

[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAI,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

No. 14-1005

**REPLY TO PETITIONER’S RESPONSE TO MOTION TO DISMISS FOR
LACK OF JURISDICTION**

Petitioner, Sai, objects to both the timing and the merits of the Respondent’s Motion to Dismiss, which was filed in this Court on February 25, 2014.

1. Sai contends that the motion to dismiss for lack of jurisdiction is “untimely, and does not affect [the Postal Service’s] mandate under [Fed. R. App. P.] 17 to have already filed the record with the Court.” The inapplicability of Rule 17 is addressed at point 3 below. Sai does not cite authority in support of his claim that the motion is untimely. To the extent that he relies on D.C. Circuit Rule 27(g)(1), which provides that dispositive motions generally must be filed within “45 days of the docketing of the case in this Court,” the Postal Service filed its motion fewer than 45 days after first learning of the petition on January 13, 2014,

when the Court sent the Postal Service a certified copy. (Sai himself did not serve the Postal Service with the petition). That certified copy stated that the petition had been docketed on January 7, 2014. If D.C. Circuit Rule 27(g)(1) governs motions to dismiss for lack of jurisdiction, and if January 7 is the applicable starting date, then our motion to dismiss should have been filed by Friday, February 21, 2014 – two business days and four total days prior to the date the Postal Service’s motion was actually filed on February 25.

At worst, undersigned counsel harbored a good faith but mistaken belief that a jurisdictional motion would not be required. After receiving the certified copy of the petition on January 13, the Postal Service received no further order of the Court, such as an initial scheduling order setting dates for filing initial submissions (such as the Docketing Statement form), and undersigned counsel believed that the Court may have been considering dismissing this case on its own motion without the need for additional filings. However, when Sai filed an additional motion on February 25, claiming that the Postal Service had run afoul of the requirements of Fed. R. App. P. 17 (addressed at point 3 below), the undersigned concluded that a motion to dismiss for lack of jurisdiction may be needed, and filed such a motion later that same day.

Even if that does not establish the “good cause” contemplated by D.C. Circuit Rule 27(g)(1) for the four-day filing delay, the Court should still consider

the motion now, and assess whether it has jurisdiction over Sai's petition, because the slight delay has not unfairly prejudiced the petitioner and the motion will result in a faster resolution of his petition for review. *See* D.C. Cir. Rule 2 (Court may suspend requirements "in the interest of expediting decisions"),

Sai responds that he will be "irreparably harm[ed]" if the Court considers this slightly delayed motion and dismisses the petition for lack of jurisdiction, but that is not so. First, claims of "irreparable harm" cannot confer original jurisdiction on this Court. Second, Sai's claim of irreparable harm is based entirely on his assertion that he can no longer bring suit in district court because the time for filing "has now expired." That assertion is incorrect. The limitations period for bringing a FOIA case in district court is six years, *see, e.g., Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55-56 (D.C. Cir. 1987); 28 U.S.C. § 2401(a), so Sai has ample time to file a complaint and pursue his action in district court.¹ Third, even if the four-day delay in noting this Court's lack of jurisdiction has somehow hindered Sai's ability to pursue his claim in a proper forum – and we do not see how it could – the remedy he seeks, denial of the motion as untimely, would result in even greater delay (and thus presumably in greater harm to Sai).

¹ Sai also asserts that, had he filed a complaint in district court rather than filing a petition for review in this Court on January 7, 2014, the Postal Service's answer would already have been due. But he did not file a complaint in district court, let alone properly serve such a complaint on the Postal Service, so the 30-day period to file a response under 5 U.S.C. § 552(a)(4)(C) would not have begun to run.

If this Court were to deny the motion and defer ruling on its jurisdiction until after the case is fully briefed, the Postal Service's brief will again present the argument that its motion presents now – that this Court lacks jurisdiction over Sai's petition. *See, e.g., Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (a party cannot waive jurisdictional argument by failing to challenge court's subject-matter jurisdiction early in the proceedings, and an appellate court is required to "raise lack of subject-matter jurisdiction on its own motion"); *Athens Community Hosp., Inc. v. Schweiker*, 686 F.2d 989, 992 (D.C. Cir. 1982) (same); *cf. U.S. v. Singletary*, 471 F.3d 193, 196 (D.C. Cir. 2006) (even with non-jurisdictional dispositive arguments, such as untimeliness, party can raise argument in brief despite failing to file a dispositive motion under D.C. Cir. Rule 27(g)(1)). Accordingly, the Court will eventually face the argument presented by motion now, and considering the argument now (rather than after briefing) will not only conserve this Court's resources but will result in a quicker resolution than the one Sai appears to seek by opposing the Postal Service's motion. Accordingly, we maintain that the Court should not refrain from considering its jurisdiction over this petition solely because the Postal Service's motion was filed on February 25 rather than February 21, 2014.

