

**[ORAL ARGUMENT NOT YET SCHEDULED]****IN THE UNITED STATES COURT OF APPEALS  
FOR THE D.C. CIRCUIT**

NICHOLAS FUENTES,

*Petitioner,**v.*

U.S. TRANSPORTATION SECURITY

ADMINISTRATION, et al.,

*Respondents.*

No. 22-1082

**RESPONDENTS' MOTION TO DISMISS**

Respondents move to dismiss this petition for review as untimely.

Petitioner Nicholas Fuentes seeks review of an order by the Transportation Security Administration issued on March 11, 2022. Under 49 U.S.C. § 46110(a), a petition for review of a TSA order “must be filed not later than 60 days after the order is issued.” A petition for review was therefore due no later than May 10, 2022. Petitioner filed his petition on May 13, 2022, three days after the deadline. His petition is thus time-barred under § 46110(a).

## STATEMENT

1. On April 27, 2021, Petitioner submitted an inquiry to the Department of Homeland Security's Traveler Redress Inquiry Program (DHS TRIP) after having been denied boarding at an airport.<sup>1</sup> Pet. 1, Dkt. No. 1946991; DHS TRIP Order 1, Dkt. No. 1950638.

2. DHS TRIP conducted a review and issued a final agency order in response to Petitioner's inquiry on March 11, 2022. DHS TRIP Order 1. The order disclosed that TSA placed Petitioner on the Deny Boarding List in January 2021 after having determined that Petitioner was a potential "threat to civil aviation or national security." *Id.* (quoting 49 U.S.C. § 114(h)(3)(A)). TSA based this determination on the totality of the available evidence, including videos that Petitioner had published expressing an intent to harm flight attendants. *Id.*

The order also disclosed that TSA removed Petitioner from the Deny Boarding List on November 2, 2021. *Id.* It explained that this decision

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<sup>1</sup> Petitioner also filed a complaint in the United States District Court for the District of Columbia. *Fuentes v. Biden*, No. 21-3106 (D.D.C. filed Nov. 23, 2021). The complaint alleged constitutional violations on the basis of Petitioner's suspected placement on government watchlists. The case is currently pending.

could not ensure that Petitioner's travel would be "delay-free," as the redress process does not affect air carriers' own policies or "other screening procedures in place at airports and borders." *Id.* at 2. The order said that it was "TSA's final agency decision." *Id.*

3. On May 13, 2022, Petitioner filed a petition for review of this order. The petition observed that the order "was entered and communicated to Fuentes on March 11, 2022" in PDF form. Pet. 1.

### ARGUMENT

Under 49 U.S.C. § 46110(a), a petition for review of a TSA order "must be filed not later than 60 days after the order is issued." A court may excuse a late filing "only if there are reasonable grounds for not filing by the 60th day." § 46110(a). This Court has "consistently construed the reasonable grounds exception narrowly." *Matar v. TSA*, 910 F.3d 538, 542 (D.C. Cir. 2018) (collecting cases); *see also Citizens Ass'n of Georgetown v. FAA*, 896 F.3d 425, 435 (D.C. Cir. 2018) ("This court 'rarely [finds] "reasonable grounds" under section 46110(a).'" (quoting *Elec. Privacy Info. Ctr. v. FAA*, 821 F.3d 39, 43 (D.C. Cir. 2016) (alterations original)).

As Petitioner has observed, the order was issued and communicated to Petitioner on March 11, 2022. Pet. 1. The time for seeking review thus expired on May 10, 2022. This petition for review was not filed until May 13, three days later, and it is therefore untimely under § 46110(a).

Petitioner has offered no justification for the untimely filing, nor is any apparent from the record. Indeed, Petitioner's parallel case in district court reveals that Petitioner was well aware of the March 11 order within the time for seeking review: Petitioner referred to the March 11 order in an amended complaint filed in district court on May 2, 2022. *Fuentes v. Biden*, No. 21-3106, Am. Compl. ¶¶ 56-58 (D.D.C. May 2, 2022).

Nor can any delay caused by Petitioner's decision to file the petition by mail delivery constitute "reasonable grounds" for not filing by the 60th day. In the first instance, the petition indicates that it was signed and mailed on May 11, *i.e.*, *after* the time period for filing had already expired. Pet. 2-3. In any event, Federal Rule of Appellate Procedure 15(a) provides that the petition must be *filed* with the court of appeals by the deadline, not just mailed by the deadline. Under Federal Rule of Appellate Procedure

25(a)(2)(A)(i), a petition for review that is filed by mail is not timely unless the clerk of Court receives the petition within the time fixed for filing.

*Henderson v. EPA*, No. 99-1329, 2000 WL 521506, at \*1 (D.C. Cir. Mar. 13, 2000) (observing that, under Rules 15(a) and 25(a)(2), a petition for review that is mailed but not received within the statutory period for filing is untimely). Petitioner's inability to establish "reasonable grounds" for the untimely filing should bar this action.

### CONCLUSION

For the foregoing reasons, the petition for review should be dismissed as untimely.

Respectfully submitted,

SHARON SWINGLE

*/s/ Catherine M. Padhi*

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(1)(E) because it was prepared with Palatino Linotype 14-point, a proportionally spaced font with serifs, and the motion complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 785 words, according to the word count of Microsoft Word.

*/s/ Catherine M. Padhi*

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Catherine M. Padhi

**CERTIFICATE OF SERVICE**

I hereby certify that on June 29, 2022, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

*/s/ Catherine M. Padhi*

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Catherine M. Padhi