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

BRIEF OF APPELLEE

JESSIE K. LIU
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

JOHNNY H. WALKER
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, District of Columbia 20530
202 252 2575

Counsel for the Department of Justice

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. All parties and amici appearing before the district court and in this Court are listed in the brief of amicus curiae Erica Hashimoto.

Ruling Under Review. This appeal challenges the November 18, 2016, memorandum opinion, R. 49, and order, R. 50, by the Honorable Christopher R. Cooper in Civil Action No. 14-759 in the United States District Court for the District of Columbia. The order granted the Department of Justice's motion to dismiss. The opinion is available on Westlaw at 2016 WL 6833923 and in the Joint Appendix beginning on page 95.

Related Cases. This case has previously been before this Court. In that appeal, on its own motion, the Court vacated the district court's order granting the defendant's motion to dismiss and remanded the case for further proceedings. *Sluss v. U.S. Dep't of Justice*, No. 15-5075, 2015 WL 6153951 (D.C. Cir. Oct. 6, 2015). Mr. Sluss also has an ongoing civil action in the United States District Court for the District of Columbia asserting claims against the Department of Justice under the Freedom of Information Act. *Sluss v. U.S. Dep't of Justice*, No. 17-64 (D.D.C. filed Jan. 11, 2017). In that case, Mr. Sluss seeks records related to his application to be transferred to Canada.

/s/ Johnny H. Walker
JOHNNY H. WALKER
Assistant United States Attorney

CONTENTS

Table of Authorities ii

Glossary of Abbreviations v

STATEMENT OF THE ISSUES 1

PERTINENT STATUTE 1

STATEMENT OF THE CASE 1

A. Legal Background 2

B. Ms. Sluss's Convictions for Sex Crimes Involving Children 6

C. Mr. Sluss's Application for Transfer to Canada 7

D. Procedural History 9

SUMMARY OF THE ARGUMENT 11

ARGUMENT 13

I. Mr. Sluss Cannot State a Claim Based on the U.S.-Canada Treaty Because It Is Not Self-Executing 13

II. The U.S.-Canada Treaty Commits Transfer Decisions to the Discretion of the Authorized Official 20

III. The IPTU Followed the U.S.-Canada Treaty by Considering Mr. Sluss's Best Interests 27

CONCLUSION 31

AUTHORITIES

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 19

Adirondack Med. Ctr. v. Sebelius,
740 F.3d 692 (D.C. Cir. 2014).....23

**Bagguley v. Bush*,
953 F.2d 660 (D.C. Cir. 1991)..... 10, 20, 25, 26

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1970) 19

Claybrook v. Slater,
111 F.3d 904 (D.C. Cir. 1997).....24

**Comm. of U.S. Citizens in Nicaragua v. Reagan*,
859 F.2d 929 (D.C. Cir. 1988)..... 13, 14, 15, 18

Diggs v. Richardson,
555 F.2d 848 (D.C. Cir. 1976).....16

Envtl. Prot. Agency,
464 F.3d 1 (D.C. Cir. 2006)..... 13, 28, 30

Foster v. Neilson,
27 U.S (2 Pet.) 253 (1829).....14

Fund for Animals, Inc. v. Kempthorne,
472 F.3d 872 (D.C. Cir. 2006)..... 16, 18

Head Money Cases,
112 U.S. 580 (1884) 14

Heckler v. Chaney,
470 U.S. 821 (1985) 19, 21

Hopson v. Kreps,
622 F.2d 1375 (9th Cir. 1980).....19

Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs,
104 F.3d 1349 (D.C. Cir. 1997).....25

Mach Mining, LLC v. Equal Emp't Opportunity Comm'n,
135 S. Ct. 1645 (2015).....24

Marquez-Ramos v. Reno,
69 F.3d 477 (10th Cir. 1995).....26

**Medellin v. Texas*,
552 U.S. 491 (2008) 14, 15

Scalise v. Thornburgh,
891 F.2d 640 (7th Cir. 1989).....20

Sec'y of Labor v. Twentymile Coal Co.,
456 F.3d 151 (D.C. Cir. 2006)..... 21, 22

Sierra Club v. Jackson,
648 F.3d 848 (D.C. Cir. 2011)..... 21, 25

Sluss v. Renaud,
No. 15-1475, 2016 WL 4487729 (Aug. 25, 2016).....8

Sluss v. USCIS,
899 F. Supp. 2d 37 (D.D.C. 2012)..... 7, 8, 9

Sluss v. U.S. Dep't of Justice,
No. 15-5075, 2015 WL 6153951 (D.C. Cir. Oct. 6, 2015) ..... i, 2, 3

United States v. Percheman,
32 U.S. (7 Pet. 51.....14

United States v. Stuart,
489 U.S. 353 (1989) 17

**Webster v. Doe*,
486 U.S. 592 (1988) 23, 24

Whitney v. Robertson,
124 U.S. 190 (1888) 14

Statutes & Regulations

5 U.S.C. § 701(a)(2) 19, 20

5 U.S.C. § 706(2)(A) 13

18 U.S.C. § 2251 7

18 U.S.C. § 4102 ..... 5, 20

18 U.S.C. §§ 4100 26

28 U.S.C. § 1331 15

42 U.S.C. § 2000e-5(b) 24

Pub. L. 95-144, 91 Stat. 1212 (Oct. 28, 1977) 5

28 C.F.R. § 0.64-2 5

Other Authorities

Treaty on the Execution of Penal Sentences, U.S.-Can., Mar. 2, 1977, 30 U.S.T. 6263 ..... 3, 15, 21, 22

Convention on the Transfer of Sentenced Persons, T.I.A.S. No. 10824, 22 I.L.M. 530, Mar. 21, 1983 5

