

United States Court of Appeals For the First Circuit

No. 15-2356

SAI,

Petitioner,

v.

DAVID P. PEKOSKE, in his official capacity
as Administrator of the Transportation Security Administration,

Respondent.

Before

Howard, Chief Judge,
Lynch and Thompson, Circuit Judges.

ORDER OF COURT

Entered: February 1, 2021

This proceeding will now enter the briefing stage, and briefing and all further proceedings will be conducted in the manner set out herein. Motions for reconsideration, by any name and in any form, will not succeed in altering the course set herein. Petitioner has inundated this court with motions, notices, and other filings from the beginning. All those motions either already have been adjudicated or are addressed below. Upon entry of this order, all pending motions will have been adjudicated, and any motion or request not expressly granted or deferred by order of court should be considered denied. The filing of further motions is discouraged in the absolute strongest of terms. Petitioner will be free to articulate any claims and concerns regarding the procedural handling of this matter during briefing, consistent with the procedure set out below, and the ultimate merits panel will determine whether any such challenges may be entertained and whether any such challenges have merit.

We note at the outset that all questions as to the viability, proper scope, and merits of petitioner's claims and contentions are reserved to the ultimate merits panel. Additionally, all matters of jurisdiction, justiciability, and standing are reserved to the ultimate merits panel, and nothing in this order should be construed to suggest otherwise. Consistent with the foregoing, petitioner's opposed "Motion to dismiss for lack of jurisdiction, and transfer to district court; and

to stay this motion pending appointment of counsel" is denied, though the ultimate merits panel may revisit all jurisdictional matters. To the extent petitioner once again seeks reconsideration of the court's denial of appointed counsel with the "Motion to dismiss . . .," that request is denied, as is any other request for relief set out in the motion.

Regarding petitioner's "Petition en banc for mandamus/prohibition vacatur," except as specified below, all requests for relief set out in that filing are denied, including any request that the court once again revisit the issue of discretionary appointment of counsel. As for petitioner's attempt to invoke "en banc" procedures, in this motion and elsewhere, to the extent such a request could be entertained at all at this preliminary stage of proceedings, this panel consists of a majority of the active judges of this court, and we discern no basis for revisiting the prior rulings denying appointment of counsel or any other prior rulings. In any event, petitioner will be free to seek rehearing en banc after the court has entered an opinion or judgment disposing of this proceeding in its entirety, and consideration of any requests for en banc review up to this point is deferred until such an opinion or judgment has entered. To be clear, it will be incumbent upon petitioner to renew any such requests for en banc review once an opinion or judgment has entered.

Any requests for relief set out in the following filings are denied in full (to the extent not already denied via prior order):

- 1) "Letter requesting ruling re unaddressed motions to supplement" (the court disposed of the filings listed in this letter via prior order(s); in any event, all requested relief is denied);
- 2) "Opposed motion for extension of time to file reply" (and related "Addendum re motion for extension of time to file reply");
- 3) "Motion to compel TSA to file updates, and for declaratory relief" (and all filings related thereto);
- 4) "Motion for joinder & intervention pursuant to 49 U.S.C. § 46109";
- 5) "Notices; motions for interim relief, abeyance, tolling, & order to show cause"; and
- 6) "Motion for redesignation by title, and joinder."

Any requests for relief set out in the following filings are denied in full (to the extent not already denied via prior order), though petitioner is free to address the points raised in these filings during briefing if petitioner wishes to do so (again, all questions as to the viability and merits of petitioner's claims are reserved to the ultimate merits panel):

- 1) "Supplemental affidavit re purported § 46110 'orders': Computed Tomography";
- 2) "Supplemental affidavit re purported § 46110 'orders': facial recognition";
- 3) "Supplemental affidavit re purported § 46110 'orders': *Elhady v. Kable*, 'Quite Skies', & 'Silent Partner'" (and related "Supplemental affidavit");
- 4) "Second supplement re purported § 46110 'orders': *Elhady v. Kable*";
- 5) "Third supplement re purported § 46110 'orders': *Elhady v. Kable*";
- 6) "Motion to strike, compel proper response, and compel SSI background check";
- 7) "Supplemental affidavit purported § 46110 'orders': medical marijuana"; and
- 8) "Supplemental affidavit & argument re purported § 46110 'orders': Star Wars soda bottles."

