SCHEDULED FOR ORAL ARGUMENT ON 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
Civil Action No. 14-0759

4-CC

REPLY BRIEF OF APPELLANT MATTHEW D. SLUSS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treaties

Other

Appellant, Matthew Sluss ("Sluss") respectfully provides this Reply Brief pursuant to Fed. R. App. P. 28(c). Mr. Sluss joins in and incorporates by reference the reply brief of Amicus Curiae, Erica Hashimoto, Esq., to the extent that it does not conflict with the argument presented herein.

ARGUMENT

I. THE US-CANADA TREATY PROVIDES A MEANINGFUL STANDARD FOR COURTS TO REVIEW THE IPTU'S DENIAL OF A TRANSFER TO CANADA

Under the Treaty between the United States of America and Canada on the Execution of Penal Sentences ("US-Canada Treaty"), 32 U.S.T. 6263, the Attorney General is required to consider whether the transfer will be in the best interests of the Offender. US-Canada Treaty at Art. III, § 6. ("In 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." ("Suitability Provision") (emphasis added).

In his brief, Mr. Sluss argues that the interpretive canon *expressio unius est exclusio alterius*, along with Supreme Court precedent should be applied to the Suitability Provision and precludes the United States Department of Justice, International Prisoner Transfer Unit ("DOJ" or "IPTU") from considering factors unrelated to the best interests of Mr. Sluss; specifically his criminal history, the seriousness of the offense, and/or his domicile. See Br. For Appellant Matthew Sluss at 16-19.

Appellee asserts that Mr. Sluss's application of *expressio unius* would be contrary to the supposed broad discretion afforded the IPTU in treaty Art. III, § 3 and would further contradict the various preconditions the treaty provides for in Art. III, § 7. See Appellee's Brief at 22-23, n.2 ("Op.Br.").

As demonstrated herein, Art. III, § 3 provides no discretion to the IPTU, let alone broad discretion. As the *expressio unius* canon must be read in the overall context, Mr. Sluss's reading of the Suitability Provision is entirely consistent with the treaty's goals and various preconditions.

A. The US-Canada Treaty Requires The Transfer Decision To Be Based On Only The Best Interests Of The Offender

The Senate, in ratifying the US-Canada Treaty understood that "the best interests of the prisoner will be the *basis* of any decision by the States on the suitability for transfer." S. Rep. 95-10 at 13. The word 'basis' is defined as the "essential element" or the "chief component". American Heritage Dictionary, 2nd Ed., 1976. See also Blacks Law Dictionary, 10th Ed., 2014 ("Basis 1. A fundamental principal").

The Suitability Provision provides a mandatory directive that the Attorney General 'shall' consider the best interests of the Offender as the fundamental principal when deciding upon the transfer. Unlike its sister treaty with Mexico[1], this

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1. Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences, 28 U.S.T. 7399.

provision does not provide for the consideration of the seriousness of offense or the offender's criminal history. Nor does it provide for broad discretion to consider 'other factors' such as in the Peruvian treaty. The IPTU's reading of the suitability Provision would *add these factors* to the clause by allowing factors that the drafters did not intend to be considered for in a decision on the suitability of transfer. See Op.Br. at 21-27; (Article III, § 6 "does not prohibit the official from considering other factors"). Id. at 22. The Supreme Court has repeatedly counseled against this exact type of behavior in teaching that "[t]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part a usurpation of power." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) citing *The Amiable Isabella*, 6 Wheat 1, 71, 5 L. Ed. 191 (1821).

It only follows that if the IPTU may not *alter, amend, or add to any treaty*, that the *expressio unius est exclusio alterius* canon would fit comfortably at home in construing such a treaty provision. While it is usually true that *expressio unius* has limited force where the agency is afforded broad discretion, the Senate understood the *essential element* of the transfer decision was the Offender's best interests. The drafters, likewise, did not include broad language that would permit a different inquiry, such as the criminal history or seriousness of offense. If the fundamental principal and chief components of suitability for transfer were meant to include those factors, the drafters would have included them in the US-Canada Treaty's language as it did with its brethern.

However, contrary to the IPTU's assertions to the district court, the drafters of the US-Canada Treaty did not include those factors in the US-Canada Treaty's Suitability Provision. DOJ may not add those factors where convenient for the agency. The preclusive power of *expressio unius*, backed by the Supreme Court's centuary old holding in *The Amiable Isabella*, fits like a custom made silk glove.