S. Rep. No. 95-10 (1977) (Exec. Rep.) 2, 4, 17, 27

S. Rep. No. 95-H (1977) (Exec. Rep.) 16, 27

H. Rep. No. 95-720, at 48 (1977) 17, 18

95 Cong. Rec. 23,729 (1977) 4, 17

95 Cong. Rec. 35,016 (1977) 18, 27

Restatement (Third) of Foreign Relations Law of the United States § 907 15

Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

APA ..... Administrative Procedure Act

Convention ..... Convention on the Transfer of Sentenced Persons

IPTU ..... International Prisoner Transfer Unit

J.A. ..... Joint Appendix

U.S-Canada Treaty ..... Treaty between the United States and Canada on the Execution of Penal Sentences

STATEMENT OF THE ISSUES

1. Whether the Treaty between the United States and Canada on the Execution of Penal Sentences is a self-executing treaty that can serve as a basis for Appellant Matthew Sluss's claim under the Administrative Procedure Act.

2. Assuming the U.S.-Canada Treaty is self-executing, whether it commits decisions about transferring offenders between the signatory nations to the discretion of each signatory's respective authorized official.

3. Assuming the U.S.-Canada Treaty is self-executing and that it allows for judicial review of prisoner-transfer decisions, whether the International Prisoner Transfer Unit bore in mind Mr. Sluss's best interests, where it considered factors relevant to his effective rehabilitation.

PERTINENT STATUTE

The U.S.-Canada Treaty is included in the statutory addendum to the brief of amicus curiae Erica Hashimoto.

STATEMENT OF THE CASE

In this case, Matthew Sluss, a federal inmate serving a lengthy prison sentence for sex crimes involving children, seeks review of the denial by the Department of Justice of his application to transfer from a correctional facility in Petersburg, Virginia to a prison in Canada. Such international prisoner transfers are governed by

treaties negotiated between the United States and foreign nations and by legislation implementing those treaties that has been enacted by Congress.

A. Legal Background

The first prisoner-transfer treaties involving the United States came about in the 1970s as Mexico was increasing its efforts to combat a growing international trade in illegal narcotics. S. Rep. No. 95-10, at 2 (1977) (Exec. Rep.). As a result of those efforts, hundreds of American citizens were arrested in Mexico and subjected to strict sentences for drug-related crimes. *Id.* By 1975, some 600 Americans were incarcerated in Mexican penal institutions, "most of which by U.S. standards [left] much to be desired." *Id.* The domestic press published accounts of mistreatment and abuse against American citizens in Mexican prisons, prompting Congress to direct the Secretary of State to report "on progress toward full respect for the human and legal rights of all United States citizens detained in Mexico." *Id.* The issue thus became a major point in the diplomatic relationship between the United States and Mexico. *Id.* To address the situation, the President of Mexico proposed a prisoner-exchange agreement with the United States, whereby American citizens convicted in Mexico could serve their sentences in the United States. *Id.* Formal negations on the agreement began in September 1976, and an agreement was finalized by November 25, 1976. *Id.*

Around the same time, the United States and Canada were negotiating an agreement about the transfer of parolees, which was expanded to include a prisoner-transfer arrangement similar to the one negotiated with Mexico. *Id.* at 3. Discussions with Canada on the revised agreement commenced on January 7, 1977, and a final agreement was signed by the Attorney General of the United States and the Solicitor General of Canada on March 2, 1977. *Id.*

Under the treaty with Canada, the parties agreed to provide a means for offenders "with their consent, to serve sentences of imprisonment or parole or supervision in the country of which they are citizens, thereby facilitating their successful reintegration into society." Treaty on the Execution of Penal Sentences, U.S.-Can. ("U.S.-Canada Treaty"), Mar. 2, 1977, 30 U.S.T. 6263, 6265. The United States and Canada agreed that a transfer would be initiated with a written application by the offender and subject to the approval of the sending state and the concurrence of the receiving state. *Id.* art. III, para. 3–4.

To effectuate the terms of the treaty, each party agreed to "designate an authority to perform the functions" therein and 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." *Id.* art. III, para. 1, 9. In deciding upon an application for transfer, each party agreed that its designated

authority would, "bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender." *Id.* art. III, para. 6.

The U.S.-Canada Treaty was referred for ratification to the United States Senate, which received it favorably. The Committee on Foreign Relations reported that the U.S.-Canada Treaty and its Mexican counterpart would address the problem whereby "[i]ndividuals imprisoned in a foreign nation face large obstacles to rehabilitation: language barriers; distance from family; differences in culture; inability to participate in educational, work-release or counseling programs; and difficulty in receiving parole." S. Rep. No. 95-10 at 9. Similarly, the Chairperson of the Committee noted during debate on ratification that

> [i]ndividuals incarcerated in foreign jails or on parole in a foreign nation face significant obstacles to effective rehabilitation and successful reentry into society. Such individuals are far from their families, they must deal with an unfamiliar legal system and they are unable to take part in rehabilitation programs, work release programs and other methods of social rehabilitation. The treaty is designed to assist Americans in Canadian jails and Canadians in U.S. jails by allowing them to be voluntarily transferred to a prison in their home country.

95 Cong. Rec. 23,729 (1977) (statement of Sen. Sparkman). The Senate ratified the U.S.-Canada treaty on July 19, 1977, by a 95-0 vote, subject to the condition that the United States would not deposit its instrument of ratification until after implementing legislation had been enacted. *Id.* at 23,780–81.

