IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

KINDHEARTS FOR CHARITABLE HUMANITARIAN DEVELOPMENT, INC., Plaintiff, v. TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the Treasury, ADAM J. SZUBIN, in his official capacity as the Director of the Office of Foreign Assets Control, and MARK R. FILIP, in his official capacity as the Acting Attorney General of the United States, Defendants.	Civil No. 3:08-cv-2400 Chief Judge James G. Carr

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND ITS MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON ALL COUNTS

HINA SHAMSI
(admitted *pro hac vice*)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 519-7886
Fax: (212) 549-2583
hshamsi@aclu.org

LYNNE BERNABEI
(admitted *pro hac vice*)
ALAN R. KABAT
(admitted *pro hac vice*)
Bernabei & Wachtel, PLLC
1775 T Street, N.W.
Washington, D.C. 20009
Telephone: (202) 745-1942
Fax: (202) 745-2672
bernabei@bernabeipllc.com
kabat@bernabeipllc.com

FREDRICK BYERS
(Ohio Bar No. 0002337)
The Spitzer Building, Suite 824
520 Madison Avenue
Toledo, OH 43603
Telephone: (419) 241-8013
Fax: (419) 241-4215
fbyers@cisp.com

DAVID D. COLE
(admitted *pro hac vice*)
Georgetown University Law Ctr.
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 662-9078
cole@law.georgetown.edu

additional counsel on following page

JEFFREY M. GAMSO
(Ohio Bar No. 0043869)
CARRIE L. DAVIS
(Ohio Bar No. 0077041)
American Civil Liberties Union of Ohio
Foundation, Inc.
4506 Chester Avenue
Cleveland, OH 44103
Telephone: (216) 472-2220
Fax: (216) 472-2210
jgamso@acluohio.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The government does not contest the essential facts in this case with respect to OFAC's freeze pending investigation of KindHearts.[1] OFAC has frozen KindHearts' assets, shut the organization down, and criminalized all transactions with KindHearts for nearly three years—without any finding of wrongdoing, without judicial approval, simply by declaring that it is "under investigation." On the face of IEEPA, Executive Order 13,224, and the Regulations, no criteria define or limit OFAC's FPI authority. When OFAC exercised that unfettered authority against KindHearts almost three years ago, it provided no statement of reasons, no hearing, no judicial review and no time limit on the freeze. KindHearts sought additional information from the government about the basis for the freeze and a process to defend itself, but received neither. KindHearts is still frozen today, and it has never even been charged with, much less adjudicated guilty of, any wrongdoing.

These facts are sufficient to grant summary judgment to KindHearts' on its challenge to the FPI. The FPI authority is unconstitutionally vague because it imposes no limits on government discretion and affords no guidance to citizens about what is proscribed. The authority violates due process because it fails to afford notice or a prompt opportunity to defend. And it violates the Fourth Amendment because the nearly three-year freeze of KindHearts' assets is a seizure without a warrant, probable cause, or any structural substitute that would render such an indefinite seizure reasonable.

In response, the government seeks to rewrite the statute to create new standards out of whole cloth. For the first time in the nearly three years that KindHearts has been frozen—and for the first time in any SDGT case of which counsel are aware—OFAC claims that its FPI

[1] Unless otherwise noted, all abbreviations and defined terms in this Reply have the meanings set forth in KindHearts' opening summary judgment brief.

authority is limited by a "reasonable basis to suspect" that the targeted entity has violated the designation criteria under Executive Order 13,224. This newly announced standard is nowhere to be found in IEEPA, the Executive Order or the applicable Regulations, and therefore cannot provide the notice that vagueness doctrine mandates. Moreover, there is no evidence that OFAC even applied this newly invented standard when it made the decision to freeze KindHearts' assets three years ago.

OFAC tries to justify the lack of process it provided to KindHearts with respect to the FPI by citing to inadequate disclosures it made 15 months later, in connection with the distinct process for KindHearts' potential designation, and still further disclosures made only after KindHearts was sued, 34 months after the freeze was imposed. These belated disclosures are no substitute for constitutionally required *prompt* notice and an opportunity to defend when the government seizes private property and in any event, they still fail to provide adequate process. As a matter of law, OFAC's FPI authority and its use of that authority against KindHearts violates the First, Fourth and Fifth Amendments facially and as applied, and KindHearts respectfully requests this Court to vacate OFAC's freeze

The government devotes much of its brief to seeking to justify its FPI as a substantive matter, resting on the administrative record it has filed. But any decision regarding the propriety of OFAC's actions as a substantive matter is premature. The government's failure to provide adequate notice or an opportunity to respond, coupled with its restrictions on KindHearts' access to its own documents and to funds for its legal defense, means that the administrative record is fatally deficient, and entirely one-sided. Moreover, as this Court's January 30, 2009 order makes clear, KindHearts still has not been afforded access to its own records, seized by the government at the time of the freeze, and therefore it cannot present its defense yet. Accordingly, this Court

should reject the government's request that the Court adjudicate the substantive merits of its decision to freeze KindHearts as premature.

KindHearts is also entitled to summary judgment on its challenge to OFAC's threatened designation of it as a "specially designated global terrorist," an action that will do irreparable damage to KindHearts' most valuable asset, its reputation. Executive Order 13,224 contains minimal criteria for designation that are unconstitutionally vague. It permits designation based on unknowing support of a designated person or entity, and three of its criteria, applied to KindHearts here, have already been deemed unconstitutionally vague by other courts.

The process OFAC has provided KindHearts in connection with its threatened designation also fails to meet constitutional standards: OFAC has not provided adequate notice, and relies largely on classified evidence that it refuses to disclose, even pursuant to security clearances. At the same time, OFAC has placed arbitrary restrictions on KindHearts' use of its own documents and resources in its own defense. Like the ongoing FPI, OFAC's designation of KindHearts would be an unreasonable seizure in violation of the Fourth Amendment. For these reasons, KindHearts asks the Court to enjoin OFAC's designation of KindHearts or, in the alternative, to enjoin designation until KindHearts has been provided constitutionally adequate process. To permit otherwise would do irreparable injury to KindHearts' reputation and likely prevent it from ever functioning again.

Finally, the Court can avoid all of the above constitutional questions by holding that OFAC's actions are not authorized by statute. The government does not contest that IEEPA was intended to restrict, not to expand, the President's authority to impose nation-based sanctions—or that no President had ever, before IEEPA, imposed a sanction on an individual except as an incident to a nation-targeted embargo. The executive branch's unilateral and unauthorized

extension of that authority to apply to a domestic corporation without any connection to a nation-targeted sanction would have shocked the Congress that enacted IEEPA to serve as a *restraint* on presidential power.

ARGUMENT

I. STANDARD OF REVIEW.

When addressing a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court must accept KindHearts' allegations as true, and "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1969 n.8 (2007); *Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2009); *Stevenson v. Willis*, 579 F. Supp. 2d 913, 917 (N.D. Ohio 2008) (Carr, J.).