Perhaps more importantly, for over a centuary, the Supreme Court has also counseled that a treaty's provisions "should be generally construed... liberally to give effect to the purpose to which animates it and that even where a provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *United States v. Stuart*, 489 U.S. 353, 368 (1989); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (same); *Hauenstien v. Lynham*, 100 U.S. 483, 487 (1880) (same). The favorability of finding rights in a treaty's clause "is the settled rule in this court." Ibid.

The essential element of a transfer to Canada is not the seriousness of the offense. The chief components of a transfer to Canada do not include the offender's criminal history or whether they are a domicile of the sending state. The essential elements of a transfer, as understood by the Senate, shall be whether it is in the best interests of the Offender. Article III, § 6 admits of no other construction. If this chief component is met, then the authority should approve the transfer. This is not an unreasonable

understanding of the US-Canada Treaty, but one that fits comfortably within the treaty's text and the understanding of those who ratified it.

B. The Application Of Expressio Unius Would Not Interfere With Other Provisions Of The US-Canada Treaty

In a footnote, DOJ contends that the application of *expressio unius* would interfere with other parts of the US-Canada Treaty, particularly, Art. III, § 3 and 7. Op.Br. at 21, n2. DOJ contends this is so because Art. III, § 3 provides "[i]f the authority of the sending state approves", thus giving the IPTU complete and unreviewable discretion. This is wrong. Nor is it a correct reading of what the purpose of Art. III, § 3 is intended to represent. Seeming to conceed this, DOJ points out that the reach of this article extends only to the IPTU's mandatory duty to "refer a transfer application to the receiving state if the authority of the sending state approves." Op.Br. at 25. As is demonstrated by the ratification report, S. Rep. No. 95-10 at 13, this provision speaks not of the discretion to approve a transfer, but for the process of applying for a transfer. It simply has nothing to do with deciding upon the suitability of the transfer. Neither would the application of *expressio unius* to the Suitability Provision offend the IPTU's duty to transmit the approved application to the receiving state. Article III, § 3 is simply about the procedure for applying for a transfer, not the decision upon the suitability of transfer.

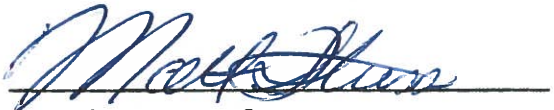
Neither would the *expressio unius* canon offend Art. III, § 7 which provides for certain preconditions that an Offender must meet before a transfer may even be considered. *Expressio unius* must be applied in the context of its surrounding language, not read in isolation. See *Shook v. D.C. Financial Responsibility & Mgmt Assist. Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) (the *expressio unius* canon's "force in particular situations depends entirely on context."). There is no inconsistancy with requiring a transfer decision to be based only on the best interests of the applicant who meets the preconditions of Art. III, § 7 and/or other provisions. DOJ's reading of the application of *expressio unius* does not consider the required necessary context and would lead to clearly absurd results, which MR. Sluss does not advocate. For example, under DOJ's reading, a non-citizen of Canada could apply for transfer to Canada, and be transferred to Canada - where he is not a citizen - if he could demonstrate it would be in his best interest. Such absurd results are not consistent with the treaty's language. Nor could the court enforce such because it could never be confident that the draftsman, when he expressed the best interests of the Offender as the essential element of the decision, indended to obviate his own preconditions when the draftsman included Art. III, § 7. *Shook, supra.* (Application of *expressio unius* is only appropriate when "one can be confident that a normal draftsman when he expressed 'the one thing' would have likely considerd the alternatives that are arguably precluded."). There simply is nothing inconsistent with requiring a transfer decision to be based only on factors linked to the best interests of the Offender.

CONCLUSION

For these reasons, along with the reasons stated in Mr. Sluss's Appellant's Brief, and the Brief of Appointed Amicus Curiae, Erica Hashitmoto, the decision of the District Court should be reversed and set aside. This matter should be renamded back to the district court for further processing consistent with the relief requested in Mr. Sluss's Appellant Brief.

The statements of fact made herein are made under penalty of perjury.

Respectfully Submitted,



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Dated March 1, 2018.

CERTIFICATE OF SERVICE

I, Matthew D. Sluss, do hereby certify that I have caused to be served, a true and correct copy of the foregoing Reply Brief upon the parties indicated below, by placing said document in first class mail, postage pre-paid, on this 1st day of March, 2018.

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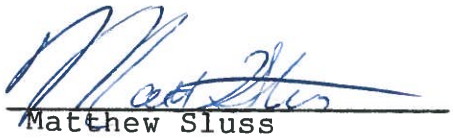
By: 
Matthew Sluss