Legislation implementing the U.S.-Canada Treaty and a similar treaty with Mexico was passed on October 25, 1977, and signed by the President on October 28, 1977. Pub. L. 95-144, 91 Stat. 1212 (Oct. 28, 1977) (codified at 18 U.S.C. § 4100, *et seq.*). It designates the Attorney General of the United States as the authority referred to in the treaties and authorizes the Attorney General "to transfer offenders under a sentence of imprisonment, on parole, or on probation to the foreign countries of which they are citizens or nationals" and "to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter." 18 U.S.C. § 4102(1), (3), (4). The Attorney General has delegated that authority to Office of Enforcement Operations in the Criminal Division pursuant to 18 U.S.C. § 4102(11), which in turn has assigned the authority to the International Prisoner Transfer Unit ("IPTU"), *see* 28 C.F.R. § 0.64-2.

Since implementing the prisoner-transfer treaties with Canada and Mexico, the United States has become party to other similar international agreements, including, in 1984, the Convention on the Transfer of Sentenced Persons ("Convention") with member states of the Council of Europe and Canada, among other countries. T.I.A.S. No. 10824, 22 I.L.M. 530, Mar. 21, 1983.

B. Mr. Sluss's Convictions for Sex Crimes Against Children

Matthew Sluss is a federal inmate serving a lengthy incarceration at the federal correctional institute in Petersburg, Virginia following multiple convictions for sexually assaulting children and advertising child pornography. His first conviction came in 1996, when he pleaded guilty in a Maryland state court to fourth-degree sexual offense for forcibly groping and fondling a thirteen-year-old boy whom he had become acquainted with on the internet. *See Sluss v. State*, No. 0010, 2015 WL 5894465, at *1 (Md. Ct. Spec. App. July 21, 2015). For that and other charges, on April 29, 1996, the Maryland court imposed concurrent sentences of one-year incarceration, which was suspended in favor of eighteen months' supervised release. *Id.* at *2.

While on supervised release, in April 1997, Mr. Sluss was found guilty by a court in Arkansas of first degree sexual assault, defined as "sexual intercourse or deviate sexual activity with a minor." *Id.*; *see also State v. Sluss*, No. 60CR-96-2059 (Ark. Cir. Ct. filed Aug. 12, 1996). The Arkansas court sentenced Mr. Sluss to thirty-six months' incarceration with eighteen months suspended. *Sluss*, 2015 WL 5894465, at *2. Finding that he had violated his probation, the Maryland court ordered that Mr. Sluss be incarcerated for the remainder of his eighteen-month sentence. *Id.*

More recently, in the spring and summer of 2010, federal law-enforcement officers discovered that Mr. Sluss had been downloading and sharing large amounts of sexual images and videos involving children. *Id.* On March 24, 2011, he pleaded guilty to advertising child pornography in violation of 18 U.S.C. § 2251(d). *See* R. 23, Plea Agreement, *United States v. Sluss*, No. 11-236 (D. Md. June 8, 2011). Because of Mr. Sluss's two prior convictions for sexually assaulting children, his child-pornography offense was punishable by imprisonment of not less than 35 years nor more than life. *See* 18 U.S.C. § 2251(e). On March 15, 2012, the Honorable Ellen Hollander of the United States District Court for the District of Maryland sentenced Mr. Sluss to 33 years' imprisonment and a lifetime of supervised release thereafter. *See.* R. 86, Judgment, *Sluss*, No. 11-236 (D. Md. Mar. 15, 2012). Mr. Sluss is currently scheduled for released in June of 2039.

C. Mr. Sluss's Application for Transfer to Canada

Not long into his sentence, on July 2, 2013, Mr. Sluss submitted to his case manager a request to be transferred to a prison in Canada for the remainder of his sentence. J.A. 59.[1] Mr. Sluss insisted that he was invoking only the U.S.-Canada

[1] According to Mr. Sluss, on September 7, 2010—days before he was arrested on child pornography charges—he travelled to a Services Canada Government Center in Toronto, Ontario and renounced his United States citizenship with the intention of relocating to Canada. *See Sluss v. USCIS*, 899 F. Supp. 2d 37, 39 (D.D.C. 2012). Several months after his arrest, on July 7, 2011, Mr. Sluss sent a letter to U.S. Citizenship and Immigration Services ("USCIS") again purporting to renounce his

Treaty and did not "consent to any consideration of any benefits under [the Convention]." *Id*. The IPTU denied Mr. Sluss's application by letter dated March 5, 2014. J.A. 78. It provided as reasons for its decision "the seriousness of the offense, because the applicant has become a domiciliary of the United States, because the prisoner is a poor candidate due to his criminal history and because the prisoner has insufficient contacts with the receiving country." *Id.* By letter dated March 10, 2014, Mr. Sluss urged the IPTU to reconsider, asserting that, under the U.S.-Canada Treaty, the IPTU was prohibited from considering factors other than his best interests in deciding whether to grant him the transfer. J.A. 56.

On August 12, 2014, the IPTU denied Mr. Sluss's request for reconsideration and explained in more detail its reasons for refusing his application. J.A. 87. The IPTU noted that Mr. Sluss was a domiciliary of the United States, had lived in the United States since he was a child, and that his parents and siblings lived in the United States. *Id*. The IPTU also noted that:

United States citizenship. J.A. 54. The State Department responded that Mr. Sluss could only renounce his citizenship before a diplomatic or consular office at a United States embassy or consulate abroad, which he had not done. *Sluss*, 899 F. Supp. 2d at 39. Mr. Sluss brought a court action seeking to compel USCIS or the State Department to issue him a certificate of loss of nationality, but the district court held that Mr. Sluss could not qualify for a such a certificate while he remained incarcerated in the United States. *Id.* at 42. Mr. Sluss brought another civil action seeking to have the government recognize his renunciation of citizenship on September 9, 2015. *Sluss v. Renaud*, No. 15-1475, 2016 WL 4487729, at *2 (Aug. 25, 2016). That case was dismiss as barred by the doctrine of res judicata. *Id.* at *4.