On a Rule 56 motion for summary judgment, the initial burden is on the movant to demonstrate the absence of any genuine issue of material fact, after which the opponent has the burden to demonstrate through the production of probative evidence that there remain disputed issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court views the evidence in the light most favorable to the party opposing summary judgment. *Taft Broad. Co. v. United States*, 929 F.2d 240, 247 (6th Cir. 1991); *Morr v. Kamco Indus., Inc.*, 548 F. Supp. 2d 472, 476-77 (N.D. Ohio 2008) (Carr, J.).

II. OFAC'S FREEZE OF KINDHEARTS PENDING INVESTIGATION IS UNCONSTITUTIONAL.

OFAC froze all of KindHearts' assets "pending investigation" under a statute that establishes no substantive criteria for freezes pending investigation, imposes no time limits, contains no procedural safeguards, and affords the frozen entity neither notice nor opportunity to

defend itself, even after the freeze has been imposed. In its opening brief, KindHearts argued that such open-ended authority to shut down a charity facially violates the First and Fifth Amendments. Pl. Br. at 18-23.

For the first time since OFAC imposed its FPI 34 months ago, the government now maintains that OFAC's authority to freeze requires a finding of a "reasonable basis to suspect" that the entity is designatable under the Executive Order's substantive criteria for SDGT designations. Gov't Br. at 30 n.25. That standard, however, finds no support in IEEPA, the Executive Order, or the Regulations. The government's attempt to rewrite the law is too little and—34 months after the freeze—far too late. Indeed, its belated invention of the standard only underscores the standardless discretion IEEPA's freeze authority actually vests in the executive branch. The government's newly declared "standard" does not and legally cannot cure the constitutional deficiencies of IEEPA and E.O. 13,224.

A. OFAC's FPI Authority Violates the First and Fifth Amendments on Its Face.

KindHearts' opening brief showed that OFAC's FPI authority is unconstitutional on its face for two reasons: (1) the FPI authority lacks any substantive criteria, and is therefore impermissibly vague, and (2) the FPI authority violates due process because it permits wholesale infringement of property rights without notice or a meaningful opportunity to respond, or any other safeguards. Pl. Br. at 18-20. The government's responses to these arguments are unpersuasive.

1. OFAC's FPI Authority Is Unconstitutionally Vague.

The government makes four arguments in response to KindHearts' substantive vagueness challenge, but only one of these arguments actually addresses the vagueness of the FPI authority on its face; the other three require this Court to accept the government's newly minted

application of the criteria for designation to OFAC's FPI authority, which, for the reasons set forth below, this Court should not do. KindHearts addresses each of the four arguments in turn.

i. The Restrictions on the FPI Authority Do Not Cure Its Vagueness.

The government argues that the FPI authority is not vague because IEEPA requires the President to declare a national emergency and to report to Congress, and bars him from prohibiting the export of personal communications, news wire feeds, and the like. Gov't Br. at 34; 50 U.S.C. § 1701(a)-(b). But these minimal requirements do not cure the vagueness of the FPI authority. The absence of any substantive criteria forces citizens to guess at the conduct that might trigger an FPI.

Once the President declares a national emergency, OFAC has the authority to freeze virtually any corporation or entity in the country "pending investigation."[2] OFAC's power is virtually unfettered. The government cites *no* statutory criteria that confine that authority or that even define the term "specially designated global terrorist," a term created by the executive branch without any legislative input. Because the national emergency President Bush declared in E.O. 13,224 continues to this day, every natural person and legal entity within this country is now subject to OFAC's FPI authority. Tomorrow, if it so chose, OFAC could freeze Microsoft, the International Committee for the Red Cross, or Amnesty International without any finding or even allegation that they had ever engaged in any wrongdoing, without a statement of reasons, and without meeting any statutory criteria set forth by Congress (because there are none). IEEPA's requirement that the President report to Congress and its bar against regulation of certain forms of communication also do not serve as meaningful restrictions because they tell

[2] The government mysteriously devotes several pages to an argument that KindHearts lacks standing to challenge the President's authority to freeze and to designate under IEEPA. But KindHearts has not challenged the President's independent authority to freeze or to designate, which should be plain from the fact that: (a) the President has not exercised that authority against KindHearts; (b) KindHearts does not name the President as a defendant; and (c) KindHearts does not seek an injunction against a freeze or designation by the President.

citizens nothing about the conduct or associations that might trigger an FPI. The FPI authority on its face creates limitless discretion and is therefore impermissibly vague.

In its opening brief, KindHearts provided an example of a statute on the same subject matter as IEEPA that courts have upheld because it contains substantive criteria that limit executive discretion. Pl. Br. at 20 (describing 8 U.S.C. § 1189, which authorizes the executive branch to block and designate as a "foreign terrorist organization" an entity that meets specified and defined statutory criteria); *Humanitarian Law Project v. Reno* (*HLP I*), 205 F.3d 1130, 1137 (9th Cir. 2000) (finding that §1189's criteria are not so vague as to grant the Secretary of State "unfettered discretion"). The government responds that "nothing in the Constitution" requires IEEPA's criteria to be identical to those upheld in *HLP I*. Gov't Br. at 37. But this misses the obvious point: the court in *HLP I* upheld § 1189 precisely because it requires, among other findings, that the blocked organization engage in defined "terrorist activity" and therefore would not permit the designation of, for example, the Red Cross. *HLP I*, 205 F.3d at 1147; Pl. Br. at 31-32. In contrast, nothing in IEEPA or E.O. 13,224 forecloses such a decision. In other words, the FPI authority contains the very infirmity that the Ninth Circuit stressed did not exist in § 1189. KindHearts' point is not that the FPI authority must be constrained by the same criteria present in § 1189, but that its criteria must permit a distinction to be drawn between the Red Cross and al-Qaeda, and between protected First Amendment speech and association and criminal support of terrorism.

ii. The Government Cannot Rely on Its Impermissible Conflation of the Distinct FPI and Designation Authorities

The government's three remaining arguments against KindHearts' facial challenge to the FPI authority require the Court to rewrite the statute and the Executive Order to conflate the separate standards for an FPI and a designation. First, the government argues that KindHearts

may bring only an as-applied challenge to the FPI authority because it applied the designation criteria to its decision to freeze KindHearts. Gov't Br. at 36. Second, the government argues that even if KindHearts could bring a facial challenge to the FPI authority, that authority is not vague because it is limited by OFAC's newly invented "reasonable basis" standard. *See* Gov't Br. at 30 n.25, 37. Finally, it argues that the criteria and terms under the Executive Order themselves are not vague. Gov't Br. at 38. All of these arguments fail because OFAC's FPI authority is distinct from its authority to designate, and OFAC may not conflate the two.

The government's attempt to conflate the source of the freeze authority in IEEPA with the minimal criteria for designation in the Executive Order, Gov't Br. at 30, has no basis in the plain language or the structure of IEEPA and E.O. 13,224. The authority to freeze and the authority to designate have distinct sources in the Executive Order and, consequently, distinct limitations (if any).

