Transfers Act* cannot be read in isolation. Instead, it is the link between the agency and the applicable treaty.

In the court below, IPTU argued 18 U.S.C. § 4102(3) as providing the IPTU with unfettered discretion. That section,

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[4] *See, e.g., Cruzan v. Director, Missouri Health Dept.*, 497 U.S. 261, 280 (1990) ("the Court held that an individual's right could still be invoked in certain circumstances under 'best interests standard'"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We cannot say that the state was required in this situation to find anything more than the adoption, and denial of legitimation, were in the best interests of the child");

however, only provides the Attorney General with the statutory authority to physically transfer an offender to or from the United States. It does not proscribe discretion to approve or deny transfers. Delegating the power to effectuate only the physical transfer of a person is all that Congress granted in the statute, and indeed, is all Congress intended to grant. *See* H.R. Rep. No. 95-720, 95th Cong., 1st sess. 43 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3155-56. In the court below, the IPTU read § 4102(3) out of context and in isolation.

In the overall statutory scheme, § 4100(a) provides "the provisions of this chapter... shall only be applicable when a treaty providing for such transfer is in force, and shall only be applicable... pursuant to such a treaty." Thus, in the scheme of things, § 4102(3) has nothing to do with the exercise of any discretion to approve or deny the transfer.

(iii) *The Legislative History of the* TRANSFERS ACT *Supports Deference to the* TREATY

The legislative history of the *Transfers Act* reflects the intent of Congress in the drafting of the statute. "[S]ubsection 4100(a)

requires that the provisions detailed in this legislation can only be applied if there is an applicable treaty... the proposed legislation does not refer specifically to all conditions which... the treaties impose." *See* H.R. Rep. No. 95-720, *supra* at 1977 U.S.C.C.A.N. 3150. IPTU's reliance on the *Transfers Act* is misplaced as the that *Act* does little more than codify an administration mechanism to be used to discharge the Attorney General's delegated obligations when a prisoner transfer treaty is already in force. That the *Act* defers to the provisions of the treaty is clear.

As discussed *supra,* the *Act* does not grant the Attorney General any discretion not granted by the applicable provisions of the prisoner transfer treaty at issue. As reflected in the plain text and the legislative history of the *Act*, the statutes comprising the *Act* must be read contemporaneously with an applicable treaty, not in isolation. Inasmuch as the *Transfers Act* defers to a treaty, the treaty's provisions - whatever they may be - must command. It is here at the confluence of the *US-Canada Treaty* and the *Transfers Act* that this Court must find any *Heckler v. Chaney* "law to apply" so as to impose judicially manageable standards.

With respect to the *US-Canada Treaty*, this confluence is not ambiguous: the US-Canada treaty limits the IPTU's discretion to approve or deny a transfer request to whether the transfer "will be in the best interests of the Offender."[5]

C. The US-Canada Treaty's Standard Requires IPTU to Consider Only Whether an International Transfer is in the Best Interests of the Offender

The plain text of Art. III, 6, requires a determination only whether a transfer is in the applicant's best interests. This provision is by its own language *expressio unius est exclusio alterius*: that is, the express mention of the best interests of the offender excludes factors unrelated to the best interests of the offender. *See United States v. Wells Fargo Bank*, 485 U.S. 351, 357

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[5] Even assuming the *US-Canada Treaty* is not self-executing, absent express statutory authority, this Circuit and Supreme Court precedent refuse to presume that Congress will ever implicitly abrogate international agreements through any means other than as a clear statement. *Owner-Operator Independent Drivers Ass'n v. United States Dep't of Transportation*, 724 F.3d 230, 234 (D.C.Cir. 2013) (*citing Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 ("legislative silence is not sufficient to abrogate a treaty").

(1988) (defining the *expressio unius* canon of statutory construction as "the expression of one thing is the exclusion of others").

Application of the *expressio unius* canon of construction is appropriate when "one can be confident that a normal draftsman when he expressed 'the one thing' would have likely considered the alternatives that are arguably precluded." *Shook v. D.C. Financial Responsibility & Management Assistance Authority*, 132 F.3d 775, 782 (D.C.Cir. 1998). Such application is especially applicable here where "the canons of avoiding surplusage and *expressio unius* are at their zenith" because "they apply in tandem." *Halverson v. Slater*, 129 F.3d 180, 184-86 (D.C.Cir. 1997).