> one of the purposes underlying the prisoner transfer program is to relieve the special hardships faced by prisoners who are incarcerated in a foreign country far from their family and friends. Such hardships may include cultural differences and difficulty in maintaining contact with family in the home country, and difficulty in speaking a foreign language in prison. These hardships are inapplicable to an inmate who has resided in the United States for a lengthy period of time with the intention to remain in this country, and whose family members are living here.

Id. at 87–88. Finally, the letter noted that, under the U.S.-Canada Treaty and the Convention, "both the sentencing and receiving countries have total discretion to approve or deny a prisoner's transfer request." *Id.* at 87.

The reason Mr. Sluss desires a transfer to Canada is clear. It would apparently reduce his sentence. According to the Correctional Service of Canada, upon transfer to Canada, Mr. Sluss will be deemed to have been sentenced to a term of only ten years (rather than 33 years) as of March 12, 2012. J.A. 126. Given that Mr. Sluss has been awarded 270 days of good-conduct time credits by the United States, his statutory release date following transfer could be as soon as December 15, 2018. *Id.* at 127.

D. Procedural History

On April 28, 2014, Mr. Sluss filed a "motion for writ of habeas corpus," which the district court construed as a civil action because it sought relief under the Administrative Procedure Act ("APA"). J.A. 8, 97. Mr. Sluss alleged that the IPTU

had violated the U.S.-Canada Treaty by failing to consider his best interests in denying his application to transfer to Canada. J.A. 10. The government moved to dismiss, arguing that Mr. Sluss lacked standing to bring a claim under the U.S.-Canada Treaty or the Convention. J.A. 71–73. The district court granted the motion, concluding that, under *Bagguley v. Bush*, 953 F.2d 660 (D.C. Cir. 1991), transfer decisions were not subject to judicial review because they were committed to agency discretion by statute. J.A. 96–100. Mr. Sluss appealed, and the government moved for summary affirmance. This Court denied the motion and, on its own motion, remanded the case to the district court to consider whether Mr. Sluss was entitled to relief under the U.S.-Canada treaty. J.A. 129.

On remand, the government again moved to dismiss, arguing that Mr. Sluss had no legally protected interest under the U.S.-Canada treaty and that the IPTU acted within its discretion in denying Mr. Sluss's application. J.A. 137–40. The district court again dismissed Mr. Sluss's case, holding that the U.S.-Canada Treaty, like its implementing legislation, committed transfer decisions to agency discretion and that, in any event, the IPTU had considered Mr. Sluss's best interests in denying his application. J.A. 176–79. Mr. Sluss appealed again, and the government moved for summary affirmance. On September 7, 2017, this Court denied the motion and appointed Professor Erica Hashimoto of the Georgetown University Law Center as

amicus curiae to present arguments in favor of Mr. Sluss. Amicus curiae and Mr. Sluss have submitted briefs urging reversal of the district court.

SUMMARY OF THE ARGUMENT

Mr. Sluss contends that the IPTU denied his application to transfer to a prison in Canada without bearing in mind his best interests as required by the U.S.-Canada Treaty. The IPTU denied Mr. Sluss's application in part because he has long been a domiciliary of the United States and his family all resides here. Mr. Sluss, however insists that a transfer to Canada would be in his best interests because it would shorten his sentence and he would reap financial gains through a higher allowance and assured contributions from his parents.

The district court dismissed Mr. Sluss's claim because the U.S.-Canada Treaty commits determinations about whether to transfer prisoners to Canada to the Attorney General's discretion. The district court also held that the IPTU had in fact considered Mr. Sluss's best interests by taking into account his domicile in the United States and the fact that his family members were all domiciled in the United States. That decision should be affirmed

1. Mr. Sluss relies exclusively on the U.S.-Canada Treaty to support his claim, but the treaty is not a binding source of domestic law. The language of the treaty as well as its ratification and implementation history make abundantly clear that it is not and was not intended to be self-executing. As such, its enforcement may

be accomplished exclusively through diplomatic channels and not through an APA claim in federal court.

2. Even were the U.S.-Canada Treaty self-executing, the district court correctly held that it commits transfer decisions to the discretion of the official authorized by each signatory nation to carry out its provisions. This is evident in the language of the U.S.-Canada Treaty and in its implementation by both signatories. It is also consistent with the level of direction typically afforded to matters of diplomacy and foreign affairs, including, specifically, international prisoner transfers.

3. Finally, even if the U.S.-Canada Treaty is self-executing, and even if it is amenable to judicial review, the district court correctly concluded that the IPTU complied with the treaty by bearing Mr. Sluss's best interests in mind before denying his transfer application. Circumstances surrounding the treaty's ratification show that the interests with which the signatories were concerned relate to the barriers to rehabilitation associated with imprisonment in a foreign and unfamiliar country far from one's family. In denying Mr. Sluss's application, the IPTU noted that he has long been domiciled in the United States, lacks sufficient connections to Canada, and that his family lives in the United States. All of those factors—more so that those advocated by Mr. Sluss—address Mr. Sluss's "best interests" within the meaning of that term in the U.S.-Canada Treaty. Because those factors do not favor transfer to

Canada, the IPTU acted comfortably within its discretion in denying Mr. Sluss's transfer application.