OFAC's authority to designate comes from section 1 of E.O. 13,224, which permits the blocking of "all property and interests in property" of three classes of entities. Only the third class, described in section 1(c)-(d), is at issue here. Section 1(c)-(d) authorizes the blocking of "all property and interests in property" of "persons determined by the Secretary of the Treasury": (1) "to be owned or controlled by, or to act for or on behalf of," other designated entities; (2) "to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism" or other designated entities; or (3) "to be otherwise associated" with other designated entities. That authority is delegated to OFAC.

Although extraordinarily broad, the designation authority under section 1(c)-(d) does not allow OFAC to freeze an entity's assets merely because it is under *investigation* for possible designation; the authority only permits *designation* based on a finding of conduct that violates

one of the criteria set forth. In fact, the Executive Order never even uses the word "investigation."

OFAC's distinct power to freeze pending investigation presumably comes from section 7 of the Executive Order, which authorizes OFAC "to employ all powers granted to the President by IEEPA . . . as may be necessary to carry out the purposes of this order." Among the powers granted by IEEPA is the authority to "block during the pendency of an investigation . . . any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B). Section 7, in contrast with section 1(c)-(d), contains no criteria that limit the power it delegates. Section 7 also makes no reference to the criteria specified in section 1(c)-(d). Instead, Section 7 is a naked assignment of the President's authority to "block during the pendency of an investigation." That authority is limited in only three ways. First, like all of IEEPA's powers, it must be triggered by the President's declaration of a national emergency, 50 U.S.C. § 1701, which President Bush did in E.O. 13,224. Second, as with all blockings, the property must be "property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B). Finally, the authority does not include the power to block certain core expressive and communicative materials. 50 U.S.C. § 1702(b)(1), (3)-(4). These three criteria are the only limitations on OFAC's freeze authority.

The government claims in a footnote that the only distinction between the freeze and the designation authorities is that the "standard" to initiate a freeze pending investigation is "a reasonable basis to suspect that the individual or entity meets the E.O. criteria." Gov't Br. at 30 n.25. But this "standard" is found nowhere in the Executive Order, in IEEPA, or in the Regulations. OFAC has literally invented this "standard"; there has been no indication before

the government's brief was filed that such a standard existed, or that OFAC was guided by it in freezing KindHearts' assets.

OFAC cannot cure the infirmity of the standardless freeze authority by fabricating a standard from whole cloth, years after it imposed the freeze. Indeed, the Sixth Circuit has held that an agency cannot even *prospectively* enforce its new interpretation of a vague regulation when the agency's original failure to provide notice of prohibited conduct prejudiced the plaintiff's ability to seek relief or guidance from the agency. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1338-39 (6th Cir. 1978) (permitting only "wholly prospective" "judicial or administrative interpretations which clarify obscurities or resolve ambiguities"); *accord United States v. Salisbury*, 983 F.2d 1369, 1380 (6th Cir. 1993) (holding that when a vague statute does not provide notice of proscribed conduct, "it is inappropriate for a court to attempt to cure the defect and retroactively apply the construction to conduct which occurred prior to its holding").

For the foregoing reasons, the government's argument that KindHearts may bring only an as-applied challenge to the FPI authority because it has applied the designation criteria to the freeze, Gov't Br. at 36, is also meritless: contrary to the government's claims, the Executive Order's designation criteria were not "clearly applied to plaintiff" as required by the cases the government itself cites. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 649-50 (1984). There is nothing in IEEPA, the Executive Order, or the Regulations that makes it "clear" that the FPI authority was constrained by the Executive Order's separate designation criteria.

2. OFAC's FPI Authority Violates Due Process Because It Lacks Any Procedural Safeguards.

The government does not dispute that OFAC's FPI authority contains no procedural safeguards: it allows the government to freeze an individual or entity's assets indefinitely, without notice of the charges, without a hearing, without any finding of wrongdoing, and without

any statement of reasons. It would be difficult to draft a statute that more clearly violated procedural due process.

Instead of defending the statute, the government attempts to sidestep KindHearts' challenge by citing *United States v. Salerno*, 481 U.S. 739 (1987), for the proposition that KindHearts must show there is no set of circumstances under which the FPI authority could be valid. Gov't Br. at 44. But the *Salerno* standard does not apply where, as here, the government's authority implicates First Amendment freedoms. Pl. Br. at 19-20; *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003); *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135, 144 n.10 (2d Cir. 2000).[3]

Even assuming that the *Salerno* standard did apply in this context, the absence of any procedural safeguards renders the FPI authority unconstitutional in *every* application. In *Salerno*, the Supreme Court rejected a facial challenge to the Bail Reform Act only after concluding that it contained "extensive [procedural] safeguards." 481 U.S. at 751-52. Among the safeguards contained on the face of the statute were: the right to counsel; the right to testify, present evidence, and cross-examine witnesses; the requirement that a judicial officer determine whether pretrial detention was appropriate on the basis of "statutorily enumerated factors"; the requirement that the government prove its case by clear and convincing evidence; the requirement that the judicial officer provide written findings of fact and a written statement of reasons; and the availability of immediate appellate review of an adverse decision. *Id.* In stark contrast, OFAC's FPI authority under IEEPA contains no safeguards whatsoever.

[3] The continuing vitality of *Salerno*'s holding on facial challenges is also doubtful. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision in this Court, including *Salerno* itself . . . ."); *United States v. Rybicki*, 354 F.3d 124, 130-33 (2d Cir. 2003) (en banc) (discussing debate over the application and continuing validity of *Salerno*).

The government argues that this Court should uphold the FPI authority because other courts have upheld the designation authority. Gov't Br. at 45-46. But here, as elsewhere, the government improperly conflates the FPI and designation authorities. None of the cases to which the government cites adjudicates the constitutional flaws in the freeze process. *See Holy Land Found. for Relief & Dev. v. Ashcroft* (*HLF*), 333 F.3d 156 (D.C. Cir. 2003) (challenge to designation and redesignation); *Global Relief Found., Inc. v. O'Neill* (*GRF*), 315 F.3d 748 (7th Cir. 2003) (challenging designation); *Chichakli v. Szubin*, 546 F.3d 315 (5th Cir. 2008) (same); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008) (same). Moreover, these cases did not address the particular infirmities KindHearts is asserting—namely the absence of *any* substantive criteria, notice, opportunity for a hearing, statement of reasons, or time limit on the freeze. KindHearts agrees that in exceptional circumstances due process permits post-deprivation process. Pl. Br. at 21; Gov't Br. at 46-47. But there must be *some* post-deprivation process, and it must be *prompt*. *Vitek v. Jones*, 445 U.S. 480, 494-97 (1980); *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 241-42 (1988).[4] IEEPA on its face does not require any kind of pre- or post-deprivation process, and therefore violates procedural due process.

B. The Process OFAC Provided KindHearts in Connection with the FPI Was Constitutionally Deficient.

The FPI imposed on KindHearts also violated procedural due process as applied because OFAC failed to provide KindHearts with constitutionally adequate notice or a meaningful opportunity to defend itself.

The government provided KindHearts with no notice of the factual or legal basis for its FPI decision. It now points to two documents issued at the time of the FPI, the so-called

[4] If this Court were to accept the government's argument, then even the *Salerno* analysis the government relies on would be unnecessary: facial due-process challenges would never succeed because the government could always remedy facially invalid statutes by concocting procedures after the fact. But that is not the law.