Application of these canons is consistent with the Supreme Court's rule in *Asakura*, that "treaties are to be construed in a broad and liberal spirit and, when two constructions are possible, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred." *Id.*, at 265 U.S. 342. Here, the drafters expressed that IPTU "shall" bear in mind, i.e., consider, whether transfer will be in the best interests of the offender. While this discretion may be broad, it is not unfettered.

United States treaties are replete with examples of where the drafters intended to include unfettered discretion. Where the drafters had meant to include other factors, such as the seriousness of the offense or the offender's criminal history, they have carefully stated so.

A quick study of other bilateral prisoner transfer treaties shows that where the drafters intended unfettered discretion, they were careful to so state. *See, e.g., US-Bolivia Treaty,* Art. V, § 6, *US-Mexico Treaty,* (Art. V, § 5), *US-Panama Treaty,* (Art V, § 6), *US-Peru Treaty,* (Art. V, § 5), *US-Thailand Treaty,* (Art. III, § 6), and the *Inter-American Treaty,* (Art. V, § 6).[6] The absence of such language in the *US-Canada Treaty* illustrates the drafter's intent to limit each party's discretion under the treaty, and argues for the application of the "expressio unius" canon of construction.

Additionally, had the drafters that the respective governments consider the offenders' domiciles – in addition to the "best interests" standard - they would have done so as they did in the *US-Mexico*

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[6] *See* citations to these prisoner transfer treaties, supra at Glossary, p. xii.

Treaty (Art. II, § 3), or the *US-Turkey Treaty*, (Art. V, § 3(c)). They did not.

Art. II, § 6, of the *US-Canada Treaty* does not include other factors, such as the seriousness of the offense, the offender's criminal history, or the offender's domicile. The only conclusion permitted by the traditional canons of statutory construction is the plain language of Art. III, § 6, limits the IPTU to "factors bearing upon the probability that transfer will be in the best interests of the Offender" and nothing more. Adding provisions where they do not exist is an abuse:

> To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not construe a treaty. Neither can this court supply a *casus omissus* in a treaty any more than a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops – whatever may be the imperfections or difficulties which it leaves behind.

Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989), *citing The Amiable Isabella*, 6 Wheat 1, 71, 5 L.Ed. 191 (1821).

Because the *US-Canada Treaty* sets forth this judicially manageable standard, the IPTU must connect each factor it uses in acting on an application for transfer to the "best interests" requirement of the *Treaty*. The IPTU's determination failed to do this, and is thus arbitrary, capricious and not in accordance with law.

D. Judicial Review is not Precluded by Law

The *APA* provides a private cause of action for a person injured by agency action. 5 U.S.C. § 702. The *APA* empowers a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §§ 706(2) & (2)(A). Review is prohibited whenever a matter has been "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The "committed to agency discretion by law" is a "very narrow exception" that applies only in "rare instances." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 501 U.S. 402, 410 (1971).

The APA establishes a strong presumption in favor of judicial review. *Dickson*, *supra* at 68 F.3d 1401. The key factor in determining whether an action is reviewable is Congressional intent. *See Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1343 (D.C.Cir. 1996). It is clear from the legislative history of the *Transfers Act*, as described *infra*, that Congress did not intend to preclude judicial review.

As originally introduced, the legislation that proposed what was codified as 18 U.S.C. § 4100(e) provided:

> A decision of the United States to consent or refuse to consent to transfer of an offender is a discretionary decision and shall not be reviewable in any court.