ARGUMENT

I. Mr. Sluss Cannot State a Claim Based on the U.S.-Canada Treaty Because It Is Not Self-Executing.

Mr. Sluss seeks to set aside the IPTU's denial of his transfer application under the APA, claiming that the IPTU's purported failure to consider his best interests was contrary to the U.S.-Canada Treaty. J.A. 10. But the U.S.-Canada Treaty has no binding effect as domestic law and therefore cannot form the basis of an APA challenge.

The APA provides a cause of action 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 law." 5 U.S.C. § 706(2)(A). As this Court recognized in *Committee of United States Citizens in Nicaragua v. Reagan*, "the APA does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." 859 F.2d 929, 943 (D.C. Cir. 1988). And an international treaty is not an operative part of domestic law unless it is "self-executing." *Id.* at 937. *see also Nat. Res. Def. Council v. Envtl. Prot. Agency*, 464 F.3d 1, 8–9 (D.C. Cir. 2006) (noting that treaties do not provide substantive legal standards for reviewing agency action under the APA unless they

are self-executing). A treaty is "primarily a compact between independent nations" and "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). "If these [interests] fail, its infraction becomes the subject of international negotiations and reclamations . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* Only "[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative commitment." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also Foster v. Neilson*, 27 U.S (2 Pet.) 253, 315 (1829) (noting that a treaty is self-executing and becomes part of domestic law if it "operates of itself without the aid of any legislative provision"), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet. 51) (1833). Thus, in *Committee of United States Citizens*, this Court held that the plaintiffs had failed to state an APA claim that the United States violated the United Nations Charter—a non-self-executing treaty—because such "'law' is not cognizable in American court." 859 F.2d at 942.

Two decades after this Court's decision in *Committee of United States Citizens*, the Supreme Court of the United States confirmed that "not all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellin v. Texas*, 552 U.S. 491, 504 (2008). Instead, the Court "has

long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law." *Id.*

Further, "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that 'international agreements, even those directly benefiting private persons, generally do not create private rights." *Id* (quoting *Restatement (Third) of Foreign Relations Law of the United States* § 907, cmt. a, p. 395 (1986)). Where a treaty does not create private rights, individual plaintiffs lack standing to bring legal challenges under them. *See Comm. of U.S. Citizens*, 859 F. 2d at 937 ("[E]ven if Congress' breach of a treaty were cognizable in domestic court, appellants would lack standing to rectify the particular breach that they allege here [because it] does not confer rights on private individuals. Treaty clauses must confer such rights in order for individuals to assert a claim 'arising under' them.") (citing U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1331).

It is clear from the text, ratification, and implementation of the U.S.-Canada Treaty that it is not and was not intended to be self-executing and does not give rise to private rights. First, the plain text of the U.S.-Canada Treaty demonstrates that it requires legislation to operate. *See Medellin*, 552 U.S. at 506 ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."). Article III, paragraph 9 of the treaty specifically states that each party must "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." This language provides that implementing legislation would be required to "give legal effect" to the treaty and that those provisions are not self-executing. Consequently, based on this plain language, the treaty is not, by itself, binding domestic law.

The plain language of the treaty is sufficient to conclude that it is not self-executing. But even were it not, the circumstances surrounding its execution and ratification show that its drafters fully understood it not to be self-executing. *See See Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 881 (D.C. Cir. 2006) ("Courts generally hold a treaty non-self-executing when one of the following conditions applies: the treaty itself contemplates implementing legislation . . . [or] the Executive Branch or Senate indicates during the treaty-making or treaty-ratifying process, for example, that the treaty is non-self-executing") (citations omitted); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) ("In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution.").

First, the Secretary of State who negotiated the treaty on behalf of the United States noted that the treaty was not self-executing. In transmitting the signed treaty to President Jimmy Carter, Secretary of State Cyrus Vance noted that "[t]he Treaty

will require implementing legislation to give it effect within the United States." S. Rep. No. 95-H at vi (1977) (Exec. Rep.). The Attorney General, who signed the treaty on behalf of the United States, also noted that the treaty did not "confer a right on the offender to be transferred." H. Rep. No. 95-720, at 48 (1977). *See United States v. Stuart*, 489 U.S. 353, 369 (1989) (the clearly expressed view of the Executive Branch on the meaning of a treaty "is entitled to great weight").

The Senate, which ratified the treaty, shared this understanding. The Committee on Foreign Relations included the following declaration in the text of the draft ratification resolution: "That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Article III has been enacted." S. Rep. 95-10 at 18. The Chairman of the Committee explained that this declaration was necessary to "prevent a situation of our having a treaty with no means of carrying out its objectives." 95 Cong. Rec. 23,729 (statement of Sen. Sparkman).

The proceedings surrounding passage of the treaty's implementing legislation also show that the United States understood that legislation was necessary for the treaty to have any effect. That legislation was initially drafted by the Department of Justice, which participated in the treaty's negotiation. In transmitting the proposed legislation to the Senate, the Department advised that such legislation was "necessary to fully implement [the U.S.-Canada treaty] for the transfer of criminal

law offenders to or from foreign countries." S. Rep. No. 95-435, at 15 (1977). Further still, legislators debating the implementing legislation understood it to be necessary for the treaty to have any effect. The House Committee on the Judiciary, which reported the implementing legislation to that chamber, noted pointedly that "the treaties [i.e., the U.S.-Canada treaty and the similar treaty with Mexico] are not self-executing and require legislation implementing their terms." H. Rep. No. 95-720, at 25 (1977); *see also* 95 Cong. Rec. 35,016 (1977) (statement of Rep. Eilberg) ("The treaties are not self-executing. They require legislative implementation.").