"Blocking Notice" and a press release. In addition, it has belatedly—nearly three years after the freeze, and only in response to this lawsuit—produced the administrative record on which it purports to have based its FPI decision.[5] According to the government, provision of the FPI record "cures" any deficiency of notice at the time of the FPI 34 months ago, a claim KindHearts discusses in greater detail below. These documents do not constitute adequate or timely notice. In fact, they only confuse matters because the charges they enumerate are internally inconsistent, leaving KindHearts to speculate as to what's actually at issue.

The only court to address a claim similar to KindHearts' found that the kinds of procedural inadequacies alleged here violated due process. In *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury* (*AHIF*), 585 F. Supp. 2d 1233, 1254-58 (D. Or. 2008), the court held that OFAC's procedure failed to give the targeted charity adequate notice of the legal or factual bases for OFAC's actions for a variety of reasons: it failed to explain how documents in the administrative record related to the designation criteria, *id.*; it failed, at least initially, to explain what designation criteria it relied upon, *id.*; it cited different criteria in support of the designation in the press release and the designation order itself, *id.* at 1255-56; it made allegations in the press release that were unsupported by the unclassified record, *id.* at 1256; its regulations did not assure timely review of AHIF's request for administrative reconsideration, and it did not, in fact, respond until three years after AHIF filed its request, *id.* at 1257; it did not provide a timely statement of reasons, *id.* at 1256-57; and it failed to justify its decision not to promptly do so, *id.* OFAC committed every one of these same violations in KindHearts' case. Indeed, the violations are even more egregious here because for FPIs, unlike designations, there is no process for notice or an opportunity to respond.

[5] That record includes eight documents that were not submitted for declassification review until November 6, 2008, after KindHearts filed this case. Declaration of Adam Szubin ¶ 47, dated Dec. 12, 2008 ("Szubin Decl.").

1. The Blocking "Notice" Does Not Provide Notice.

The only document that OFAC actually provided to KindHearts at the time of the FPI was the Blocking Notice, which stated in boilerplate terms that KindHearts was being frozen pending investigation into whether its designation was appropriate "for being controlled by, acting for or on behalf of, assisting in or providing financial or material support to, and/or otherwise being associated with Hamas." AR2. The "notice" offers no explanation of the factual or legal basis for the FPI, and KindHearts cannot possibly "present [its] side of the story" in response to such bare and unsupported allegations. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *see also* Pl. Br. at 23-24.

2. A Press Release Is Not Legal Notice.

In view of the patent deficiency of its Blocking Notice, the government asks the Court to treat a press release as notice. But a press release is not legal notice, much less a "statement of the case." Gov't Br. at 49. It is just government spin. The government's suggestion otherwise only underscores how desperate it is to try to point to *something* that might constitute "notice." Not surprisingly, the government cites no authority for its view; we believe none exists. The only case the government cites, *Al-Aqeel*, 568 F. Supp. 2d 64, observes that a press release may provide a plaintiff with notice *that a designation had occurred* but does not hold that a press release provides the legally required notice of *the legal and factual basis for the designation.*

OFAC's press release in KindHearts' case shows why a press release is no substitute for a real "statement of the case." The release does not identify the specific criteria of the Executive Order that OFAC believes to be evidenced by the release's conclusory statements. See AR6-7. It relies on vague conclusions, unnamed sources, and multiple levels of hearsay. Tellingly, rather than detailing supportive facts, the language of the release calls into question the bases for

OFAC's allegations: "reportedly phoned," "reportedly communicated," "reportedly collected," "believed to be," and "according to information available to the U.S." AR6-7. This type of language may suffice for media sound bites, but it does not constitute legal notice.

3. Documents Provided 34 Months After the Violation of the Prompt Notice Requirement Do Not Provide Notice.

The government cannot successfully argue that its belated production of the FPI Memorandum and the FPI administrative record, 34 months after its freeze of KindHearts, now "cures" the flaws of its initial failure to provide notice. Gov't Br. at 49; *see* AR8-32; AR1-651, 1727-59. This argument negates the very purpose of notice—to afford the individual a meaningful opportunity to prepare a defense. *Sira v. Morton*, 380 F.3d 57, 70 (2d Cir. 2004) (requiring that inmate in disciplinary proceeding be provided with notice sufficiently specific "as to the misconduct with which the inmate is charged to inform the inmate of what he is accused of doing so that he can prepare a defense to those charges and not be made to explain away vague charges" (quoting *Taylor v. Rodriguez*, 238 F.3d 188, 192-93 (2d Cir. 2001)) (internal quotation marks omitted)); *NLRB v. Coca Cola Bottling Co. of Buffalo, Inc.*, 811 F.2d 82, 87 (2d Cir. 1987) ("The notice requirement is only satisfied if the notice reasonably enables the charged party to prepare his case."); Henry Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1279-95 (1975) (listing "Notice of the Proposed Action and the Grounds Asserted for It" as second only to "An Unbiased Tribunal" in list of what due process requires). OFAC never gave KindHearts what was required—notice of the charges against it so that it could prepare a meaningful defense.

Even if OFAC had provided the FPI Memorandum and the FPI administrative record to KindHearts with the Blocking Notice, the documents are so thoroughly redacted that they literally hide the bases for OFAC's conclusion that it was appropriate to freeze KindHearts.

OFAC's heavy redaction and its reliance on classified evidence defeat KindHearts' ability to understand or respond to the case against it. *See* Pl. Br. at 38-45; *infra* Part III.C.3. Nowhere is this better evidenced than in the FPI Memorandum's conclusion, in which it lists three legal bases for OFAC's decision to freeze KindHearts: the first is *entirely* blacked out, and the third is unconstitutional on its face.[6] The rest of the FPI Memorandum and administrative record are no more illuminating. Virtually all of the *unredacted* portions of these documents relate either to acts before KindHearts came into existence or to actions taken by *other* entities only after KindHearts had ended its relationship with them. *See, e.g.*, AR10-12, 17-21 (providing background information on Hamas and the Muslim Brotherhood, and describing individuals involved with HLF before KindHearts' founding); AR1727-32 (FPI Ex. 18) (describing arrest of individuals for association with HLF, prior to creation of KindHearts); AR61-69 (FPI Ex. 20) (1998 document reporting hearsay accusation against alleged Hamas associate); AR77-79 (FPI Ex. 25) (1995 document containing hearsay allegation against purported Hamas fundraiser); AR162-68 (FPI Ex. 27) (reproducing list of names appearing on a document obtained in 1993).

Finally, the FPI Memorandum and the positions the government takes in this litigation only create more confusion because the "criteria" they contain are inconsistent with each other, and with the notice provided at the time of the FPI. To cite just two examples:

- OFAC's newly released FPI Memorandum does not include the terms "being controlled by" or "acting for or on behalf of" as justifications for the freeze, even

[6] The three criteria as produced in the FPI Memorandum are:

> (1) [redacted]
>
> (2) KINDHEARTS assists in, or provides financial or material support to Hamas by providing funds to Hamas-affiliated entities, including Sanabil Association for Relief and Development ("Sanabil"), among other activities;
>
> (3) KINDHEARTS is otherwise associated with Hamas through its leaders, fundraisers, and employees. Additional evidence that KINDHEARTS' leaders, fundraisers, and employees held leadership or other positions with the HLFRD and the GRF which were designated for their support to Hamas and al Qaida, further support the above criteria.