See Confidential Committee Print, S. 1682, 95th Cong, 1st sess. (Aug 9, 1977). This language was deleted from the measure before it was passed by both houses. While neither the Senate nor the House Committees reports discusses the reason for the deletion, the fact that the language was considered and rejected provides strong evidence that Congress did not intend to preclude judicial review. Indeed, the language's omission from the final measure implies that

Congress firmly intended that transfer decisions by the IPTU be judicially reviewable under the APA.[7]

Given that the IPTU's decision is reviewable, then in order for the determination to survive "arbitrary and capricious" review, it must be the product of reasoned decision making. "An agency [decision] would be arbitrary and capricious if the agency had relied on factors which Congress had not intended it to consider, [or] entirely failed to consider an important aspect." *Motor Vehicles Mfrs. Assn. v. State Farm Mutual Automobile Insurance. Co.,* 463 U.S. 29, 43 (1983).

At the confluence of the *Transfers Act* and the *US-Canada Treaty,* there is "law to apply" in order to judge whether the agency has abused its discretion. The "best interests" standard of Art. III, 6, is judicially manageable and demands consideration of only whether transfer would be in the best interests of the offender. Such a standard is not difficult to comprehend, nor does it require

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[7] See M. Abbell, *International Prisoner Transfers* (3rd ed. 2004), at §§ 4-4, 4-6 & 4-7. Selected pages reproduced and included at JA 048-052.

amorphous notions or complex calculations. Consideration of factors unrelated to the "best interests" standard would thus be arbitrary and capricious, an abuse of discretion, and contrary to law.

III. *Applying the Best Interests Standard Under the APA, Sluss Sets Out a Plausible Claim for Relief that the Agency Acted Arbitrarily and Capriciously*

A. Sluss's Request for Transfer and Subsequent Denials

On July 2, 2013, Sluss filed a request pursuant to the *US-Canada Treaty* to serve the remainder of his sentence in Canada. On March 5, 2014. and again on September 2, 2016, the IPTU denied Sluss's requests. JA 047 and 168.

The IPTU's denial letter explained the denial was "because of the seriousness of the offense, because [Sluss] had become a domiciliary of the United States, because [Sluss] is a poor candidate due to his criminal history, and because [Sluss] has insufficient contacts with the receiving country." JA 168.

An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs., supra* at 463 U.S. 43. Conspicuously absent from the IPTU's letter(s) are the very thing the IPTU was commanded to review: whether it was in Sluss's best interests.

B. The Administrative Record on Review

After the IPTU's denial, Sluss sought relief from the District Court, alleging that the IPTU had failed to consider his best interests under the *US-Canada Treaty* and that he was entitled to relief under the *APA*. *See Complaint*, JA 007-038. Sluss requested discovery, which was denied. The Agency did not file the administrative record.

In September 2016, Sluss requested all information the IPTU used to make its determination through FOIA. On August 15, 2017, the *FOIA* request uncovered two substantially redacted memoranda from the IPTU. Sluss moved this court for leave to supplement the appellate record with these documents on August

15, 2017, as these memoranda are material and were previously unavailable to him and the District Court. JA 164-66.

The 2014 Memorandum is entitled "FULL REVIEW - Request for a Decision on Prisoner transfer application of Matthew David Sluss, 52455-037 transferring to Canada." The description provided by IPTU is as follows:

> This document was written by an IPTU attorney, and contains in-depth analysis and summary of Sluss's criminal history; his rehabilitative and recidivist potential; his suitability as a candidate for prisoner transfer and further discusses his motivations for requesting an international prisoner transfer.

The second memorandum is labeled the same, except it is a "reapplication review" for the 2016 denial.

Had the District Court permitted discovery or ordered the administrative record filed, Sluss would have been entitled to these documents prior to an adjudication on the merits. As it is, the District Court did not have this vital information available to it in order to assess whether the agency complied with the requirements of the *US-Canada Treaty*. While the memoranda have most of the information redacted, it is likely no discussions of Sluss's best

interests is contained within it. While it is possible that discussions of Sluss's best interests are in the redacted portions, it is more likely the IPTU neglected to consider Sluss's best interests. They likely would have said as much if they had made the proper treaty application and considerations.

Furthermore, without the administrative record filed, the District Court could not have had the necessary evidence before it to determine what the agency did or did not consider. The IPTU's letter is a woefully inadequate basis on which a court could base an informed decision.