Given that the text, ratification history, and subsequent legislative history surrounding the U.S.-Canada Treaty all show without contradiction that it is not and was not intended to be self-executing, the provisions of that treaty do not constitute binding domestic law and cannot form the basis of a claim under the APA. *See Comm. of U.S. Citizens*, 859 F. 2d at 943. Instead, Mr. Sluss must look exclusively to the implementing legislation passed by Congress as the source of domestic law governing the treaty's provisions. *See* Restatement (Third) of Foreign Relations Law § 111 cmt. h (1987) ("[S]trictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is 'enacted' by, or incorporated in, implementing legislation."); *see also Fund for Animals*, 472 F.3d at 879 (Kavanaugh, J., concurring) ("non-self-executing treaties have no effect or force as

a matter of domestic law (though Congress may choose to incorporate parts of non-self-executing treaties into domestic law by enacting implementing statutes)"); *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) ("'if a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively 'law of the land'") (quoting L. Henkin, *Foreign Affairs and the Constitution* 159 (1972)).

The implementing legislation for the U.S.-Canada Treaty is the Transfer of Offenders to and from Foreign Countries Act. But it provides Mr. Sluss no basis for an APA claim because it commits international prisoner-transfer decisions to agency discretion. The APA expressly precludes judicial review of agency action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Although there is a strong presumption of reviewability under the APA, *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), agency action will be deemed committed to agency discretion where "statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1970) (internal quotations omitted), or where there is "no meaningful standard against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

The broad language of the prisoner-transfer statue contains no meaningful standards by which to evaluate transfer decisions. It simply "authorize[s]" the Attorney General to "transfer offenders under a sentence of imprisonment . . . to the

foreign countries of which they are citizens or nationals" and to "make regulations for the proper implementation of such treaties . . . and to . . . implement" the Act. 18 U.S.C. § 4102(3), (4). It does not provide any criteria by which the Attorney General's discretion may be judicially reviewed. Indeed, the binding law of this Circuit holds that the statute "give[s] the Attorney General unfettered discretion with respect to transfer decisions . . . [and] such decisions constitute agency action committed to agency discretion by law. Such decisions are, therefore, not reviewable according to 5 U.S.C. § 701(a)(2)." *Bagguley v. Bush*, 953 F.2d 660, 662 (D.C. Cir. 1991); *see also Scalise v. Thornburgh*, 891 F.2d 640, 648–49 (7th Cir. 1989) (also holding that prisoner-transfer decisions under the Act are committed to the Attorney General's discretion by law and courts lack jurisdiction to review them under the APA). In light of this binding precedent, Mr. Sluss may not obtain judicial review under the U.S.-Canada Treaty's implementing legislation. Because that legislation is the only source of domestic law upon which Mr. Sluss may rely to support his APA challenge, his claim fails and the district court's order dismissing it should be affirmed.

II. The U.S.-Canada Treaty Commits Transfer Decisions to the Discretion of the Authorized Official.

Alternatively, even if the U.S.-Canada Treaty were self-executing such that Mr. Sluss could invoke it as a source of binding domestic law, his claim would still

fail because the U.S.-Canada Treaty itself—like its implementing legislation—provides no meaningful standard by which a court may review an authorized official's transfer decision. Thus, it commits such decisions to agency discretion by law and exempts them from review under the APA.

As noted above, an action is committed to agency discretion and therefore unreviewable under the APA where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. When deciding whether an action is committed to agency discretion, courts "consider both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (internal quotation marks omitted) (quoting *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006)).

First, the broad language of the U.S.-Canada Treaty demonstrates that transfer decisions are committed to the discretion of the official authorized by each nation to carry out the treaty's terms. It provides that the United States will designate an authority to perform the functions of the treaty and that such official, upon written application by an offender, will transmit a transfer application to a would-be receiving state "[i]f the authority of the Sending State approves." U.S.-Canada Treaty, art. III, para. 3. The would-be receiving state would then have to concur in

the transfer for it to be effective. *Id.* at art. III, para. 4. Though the treaty provides certain circumstances under which a designated authority must not approve a transfer, *id.* at art. II, para. a, and certain other preconditions for a transfer, *id.* at art. III, para. 7, it imposes no condition that would compel a designated authority to grant a transfer. The decision to grant a transfer is therefore committed to the designated official's discretion and is not subject to judicial review under the APA.

Mr. Sluss and amicus curiae identify a single passage that they contend supplies a meaningful standard for judicial review. Article III, paragraph 6 states in full: "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." This provision does not, however, constrain the authorized official's discretion. It does not compel the official to grant a transfer application where it is in the "best interests" of the offender; it imposes no limit on the official's discretion to determine what would be in the offender's best interest; and it does not prohibit the official from considering any other factors or from affording those factors equal or greater weight than the offender's best interest.[2] It

[2] Mr. Sluss contends that the interpretive canon *expressio unius est exclusio alterius* (the expression of one is the exclusion of others) requires that the treaty be read to exclude consideration of any factor other than an offender's best interests. Brief of Appellant at 16–17. The canon compels no such reading. First, it would contradict the broad authority of authorized officials to refer transfer applications "if [they] approve[]." *See* U.S.-Canada Treaty, art. III, para. 3. "[W]hen countervailed

therefore provides a court no standards by which to set aside an authorized official's decision not to approve a transfer application, thereby leaving that decision to the discretion of the official.

Amicus contends that the use of the word "shall" in article III, paragraph 6, results in a manageable standard. Brief of Amicus Curiae at 17–19. It does not. The word "shall" simply instructs an authorized official to "bear in mind" one particular factor—the offender's best interests. It does not establish that factor as a "manageable" standard for judicial review, however, because it does nothing to curtail an authorized official's discretion in implementing it, including determining what constitutes an offender's best interests, what other factors should be considered and how much relative weight should be given to each of them, and what the ultimate outcome should be.