AR22.

though OFAC included them in the Blocking Notice. *Compare* AR2, *with* AR22-DC.

- In its brief, the government claims that it *is* applying the term "acting for or on behalf of" and that it is also applying the term "other services," which is not included either in the Blocking Notice or in the FPI Memorandum. Gov't Br. at 36 & n.29; Gov't Br. at 38-41.

In short, three years after the FPI was imposed and its operations were shut down, KindHearts remains in the dark about the basis for OFAC's imposition of the FPI in the first place. Even if due process somehow permitted the government to seize the entirety of an entity's property and provide notice only three years later, OFAC has still failed to provide adequate notice.

4. OFAC May Not Conflate the Procedure It Provided in the Separate FPIand Designation Processes.

Consistent with its attempt to conflate the FPI and designation authorities, the government attempts to make up for its procedural failures with respect to the FPI process by lumping that process with the distinct and on-going threatened designation. *See, e.g.*, Gov't Br. at 3 ("classified and unclassified evidence obtained subsequent to the issuance of the BPI further supports OFAC's action"); Gov't Br. at 49 (arguing that the "statement of the case" was included in both a 2006 FPI press release and the 2007 unclassified summary of evidence with respect to the threatened designation). But, as the government itself admits, it cannot rely on evidence that postdates the FPI to buttress the lack of virtually *any* notice or meaningful opportunity to respond with respect to the FPI. Gov't Br. at 17 ("the KindHearts BPI should be reviewed on the basis of the full administrative record before the agency *at that time*" (emphasis added)).

The government cites to the administrative record it gave KindHearts on May 25, 2007, but that record was designed for an entirely different purpose—to identify the bases on which KindHearts might be designated. *Compare* AR2 (Blocking Notice) (FPI was based, in part, upon the terms "controlled by," "act for or on behalf of," "assist in," and "to be otherwise associated

with"), *with* AR670 (OFAC's provisional designation memorandum) (relying on terms not listed in the Blocking Notice, including "financial or other services," and not relying on terms listed in the Blocking Notice, including "otherwise associated with"). The record was produced over fifteen months *after* OFAC froze KindHearts for investigation, in connection with the separate process of a potential designation. Even if these documents were intended to constitute notice of the basis for OFAC's FPI, which they plainly were not, they came far too late to constitute prompt notice as required by the Constitution. *See* Pl. Br. at 21-22. Notice regarding the threatened designation cannot qualify as notice regarding the FPI.

5. OFAC Has Denied KindHearts a Meaningful Opportunity to Defend Itself Against the FPI.

Due process also requires a meaningful opportunity to respond to the government's charges. The government afforded KindHearts no such opportunity. Instead, OFAC merely advised KindHearts in the Blocking Notice that it could send a letter requesting OFAC to reconsider. The government cannot meet its obligation to afford a meaningful opportunity to defend by making a unilateral decision to deprive an entity of its property—and its existence—and then "permitting" the entity to ask the government to change its mind. As in the civil forfeiture context, Pl. Br. at 26-27, due process requires meaningful notice, a meaningful opportunity to respond before a neutral arbiter, and, in the context of indefinite seizure of property, judicial review.

In any event, OFAC never actually provided the reconsideration it promised. KindHearts' counsel sought reconsideration on April 24, 2006, and guessed at what OFAC's allegations might be. *See* AR597A-G ("To date, not one single official factual allegation has been levied against KindHearts by any governmental entity . . . ."). The letter focused in large part upon KindHearts' accounting records and argued that the records, which had been seized by

the government and were now in the government's sole possession, exonerated KindHearts. AR597C-D. The letter specifically requested that OFAC review those records. AR597D. OFAC *never* responded to KindHearts' request for reconsideration, even though it responded to other correspondence on more ministerial or administrative issues. *See, e.g.*, AR599 (discussing access to blocked funds and payment of legal expenses); AR608-10, 637, 640 (issuing licenses to plaintiff's counsel); AR620 (discussing payment of legal expenses and the reporting requirements on blocked property). Thus OFAC failed to provide even the minimal process it promised.

***

Application of the three-part test in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), makes clear that OFAC violated due process. The private interest at stake here is considerable—KindHearts has been shut down by the government for nearly three years. The government's legitimate interest in freezing assets of those who support terrorist activities would in no way be undermined by informing the potential designee of what it is thought to have done to warrant the FPI; such notice may be provided after the entity's assets have been frozen, as long as it is prompt. There is no legitimate interest in "hiding the ball." But here, notice was not provided at all and the government does not explain why it did not disclose the FPI administrative record when the freeze was effected, especially given the speed with which that record was produced once KindHearts commenced this lawsuit. Prompt post-freeze notice to KindHearts of the specific charges being considered against it would not have jeopardized any government interest because KindHearts was effectively shut down. And the risk of error is substantially increased when an entity must guess what it is supposed to be responding to when it defends itself against a freeze of its assets.

C. OFAC's Seizure of KindHearts' Assets Violates the Fourth Amendment.

In its opening brief, KindHearts showed that the wholesale freeze of all of its assets for more than 34 months constitutes an unreasonable seizure in violation of the Fourth Amendment because the FPI was effected without a warrant or probable cause. Pl. Br. at 25-28. In reply, the government asks this Court to accept a truly radical proposition: that when the President declares a national emergency, the Fourth Amendment simply does not apply to executive branch seizures within this nation's borders. That is not the law. The Supreme Court has never recognized a national emergency exception to the Fourth Amendment. Nor has it ever upheld seizures under the kind of open-ended scheme the government advances here, one that does not require a warrant, probable cause, or individualized suspicion, and permits the imposition of an indefinite seizure of all of an entity's property without a showing of reasonableness or any safeguards that limit executive discretion.

1. The Fourth Amendment Applies in Cases that Raise National Security and Foreign Policy Concerns.

The government asks the Court to exempt an entire category of domestic executive conduct from Fourth Amendment scrutiny. Gov't Br. at 65-66. But courts have regularly adjudicated constitutional and Fourth Amendment challenges that touch upon even the most sensitive national security and foreign policy issues. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971) (national security "is not a talisman in whose presence the Fourth Amendment fades away and disappears"); *United States v. U.S. Dist. Court*, 407 U.S. 297, 320 (1972) ("the President's domestic security role . . . must be exercised in a manner compatible with the Fourth Amendment"); *see also United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (the foreign affairs power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution"); *Home Bldg. & Loan*

Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("even the war power does not remove constitutional limitations safeguarding essential liberties"); *United States v. Bin Laden*, 126 F. Supp. 2d 264, 273 (S.D.N.Y. 2000) ("even in the exercise of his foreign affairs power, the President is constrained by other provisions of the Constitution").