Upon remand, this Court directed IPTU to address the *US-Canada Treaty*. IPTU's rewind *Motion to Dismiss* addressed the *Treaty* only generally. JA 130-44. It did not address the "best interests" standard. Sluss's opposition was focused on IPTU's failure to address Art. III, 6. JA 144-55.

IPTU averred Sluss's claim under the *APA* and Art III, 6, was a "last ditch effort to save his claims." JA 159. IPTU's claims, however, missed the mark as Sluss's *APA* claim was set forth in his original complaint. JA 010. IPTU never acknowledged in any

pleading or asserted that it had ever applied the *US-Canada Treaty* or had considered Sluss's best interests, even among the "other factors" it purportedly examined. Instead, the agency made the unsupported assertion that "the D.C. Circuit, however, has already held that the *APA* does not apply to such challenges under treaties because the decision is left in the [a]gency's discretion." JA 159.

The IPTU's assertion is just plain wrong. From the available record, it is unclear whether the IPTU ever considered Sluss's best interests or considered the directives of the *US-Canada Treaty*.

IV. *The District Court Erred in Granting the IPTU's Motion to Dismiss Inasmuch as Sluss Set Forth a Plausible Claim for Arbitrary and Capricious Review Under the* APA

A. *The District Court Erred by Finding the Agency Can Consider Factors Unrelated to Sluss's Best Interests*

Art. III, § 6 of the *US-Canada Treaty* requires that the IPTU *shall* L consider only factors bearing upon the "probability that transfer will be in the best interests of" Sluss. The District Court must ensure the IPTU has provided an explanation for its actions sufficient to show that its decision was not arbitrary or capricious,

and was in accordance with law. Such a review is simply not possible without the filing of the administrative record. Yet, the District Court, in effect, looked the other way, approving the IPTU's consideration of factors unrelated to Sluss's best interests.

As discussed *supra*, this Court can be confident that the *Treaty* drafters wrote Art. III, § 6, to exclude factors unrelated to the offender's best interests. As the Supreme Court has "stated time and again... courts must presume that a legislature says in a statute what it means and means what it says there. When the words of a statute are unambiguous, then, this first canon is also the last; judicial inquiry is complete." *Barnhart v. Sigmon Coal, Inc.*, 534 U.S. 438, 461-62 (2002).

Here, the District Court did not apply the traditional tools of statutory interpretation. The lower court should have applied both "canons of avoiding surplusage and *expressio unius*," because they "are at their zenith when they apply in tandem." *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 636, 646 (D.C.Cir. 2000), *citing Halverson, supra.* Applying these canons to Art. III, § 6, of the *US-Canada Treaty*, it is clear that Congress has

expressly spoken to the precise issue at question. *Motor Vehicle Mfrs, supra* at 469 U.S. 43. Judicial inquiry is complete and the court need look no further. The best interests of the offender must be the deciding factor in whether to approve or deny a transfer to or from Canada under the *US-Canada Treaty*.

The *US-Canada Treaty* requires the IPTU to assess whether the transfer is in the applicant's best interests. The agency must stop with that analysis, and render a decision on that basis and that basis alone. There is no authority in the *Treaty* or the *Transfers Act* for a searching inquiry of other factors, whether they be criminal history, domiciliary, or the seriousness of the offense, unless there is a reasoned means of linking those factors to the "best interests" standard.

To be sure, the *Treaty* is drafted quite differently from the *US-Bolivia, US-Mexico, US-Panama, US-Peru, US-Thailand, US-Turkey,* and the *Inter-American* treaties. Each of those other treaties permits the IPTU to consider nearly anything. The *US-Canada Treaty* does not. Perhaps the IPTU would find it simpler, or philosophically more satisfying it the *Treaty* were more like its other

inter-American brethren, but that decision is reserved to the President and Congress, not to the IPTU.

Indeed, the comparison among the prisoner transfer treaties enables this Court to be "confident that [the] draftsman would have likely considered [other factors] that are arguably precluded." *Shook*, *supra* at 132 F.3d 782. While the alternatives excluded are expressly named in the collective treaties, they are absent from the *US-Canada Treaty*. The IPTU's interpretation of Art. III, 6 renders as surplusage the "all factors bearing upon the probability that transfer will be in the best interests of the Offender" language, suggesting that this simply means that it may consider anything it wants to, considerations which may or may not include those factors.