Any requests for relief set out in the following filings are denied, except that the ultimate merits panel may consider the court decisions and other materials submitted with the motions to the extent relevant and appropriate:

- 1) "FRAP 28(j) notice re *Elhady* unconstitutionality & APA violation ruling, and notice re motion for order to show cause"; and
- 2) "FRAP 28(j) notice re *Kashem et al. v. [Attorney General], [FBI Director], [TSC Director]*, supplemental affidavit, motion for judicial notice, and contingent motion for interrogatories."

Regarding petitioner's "Petition for rulemaking re unpublished First Circuit rules, procedures, & policies," this filing also was docketed as an original proceeding and assigned Appeal No. 19-8004. A ruling on the petition will be made in the context of that proceeding (to the extent a ruling has not yet entered as of the date of this order).

Regarding petitioner's "Motion for ruling re 'eyes only' alternative; protective order; leave to file under seal and ex parte re legal obligation not to disclose; stay; and reconsideration re fee recoverability" and accompanying affidavit, by order entered March 11, 2019, the court warned, "If Sai still wishes to pursue IFP status for purposes going beyond the filing fee, Sai may do so in accordance with this court's usual procedures within 14 days of entry of this order. If Sai fails to do so, the issue of IFP status will not be revisited during this litigation." Instead of seeking IFP status in accordance with that order, petitioner filed this motion. To the extent petitioner sought to stay the 14-day deadline set in the March 11 order, that request is denied. Further, consistent with the court's clear warning, the matter of IFP status and the filing fee will not be revisited. Thus, all requests for relief set out in the "Motion for ruling . . .," including any requests for reconsideration of prior orders of court, are denied.

Regarding "Respondent's Response to Court's December 7, 2018 Order, and Motion to File Second Addendum *Ex Parte* and *In Camera*," the motion is granted, and the second addendum is accepted for filing *ex parte* and *in camera*.

Turning to the specifics of further proceedings and briefing, "Respondent's Response to Court's December 7, 2018 Order" will constitute the full administrative record in this matter. See 49 U.S.C. § 46110(b) (respondent "shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28."); see also Fed. R. App. P. 16. This ruling, like all other rulings set out herein, is subject to revisitation by the ultimate merits panel.

The matter will proceed to briefing based on the administrative record as just designated. A portion of that administrative record has been accepted for filing *ex parte* and *in camera*, and petitioner's request for clearance to access those materials is denied. Nonetheless, briefing shall proceed. The purpose of a proceeding of this sort is to allow for the challenge of specific agency orders, see 49 U.S.C. § 46110(a), not to facilitate broad discovery of agency policies and practices. With this purpose in mind, the court discerns no reason why petitioner cannot prepare a brief that fully conveys challenges to specific orders despite the unavailability of a portion of the administrative record. Petitioner need only clearly articulate the nature of any orders petitioner reasonably believes *may* have been disclosed in the sealed portion of the administrative record and then explain why such an order, if it exists, would be amenable to review under § 46110 and why

the existence or enforcement of such an order would be illegal or unconstitutional. In other words, to the extent petitioner cannot discern from the publicly filed portion of the administrative record whether a particular order exists, petitioner may present arguments hypothetically assuming the existence of the order and explaining why such an order, if it existed, would be illegal or unconstitutional. Once briefing is complete, the ultimate merits panel will be in a position to review the full administrative record, including the portions of the administrative record filed *ex parte* and *in camera*. The ultimate merits panel can assess petitioner's claims in light of that review. Again, all questions regarding the viability and merits of petitioner's claims is reserved to the ultimate merits panel.

The following briefing schedule shall apply:

- 1) Petitioner shall file the opening brief within 30 days of entry of this order, and that brief shall be prepared and filed in accordance with all applicable rules of court;
- 2) Respondent shall file the response brief within 30 days of service of petitioner's brief, and that brief shall be prepared and filed in accordance with all applicable rules of court;
- 3) Any reply brief shall be filed within 21 days of service of respondent's brief, and any such brief shall be prepared and filed in accordance with all applicable rules of court.

Extensions of these deadlines should not be expected. The court once again emphasizes that the filing of additional motions is strongly discouraged and that the parties now should focus on briefing.

By the Court:

Maria R. Hamilton, Clerk

cc:
Sai
Sharon Swingle
Michael Shih