The cases the government cites in support of its argument confirm, in fact, that courts are fully competent to resolve constitutional challenges in the national security and foreign policy contexts. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 660, 688-90 (1981) (reaching the merits of petitioner's constitutional challenges to an executive order suspending legal claims against Iran, and acknowledging the availability of a claim for just compensation if the President's action amounted to an unconstitutional taking); *Haig v. Agee*, 453 U.S. 280, 306-10 (1981) (reviewing on the merits three constitutional challenges to the passport-revocation of a U.S. citizen living abroad who had intentionally obstructed CIA operations, causing the death of several agents); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-96 (1952) (reaching merits of constitutional challenges to the deportation of a legally resident alien on the basis of membership in an organization that advocated the violent overthrow of the U.S. government).[7]

Contrary to the government's straw-man argument, KindHearts does not challenge the executive branch's authority to impose economic sanctions against nations or even against individuals and entities (as long as they are attendant to sanctions against nations). Gov't Br. at 67. This argument "misses the mark. The question is not, at this stage at least, whether these

[7] None of the other cases the government cites on this point even addressed the Fourth Amendment, so they can scarcely provide authority for the government's sweeping assertion that OFAC's power to seize and indefinitely freeze an organization is immune from judicial review. *See, e.g.*, *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996) (addressing non-delegation challenge); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982) (addressing claim to Presidential immunity by White House aides); *Dep't of Navy v. Egan*, 484 U.S. 518, 528-29 (1988) (concerning authority of an administrative board to review a decision by the Navy to revoke a security clearance); *Regan v. Wald*, 468 U.S. 222, 224-25 (1984) (addressing challenge to Treasury Department's ban on travel to Cuba); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 104 (1948) (addressing statutory scope of judicial review under the Civil Aeronautics Act).

[seizures] may be made, but whether they may be made without a warrant" and probable cause. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 533 (1967). KindHearts' Fourth Amendment claim asks only whether the government may seize the operations and assets of a domestic corporation, shutting it down indefinitely and criminalizing virtually all transactions with it, without satisfying any of the requirements of the Fourth Amendment.

2. OFAC's Freeze of KindHearts' Assets Is a Seizure.

The government does not contest long-standing Supreme Court and Sixth Circuit precedent that "[a] 'seizure' of property . . . occurs when 'there is some meaningful interference with an individual's possessory interests in that property,'" *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); *Arizona v. Hicks*, 480 U.S. 321, 324 (1987); *United States v. Perez*, 440 F.3d 363, 374 (6th Cir. 2006); *United States v. Robinson*, 390 F.3d 853, 870 (6th Cir. 2004); *United States v. Gant*, 112 F.3d 239, 241 (6th Cir. 1997). Instead, it improperly relies on a handful of cases that mistakenly apply a Takings Clause analysis (which examines whether title to property has passed to the government) in the Fourth Amendment context (in which a seizure may occur regardless of a change in title). *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 79 (D.D.C. 2002); *Islamic Am. Relief Agency v. Unidentified FBI Agents* (*IARA*), 394 F. Supp. 2d 34, 48 (D.D.C. 2005). This Court should follow the court in *AHIF* by rejecting the government's conflation of standards. 585 F. Supp. 2d at 1262-63; *see also* Pl. Br. 26 & n.14.

3. OFAC's Authority to Freeze and Designate Violates the Warrant and Probable-Cause Requirements.

Searches and seizures conducted without a warrant based upon probable cause are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and

well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted); *see also Chandler v. Miller*, 520 U.S. 305, 308 (1997); *United States v. Karo*, 468 U.S. 705, 717 (1984); *Payton v. New York*, 445 U.S. 573, 586-87 (1980); *Camara*, 387 U.S. at 528-29; *United States v. Hare*, 589 F.2d 1291, 1293 (6th Cir. 1979). Neither IEEPA nor the Executive Order requires OFAC to have probable cause or a warrant before freezing an entity's assets, and the government does not argue that OFAC had probable cause or that it sought a warrant in KindHearts' case. OFAC's seizure is therefore presumptively unreasonable.

Rather than point to any "specifically established and well-delineated exceptions," the government, citing a grab-bag of inapplicable cases, appears to ask the Court to create a new type of special needs or administrative search exception to the warrant requirement. Gov't Br. at 64-66. But the government does not even attempt to meet its burden to show that it satisfies the requirements of either exception. Moreover, the special needs and administrative search doctrines have as their hallmark the elimination of executive discretion, and allow only minimal invasions into privacy. IEEPA and the Executive Order, by contrast, give OFAC virtually unrestrained discretion to intrude in the most fundamental way upon KindHearts' Fourth Amendment rights. OFAC's power to freeze and designate does not satisfy any of the fundamental requirements of these "closely guarded" and "well-delineated" exceptions. *See Chandler*, 520 U.S. at 309; *Katz*, 389 U.S. at 357.

The special needs doctrine is a narrow one. "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *see also Chandler*, 520 U.S. at 309. Courts have recognized a "special needs"

exception only where the government shows: (1) that the primary purpose of its actions is above and beyond criminal law enforcement, *Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-47 (2000); and (2) that the special needs "'make the warrant and probable-cause requirement impracticable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *T.L.O.*, 469 U.S. at 351). In addition, even if the government meets these threshold tests, it must still establish that the scheme is reasonable. *Illinois v. Lidster*, 540 U.S. 419, 426 (2004).

OFAC cannot show that the warrant and probable-cause requirements were impracticable in KindHearts' case or in freeze or designation cases generally. OFAC engages in targeted investigations prior to freezing and designating, and it investigates for some time before acting. In KindHearts' case, OFAC had time to complete a twenty-five page FPI memorandum before it froze KindHearts on February 19, 2006. *See* AR8-DC. There is no basis in the record for concluding that it would have been impracticable to obtain an *ex parte* warrant for the freeze of KindHearts pending investigation. As in the context of exigent circumstances, the warrant requirement is not impracticable for such "planned" seizures. *See United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984) (no justification for warrantless intrusion that was "a planned occurrence, rather than the result of an ongoing field investigation"); *United States v. Gargotto*, 476 F.2d 1009, 1013 (6th Cir. 1973); 3 Wayne R. LaFave, Search and Seizure 318-21 (4th ed. 2004); *see also G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (one or two-day delay prior to search insufficiently exigent for exigent-circumstances exception). Nor is the probable-cause requirement impracticable in OFAC's targeted scheme, which is not one "where 'the concept of individualized suspicion has little role to play.'" *Wilson v. Collins*, 517 F.3d 421, 426 (6th Cir. 2008) (quoting *Lidster*, 540 U.S. at 424-25)).

The administrative-search doctrine similarly does not justify the seizure. Warrantless searches of pervasively regulated businesses are permitted only when three criteria are met: (1) a "substantial" government interest must inform the regulatory scheme at issue; (2) warrantless inspections must be necessary to avoid frustrating the object of the scheme; and, most importantly, (3) the certainty and regularity of the regulatory scheme must serve as "'a constitutionally adequate substitute for a warrant.'" *New York v. Burger*, 482 U.S. 691, 702-03 (1987) (quoting *Donovan v. Dewey*, 452 U.S. 594, 602 (1981)).