The District Court's order granting the IPTU motion to dismiss should be vacated and the motion denied.

B. *Even if Somehow the Treaty Permits Consideration of Other Factors, the IPTU Still Failed to Consider Sluss's Best Interests*

Even assuming, *arguendo*, that Art. III, § 6, of the *US-Canada Treaty* somehow permits the IPTU to consider the seriousness of Sluss's offense, his domicile, or his criminal history, the IPTU still failed to articulate how these factors related to his best interests.

The District Court's *ipse dixit* conclusion that the IPTU "clearly considered Sluss's best interests" is utterly without support. The IPTU never averred that it did so. The available record does not support such a finding. The District Court's holding runs afoul of the "simple but fundamental rule of administrative law" that holds "the Agency alone is authorized to judge the propriety of such action solely on the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Here, the IPTU never argued it considered Sluss's best interests. Indeed, it believed it was under no obligation to do so. It

is thus improper for the District Court to substitute its judgment for that of the agency. Even were this not so, without an administrative record in front of it, the District Court's finding was little more than wild guess.

The District Court erred in finding Sluss's best interests had been considered by the IPTU as the agency itself had never advanced that argument. This assertion by the District Court – *dicta* to be sure - is further not supported by record evidence, and indeed is contradicted by records Sluss obtained from the agency through an FOIA request.

Sluss requests this Court vacate the District Court's *Order* granting the IPTU's *Motion to Dismiss.*

CONCLUSION

Without a doubt, Sluss's complaint sets forth a plausible claim for relief under the *US-Canada Treaty* and the *APA*. The IPTU's *Motion to Dismiss* should be denied. The *US-Canada Treaty* provides "law to apply," giving a meaningful standard to allow judicial review.

Thus, Sluss requests that this Court (1) vacate the District Court's order granting IPTU's renewed *Motion to Dismiss*; (2) instruct the District Court to review the IPTU's denial of Sluss's application for arbitrariness, capriciousness or failure to conform to the law, applying the "best interests" standard of Art. III, § 6, of the *Treaty*; and (3) direct the District Court to order the administrative record be filed.

WHEREFORE, this appeal should be granted. The statements of fact made herein are true, under penalty of perjury.

Executed November 14, 2017

Matthew D. Sluss
Reg. No. 52455-037
FCI Petersburg Medium
P.O. Box 1000
Petersburg, Virginia 23804

CERTIFICATE OF COMPLIANCE

I herewith certify, in compliance with F.R.App.P. 32(a)(7)(C) that the foregoing *Brief* of Plaintiff-Appellant:

(1) complies with the type-volume limitation of F.R.App.P. 32(a)(7)(B) because this *Brief* contains 6,193 words, excluding the parts of the *Brief* exempted by F.R.App.P. 32(a)(7)(B)(iii); and

(2) complies with the typeface requirement of F.R.App.P. 32(a)(5) and the type style requirement of F.R.App.P. 32(a)(6) because this *Brief* has been prepared on a proportionally space typeface using Microsoft Word, version 14.4.9, in 14-point font size using Bookman Old Style type style.

Executed November 16, 2017

/Matt Sluss/
Matthew D. Sluss

CERTIFICATE OF SERVICE

I herewith certify pursuant to 28 U.S.C. § 1746 that I have transmitted a manually signed original of the foregoing *Brief* by placing the same in first-class mail, postage pre-paid, addressed to the following:

Clerk
United States Court of Appeals for
the District of Columbia Circuit
333 Constitution Avenue N.W.
Washington, D.C. 20001

and I have served a true and complete copy of the same by depositing said document in first-class mail, postage prepaid, addressed to the following:

Joshua L. Rogers
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530

Erica Hashimoto, Esq.
Director, Georgetown University Law Center Appellate Litigation Program
111 F Street N.W., Ste. 306
Washington, D.C. 20001

The foregoing statements are true under penalty of perjury.

Executed November 16, 2017

Matthew D. Sluss