2. On the merits of the Postal Service's motion, Sai does not appear to dispute that FOIA itself vests *district courts*, not this Court, with original

jurisdiction to review the Postal Service's denial of a FOIA request (or, here, the denial of expedited processing and a fee waiver). He maintains, however, that FOIA is not "exclusive" and that the Postal Service's denial is also "reviewable by this Court" under the Administrative Procedures Act (APA). Sai's argument is incorrect in two respects. First, the APA's judicial review provisions do not confer jurisdiction on this Court to review agency action directly. Instead, unless Congress expressly supplied this Court with jurisdiction to review agency action directly, an APA challenge falls within the federal-question jurisdiction of the district courts and must be brought there. *See NetCoalition v. S.E.C.*, 715 F.3d 342, 347 (D.C. Cir. 2013); *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151-52 (D.C. Cir. 2010). Second, the judicial review provisions of the APA do not apply to the Postal Service. *See* 39 U.S.C. § 410(a). In any event, Sai's "APA" claim – that the Postal Service's fee-waiver regulations are inconsistent with FOIA itself – is simply a restatement of his underlying FOIA claim (that the Postal Service violated FOIA by when it refused to waive fees), and can be brought in district court as part of that action.

3. Sai also contends that, even if this Court lacks jurisdiction over his petition for review, the Postal Service still must "file the record" with this Court under Fed. R. App. P. 17. The applicable rule is D.C. Circuit Rule 17(b), which requires transmission of a certified list, and not the entire record. In any event, that

rule and Fed. R. App. P. 17 appear in Title IV of the Rules of Appellate Procedure, which governs “Review or Enforcement of an Order of an Administrative Agency, Board, Commission, or Officer.” The rules of Title IV apply only to petitions for review in “a court of appeals authorized to review the agency order.” Fed. R. App. P. 15(a)(1). Because neither this Court nor any other appellate court is “authorized to review” directly the Postal Service’s administrative ruling on Sai’s FOIA request, then this is not a valid “petition for review” and the rules of Title IV, including Rule 17, do not apply. Put differently, Rule 17 applies only to the extent that this Court has jurisdiction to hear Sai’s petition. Because this Court lacks jurisdiction over the petition, the Postal Service is not required to file a certified list of the record under D.C. Circuit. Rule 17.

4. Finally, Sai argues that, if this Court lacks jurisdiction over his petition for review, it should transfer his petition to the U.S. District Court for the District of Columbia rather than dismiss it. Under 28 U.S.C. § 1631, when a petition for review is filed with a Court that lacks jurisdiction to hear it, the Court shall, “if it is in the interest of justice,” transfer “such action” to a court in which “the action . . . could have been brought at the time it was filed.” Here, a transfer is unwarranted. First, this “action” – a petition for review – cannot be filed in district court. Instead, Sai’s FOIA claims must be brought through a “complaint,” which must be properly served. *See* 5 U.S.C. § 552(a)(4)(B); Fed. R. Civ. P. 4

(service of process); 39 U.S.C. § 409(b) (same). Second, the interest of justice does not require a transfer. A transfer will not expedite the resolution of the case or otherwise serve the interests of judicial economy – Sai will still have to file and serve a complaint in order to proceed in district court, regardless of whether the case is transferred – and will not protect Sai from losing his ability to pursue his claims – as noted above, FOIA claims are subject to a six-year statute of limitations, more than enough time for him to properly commence an action in district court, so he is in no danger of losing his right to file a complaint there.

Respectfully submitted,

/s/ David C. Belt

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I electronically filed the Reply to Petitioner's Response to Motion to Dismiss for Lack of Jurisdiction with the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. The petitioner is registered as an ECF filer, and will be served by the CM/ECF system.

/s/ David C. Belt _____

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