This distinction is illustrated in *Webster v. Doe*, 486 U.S. 592 (1988). That case concerned a provision permitting the Director of the Central Intelligence Agency to terminate an employee if the Director "'shall deem such termination necessary or advisable in the interest of the United States.'" *Id.* at 600 (quoting the

---

by a broad grant of authority contained within the same statutory scheme, the [*expressio unius*] canon is a poor indicator of Congress' intent." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014). Further, such a reading would directly contradict other parts of the treaty, which specify criteria and preconditions for denying transfer applications that have nothing to do with an offender's best interest. *See* U.S. Canada Treaty, art. II & art. III, para. 7.

statute). The Supreme Court noted that this language "fairly exudes deference to the Director" because it permitted termination where the Director "deems" it to be in the interests of the United States, not when it "is" in the interest of the United States. *Id*. The same is true of the U.S.-Canada Treaty. Article III, paragraph 6 states only that the authorized official is to "bear in mind" the offender's best interests; it does not compel a transfer whenever it "is" in the offender's best interest. Thus, like the statute in *Webster*, it "exudes deference" to the authorized official. *See also Claybrook v. Slater*, 111 F.3d 904, 909 (D.C. Cir. 1997) (determination to adjourn a meeting is committed to agency discretion because "[r]ather than allowing adjournment when it *is* in the public interest, section 10(e) authorizes the agency representative to *determine* whether adjournment is in the public interest")

For its argument to the contrary, amicus curiae relies primarily on an analogy to *Mach Mining, LLC v. Equal Employment Opportunity Commission*, 135 S. Ct. 1645 (2015). But that case involves a very different situation. The petitioner in *Mach Mining* challenged the Equal Employment Opportunity Commission's failure to take a specific action mandated by statute. The relevant statute mandated that the Commission "'shall endeavor to eliminate [an] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.'" *Id.* at 1651 (quoting 42 U.S.C. § 2000e-5(b)). The petitioner claimed that the Commission had simply not done so. By contrast, here, the relevant treaty language does not

compel the authorized official to grant a transfer application in any particular circumstance. Instead, it simply provides one factor—the offender's best interests—that the authorized official shall consider when exercising his or her discretion. Indeed, the only relevant action that the U.S.-Canada Treaty mandates is that an authorized official refer a transfer application to the receiving state "[i]f the authority of the Sending State approves." Consequently, *Mach Mining* fails to support amicus curiae's reading of the treaty.

In addition to the text of the treaty, the "nature of the administrative action" also supports the judiciary's affording broad discretion to the Attorney General. *See Sierra Club*, 648 F.3d at 855. The decision of whether or not to transfer a Canadian citizen to Canada to serve a Unites States prison sentence there involves complex considerations about diplomatic relations, an area in which this Court has afforded broad discretion to executive agencies. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997) ("By long-standing tradition, courts have been wary of second-guessing executive branch decisions involving complicated foreign policy matters."). Indeed, this Court has specifically afforded broad discretion to prisoner-transfer decisions, owing in part to the nature of the administrative action. *See Bagguley*, 953 F.2d at 662 (noting that "a broad grant of discretionary authority is particularly appropriate

to prison transfer decisions, depending as they do on a variety of considerations.");[3] *see also Marquez-Ramos v. Reno*, 69 F.3d 477, 480 (10th Cir. 1995) ("[T]he particular context in which transfer decisions are made cannot be ignored; such determination have international and political ramifications that cannot be relegated to mere ministerial actions."). This case involves the same type of administrative action that this Court in *Bagguley* held should be afforded broad discretion. Therefore, the Court should afford the same degree of discretion here.

Finally, the implementation of the treaty in both the United States and Canada shows that both signatories viewed the treaty as permitting broad discretion to the official authorized to decide applications for transfers. As noted, the United States implemented the treaty through a broad statute that this Court has held affords broad and unreviewable discretion to the Attorney General in making transfer decisions. *See Bagguley*, 953 F.2d at 662. Canada's implementing statute also grants broad discretion to its authorized official. Its implementing legislation states that "[i]n determining whether to consent to the transfer of a Canadian offender, the Minister *may* consider" several enumerated factors (none of which is "offender's best interest"). *See* International Transfer of Offenders Act, S.C. 2004, c.21, s. 10 (Can.)

[3] *Bagguley* dealt with a prisoner who sought transfer to the United Kingdom under the 18 U.S.C. §§ 4100, *et seq.*, and the Convention. It did not address the U.S.-Canada Treaty.

(emphasis added). The fact that both signatories to the treaty afforded their authorized officials broad discretion in deciding transfer applications shows that neither understood the treaty's language to be so constricting as Mr. Sluss contends.

III. The IPTU Followed the U.S.-Canada Treaty by Considering Mr. Sluss's Best Interests.

Finally, even if the U.S.-Canada Treaty were binding domestic law, and even if it did subject international prisoner transfers to judicial review, Mr. Sluss's claim still fails because his own pleading and the documents incorporated therein show that the IPTU bore his best interests in mind when denying his transfer application.