The Executive Order and IEEPA fail to pass the threshold inquiry in the analysis: the entities targeted by the scheme are not pervasively regulated within the meaning of the doctrine. The Executive Order and IEEPA may be invoked to freeze the domestic assets of virtually any person or entity inside or outside the United States. The scheme is not carefully targeted at a select problem menacing a select industry. It is, instead, a tremendously broad grant of discretion to OFAC to freeze any asset that passes through this country.[8] Moreover, as discussed below in the context of reasonableness, the Executive Order and IEEPA fail the test for warrantless administrative searches: they do not impose a minimal intrusion, do not contain substitute safeguards for the warrant requirement, and in no meaningful way constrain executive discretion.

4. OFAC's Authority to Freeze and Designate Is Unreasonable.

As noted above, even if the government succeeds in meeting the threshold requirements for invoking the special needs or administrative exceptions, it must also establish that its scheme is reasonable. Reasonableness is the "ultimate touchstone" of any Fourth Amendment analysis, *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006), and the reasonableness requirement

[8] For this reason, the government's reliance on *United States v. Holy Land Foundation for Relief and Development*, No. 04-cr-240, 2007 WL 1285751, at *3 (N.D. Tex. May 2, 2007), is unavailing. Even assuming that SDGTs qualify as a "closely regulated industry," which KindHearts disputes, KindHearts is not an SDGT.

applies even where the warrant and probable-cause requirements do not. *Lidster*, 540 U.S. at 426; *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (per curiam); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 371 (6th Cir. 1998).

To determine the reasonableness of a seizure, courts look to the totality of the circumstances, considering the nature and extent of the government's intrusion on the private interest, the government's interest, and the checks on arbitrary exercises of executive discretion. *See, e.g.*, *Samson v. California*, 547 U.S. 843 (2006); *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979); *Slusher v. Carson*, 540 F.3d 449, 455 (6th Cir. 2008); *Relford v. Lexington-Fayette Urban County Gov't*, 390 F.3d 452, 458 (6th Cir. 2004). Where the government seeks an exception to the warrant and probable cause requirements, the reasonableness inquiry focuses especially on the degree to which the scheme at issue structurally replaces the need for the warrant and probable cause requirements by cabining executive discretion and limiting the invasiveness of the intrusion allowed. *See Prouse*, 440 U.S. at 654-55 ("In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" (quoting *Camara*, 387 U.S. at 532)).

The government cannot meet the reasonableness requirement of the Fourth Amendment because the freeze and designation schemes severely intrude upon significant private interests and because the schemes do not limit at all (in the case of the FPI scheme) or meaningfully (in the case of the designation scheme), OFAC's discretion.

First, OFAC's freeze authority is a sweeping intrusion on substantial private interests. It targets "all property and interests in property . . . that are in the United States or that hereafter

come within the United States, or that hereafter come within the possession or control of United States persons." E.O. 13,224 § 1. A freeze can last indefinitely, and the freeze authority makes it a crime for anyone to transact in virtually any manner with the targeted entity. *Id.* § 2; 50 U.S.C. § 1705. This intrusion is far beyond anything the Supreme Court has ever upheld under either the special needs or administrative search exceptions. The Court has permitted intrusions without a warrant or probable cause only if the invasion of private interests is minimal. *See, e.g.*, *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-57 (1995) (emphasizing minimal privacy interests invaded by circumscribed drug-testing of student athletes, who "voluntarily subject themselves" to greater regulation); *Donovan v. Dewey*, 452 U.S. 594, 603-04 (1981) (upholding warrantless searches of mines, which are pervasively regulated such that "owner of such a facility cannot help but be aware that he 'will be subject to effective inspection'"); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451-53 (1990) (upholding discretionless sobriety checkpoints that entail only a "brief stop" and a "slight" intrusion on privacy); *Burger*, 482 U.S. at 707 (finding intrusion limited because of "reduced expectation of privacy" of automobile-junkyard operators). As the three-year FPI in this case dramatically illustrates, OFAC's FPI authority is anything but minimal.

Second, OFAC's FPI authority lacks any structural safeguards that might substitute for a warrant and probable cause by limiting government discretion. Under IEEPA, once a national emergency is declared, OFAC's power to target individuals and entities with FPIs is unfettered. *See supra* Part II.A.1.i. But even if OFAC's authority to freeze pending investigation were limited with respect to how it selects targets, its authority would still be unrestricted in time, place, and scope. *See, e.g.*, *Donovan*, 452 U.S. at 601 (statute that was not limited in time, place, and scope violated the Fourth Amendment); *Burger*, 482 U.S. at 703. The Executive Order

authorizes OFAC to shut down an entire corporation and all its operations worldwide, based solely on a claim that it is "investigating" a single, unknowing, and improper donation. *Cf.* SOF ¶ 12 (in addition to its operations in Gaza and Lebanon, KindHearts provided aid in other parts of the world, including to victims of Hurricane Katrina in the United States, and of the 2005 earthquake in Pakistan). Such broad power has never been upheld under the special needs or administrative search exceptions.[9]

The government argues that the reasonableness of a warrantless seizure by OFAC is evidenced by "longstanding executive practice." Gov't Br. at 67. In essence, it argues that this Court should not find OFAC's FPI authority unconstitutional because a warrant has never been required under IEEPA. But the passage of time does not make unconstitutional conduct constitutional. Longstanding executive practice may provide a "gloss" of history on questions regarding the structural separation of powers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). But executive practice is of little use in interpreting the express constitutional command of the Fourth Amendment. If a seizure is otherwise unreasonable under the Fourth Amendment, the fact that the agency has been violating the law for a long time does not remedy the violation.[10]

[9] Even if this Court were to accept the government's argument that the substantive criteria of the designation authority should apply to the freeze authority, such a vague and "broad statutory safeguard[] [is] no substitute for individualized review" mandated by the warrant requirement. *Camara*, 387 U.S. at 533.

[10] In a footnote, the government notes that two courts have upheld warrantless seizures under the TWEA. The facts of those cases are unique and inapposite here. In *Noro v. United States*, 148 F.2d 696, 698 (5th Cir. 1945), the Fifth Circuit addressed the seizure of assets of a foreign national company, which was at the time operating under a license issued by the Secretary of the Treasury. Immediately after the attack on Pearl Harbor, the Secretary revoked the license, and the next day—the day after the attack on Pearl Harbor—customs officers seized the possessions of the business without a warrant, which the court upheld. *Id.* In *United States v. Heine*, 149 F.2d 485, 487-89 (2d Cir. 1945), the Second Circuit addressed a war-time seizure of property from the house of an alien-enemy member of the Nazi Party. Importantly, the Second Circuit held that the seizure was made with the consent of the defendant's wife, rendering unnecessary the constitutional dicta relied upon by the government here. *Id.* at 488-89. In any event, the Second Circuit stated that its holding was limited to "property unlawfully held by an alien enemy." *Id.* at 489. Both cases are clearly inapplicable here. OFAC's FPI of KindHearts was not tied to an ongoing war, and KindHearts is not an "alien enemy," *i.e.*, a citizen of a country against which the United States has formally declared war.