As the ratification and implementation history of the U.S.-Canada Treaty show, its drafters were concerned that citizens serving terms of imprisonment in foreign penal institutions face barriers to rehabilitation, including, specifically, language barriers, cultural alienation, and separation from family. *See* S. Rep. No. 95-H at v (noting that the treaty was intended to "relieve the special hardships which fall upon prisoners incarcerated far from home and to make their rehabilitation more feasible"); S. Rep. No. 95-10 ("Individuals imprisoned in a foreign nation face large obstacles to rehabilitation: language barriers; distance from family; differences in culture; inability to participate in educational, work-release or counseling programs; and difficulty in receiving parole."); 95 Cong. Rec. 35,016 ("These treaties provide for transfer back to their homelands of foreign offenders—those incarcerated; those

on probation; and those on parole—so that they can complete their sentences in their own country—close to family, friends, and homes.") (statement of Rep. Eilberg), *id.* at 35,017 ("Rehabilitation, a primary objective of U.S. penal policy, would be greatly facilitated by implementation of these treaties. This aspect of criminal justice is almost nonexistent where a prisoner is forced to serve his sentence in unfamiliar and oftentimes hostile surroundings. This is magnified where he is imprisoned in a non-English-speaking country.") (statement of Rep. Eilberg). Amicus curiae acknowledge that the "best interests" provision is intended to achieve these underlying rehabilitation goals. Brief for Amicus Curiae at 22–25.

The denial letters from the IPTU show that it considered factors related to whether Mr. Sluss would face the barriers to rehabilitation that the U.S.-Canada Treaty seeks to rectify. The IPTU's initial denial letter noted that Mr. Sluss has "become a domiciliary of the United States" and has "insufficient contacts with the receiving country." J.A. 78. The letter denying Mr. Sluss's request for reconsideration provides even more detail. It notes that the IPTU bore in mind that Mr. Sluss "[has] U.S. citizenship and [has] lived in this country since [he was] a child" and that "[his] parents and siblings all reside in the United States, and that [he has] no immediate family members in Canada." (Mr. Sluss has not denied these facts.) Thus, the IPTU considered Mr. Sluss's best interests as they relate to the

rehabilitative purposes of the U.S.-Canada Treaty and properly determined that those interests would not be served by transfer to Canada.

Mr. Sluss's argument to the contrary ignores the rehabilitative purposes of the U.S.-Canada Treaty in favor of his own subjective desires. He contends that transfer to Canada would be in his best interest because it would significantly shorten his sentence and increase his monetary allowance, and because his parents have apparently offered him financial support if he relocates to Canada. J.A. 30–31, Pl.'s Mot. for Writ of Habeas Corpus. But while Mr. Sluss would undoubtedly enjoy those benefits personally, the circumstances surrounding the ratification and implementation of the U.S.-Canada Treaty show that the term "bests interests" refers to rehabilitation, not simply earlier release from a sentence (which would generally cut off rehabilitation efforts) or financial gain. For that reason, the ITPU's analysis satisfies the treaty's directive to bear in mind the offender's best interests, even if it did not include the considerations that Mr. Sluss advances.

For its part, amicus curiae largely ignores the clear indications in the record that the IPTU considered Mr. Sluss's rehabilitation interests, and instead argues that the district court's conclusion on this point cannot be affirmed because the court did not require the government to compile and serve the full administrative record. Brief of Amicus Curiae at 28–35. But that exercise would have been unnecessary. The government moved to dismiss Mr. Sluss's complaint under Federal Rule of Civil

Procedure 12 because, among other reasons, the existing record, including Mr. Sluss's pleadings and the documents he included in the record, conclusively show that the IPTU bore his best interests in mind when denying his transfer application, which is precisely what Mr. Sluss asserts that the IPTU must do.

Amicus curiae also insists that the full administrative record should have been filed for the district court to evaluate whether the IPTU acted arbitrarily and capriciously in denying Mr. Sluss's application. *Id.* at 35–40. That argument assumes a far broader claim that Mr. Sluss presents. Mr. Sluss does not (and cannot) contend that that the U.S.-Canada Treaty provides meaningful standards for judicial review of *how* the IPTU bears in mind a transfer applicant's best interests, only that it allows a court to review *whether* the IPTU bore in mind such interests. The existing record sufficiently shows that the IPTU did in fact consider Mr. Sluss's best interests within the meaning of the treaty, and further review is neither permitted by the treaty nor sought by Mr. Sluss.

For the same reason, the Court should deny Mr. Sluss's request to augment the record on appeal with documents he obtained through a Freedom of Information Act request. Those documents are irrelevant to a review of the district court's order dismissing Mr. Sluss's case, which was based on the pleadings and documents submitted by Mr. Sluss below and can be affirmed based on the existing record. In any event, even if the Court considers those documents, they demonstrate that the

IPTU considered Mr. Sluss's best interests before denying his transfer application, including that he has lived in the United States since at least high school, that every job he has ever held was in the United States, and that his family resides in the United States. *See* Appellant's Motion to Augment the Record, Exhibits A, B. These facts further bolster the conclusion that he faces none of the barriers to rehabilitation that the U.S.-Canada Treaty endeavors to alleviate.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment in favor of the United States Department of Justice.

February 5, 2017

Respectfully submitted,

JESSIE K. LIU
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

By: /s/ Johnny H. Walker
JOHNNY H. WALKER
Assistant United States Attorney
555 4th Street NW
Washington, D.C. 20530
202 252 2575

Counsel for the Department of Justice

CERTIFICATE OF COMPLIANCE

This Brief of Appellee complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,494 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This Brief of Appellee also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman font.

/s/ Johnny H. Walker
JOHNNY H. WALKER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Johnny H. Walker, counsel for the United States Department of Justice, certify that on February 5, 2018, I served a copy of the Brief of Appellee by first-class mail, postage prepaid, to Appellant Matthew Sluss at the following address.

MATTHEW SLUSS
Reg. No. 52455-037
FCC Petersburg Medium
P.O. Box 1000
Petersburg, Virginia 23804

I further certify that on the same date I filed the Brief of Appellee on the Court's CM/ECF system, which constitutes service on Amicus Curiae Erica Hashimoto.

/s/ Johnny H. Walker
JOHNNY H. WALKER
Assistant United States Attorney