In sum, OFAC's FPI authority violates the Fourth Amendment because it does not require a warrant, probable cause, or a showing of reasonableness, and OFAC cannot show that it met the Fourth Amendment's requirements in KindHearts' case.

D. The Merits of OFAC's Freeze Are Not Properly Before the Court at This Time.

KindHearts' motion for partial summary judgment specifically declined to seek summary judgment with respect to the substantive basis, or merits, of OFAC's decision to freeze pending investigation because the constitutional flaws in the FPI regime precluded KindHearts from making a defense that would permit the Court to assess the basis for the FPI on a complete record. Pl. Br. at 17-28. Because review of the substantive basis of OFAC's decision is based on the administrative record, and because KindHearts was effectively foreclosed from contributing to that record in a meaningful manner, it would be premature for this Court to review the merits of OFAC's procedurally flawed decision

As explained above, OFAC never gave KindHearts notice of the factual and legal basis of its FPI decision, or a meaningful opportunity to defend itself. *See supra* Part II.B. KindHearts has not had access to all of the documents that the government seized from it nearly three years ago, which are necessary to its defense and which this Court ordered released one business day before this brief was due. Order, *In re Search of KindHearts for Charitable Humanitarian Dev., Inc.*, No. 3:06-MJ-7019 (N.D. Ohio Jan. 30, 2009). In making its FPI decision, OFAC relied upon classified evidence to which KindHearts cannot respond, even though the government has since conceded that portions of the record were not properly classified. *See infra* Part III.C.3. And OFAC improperly created a one-sided administrative record by willfully ignoring a large subset of the documents in the government's possession—the electronic documents it seized—

which KindHearts has repeatedly insisted are exculpatory and should be reviewed. *See infra* III.C.2.

The cumulative effect of these procedural deficiencies is to create a one-sided and incomplete administrative record. Reviewing agency action in these circumstances would deprive the Court of the tools necessary to fairly and accurately adjudicate the merits, making judicial review ineffective and perfunctory. Accordingly, the Court should first adjudicate KindHearts' constitutional and statutory challenges. Only if it upholds the freeze authority and finds that OFAC has afforded constitutionally adequate process with respect to the FPI should it then order full briefing on Count VIII of KindHearts' Complaint.

To demonstrate the extent to which OFAC's representation of the "facts" is one-sided and should not be considered by the Court at this point, KindHearts will address briefly some of the government's allegations. As a threshold matter, one of the consistent problems with the government's portrayal of the facts is that it asks the Court to review the merits of the FPI based on the government's record for the threatened designation. The record for the FPI is in Bates ranges AR1-651 and AR1727-59. Yet the government's argument on the merits of the FPI rests heavily on citations to the provisional designation record, which has a Bates range of AR652-1726. The government correctly states that there is overlap between the two records, but most of the citations are not to duplicated documents. There are at least 19 citations of the provisional-designation record in the section of the government's argument that the *FPI* was justified, and an entire section of the FPI argument is devoted exclusively to the "developing record for the designation proceeding." Gov't Br. at 23-24. None of this evidence can support the FPI, which must be judged solely on the basis of the record before the agency at the time it made its decision.

Much of what the government says about KindHearts is wholly unsupported. Nowhere in the factual record, for example, is there any evidence that KindHearts actually provided material support to Hamas or any other SDGT.

To the extent that one can glean the basis for its actions, OFAC's case appears to be based on association. One of the three bases for designation set forth in the recently produced FPI Memorandum is simply that KindHearts was "otherwise associated with" persons who were in turn associated with other organizations, including the Holy Land Foundation and the Global Relief Foundation. AR22-DC. This reliance on associations is itself unconstitutional, and renders the FPI presumptively invalid. *Humanitarian Law Project v. U.S. Dep't of Treasury* (*HLP II*), 463 F. Supp. 2d 1049 (C.D. Cal. 2006) (declaring the "otherwise associated with" provision OFAC relief upon to impose the FPI unconstitutional under the First and Fifth Amendments).[11] Similarly, OFAC alleges that some of KindHearts' officers and contract fundraisers previously had associations with the Holy Land Foundation and the Global Relief Foundation, *see* Gov't Br. at 21-23, 50, but fails to note that none of these individuals was ever charged or prosecuted for anything they did for, or in connection with, KindHearts.

OFAC points out that KindHearts used a bank account in the name of the Sanabil Association in Lebanon in order to transfer money to that country, and that Sanabil was later placed on OFAC's SDGT list. *See* Gov't Br. at 9-10, 23. But Sanabil was not a designated entity at any point while KindHearts was using its bank account. And as KindHearts has specifically and repeatedly explained to OFAC in its April 24, 2006 and June 25, 2007 letters,

[11] KindHearts' freeze based on association is presumptively unconstitutional regardless of whether association was the sole factor or one factor among many unless the government can prove that it would have designated KindHearts even without consideration of its associations. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (where illegitimate consideration is a "motivating factor" in a decision with mixed motives, government bears burden of proving that it would have reached the same decision without consideration of the impermissible factor). The government has not made such a showing.

KindHearts temporarily used Sanabil's account solely because it did not then have a bank account in Lebanon, and it needed to transfer funds to support its humanitarian aid to refugees in the refugee camps in that country. *See* AR597D, 1584. Once KindHearts was able to open a bank account in Lebanon, it stopped using the Sanabil Association, well before Sanabil was designated. AR597D, 1584. There are no documents in the FPI record showing that KindHearts engaged in any transaction with Sanabil after it was designated, or that any of the funds it transferred through that bank account were used for any improper purpose.

KindHearts' counsel specifically sought guidance from the Treasury Department about how it could ensure full compliance with U.S. laws, but the "Treasury Department's only response was to refer [counsel] to its website for a list of the organizations and individuals with whom U.S. nationals are prohibited from entering into any transactions." Declaration of Jihad Smaili ¶¶ 10, 12, dated Nov. 18, 2008 ("Smaili Decl."). KindHearts did exactly that. Sanabil was not on that list until August 22, 2003, well after KindHearts stopped using Sanabil's bank account to process donations. *See* AR597D, 1584; Gov't Br. at 23; Complaint ¶¶ 50, 53. Notwithstanding that KindHearts followed to the letter the only advice OFAC gave it, OFAC now seeks to hold against KindHearts its association with a non-designated entity.

The government's allegations regarding transactions with the Islamic American Relief Organization ("IARA"), Gov't Br. at 24, are similar to those regarding Sanabil in that the alleged transactions all predate OFAC's designation of IARA in October 2004. *See* AR1584-85. KindHearts could not have known as early as 2002 that OFAC would designate IARA in October 2004. Nor does the government respond to—much less contradict with evidence—KindHearts' previous explanation to OFAC that the relatively meager transactions between

KindHearts and IARA were used to purchase cows and sheep for food for refugees in refugee camps. AR1584.

Finally, the government recites allegations regarding various outside fundraisers for KindHearts, such as statements that they allegedly made at fundraising events, or even telephone calls that yet other (unidentified) persons made to the fundraisers. *See* Gov't Br. at 21-23. But KindHearts' fundraising contracts make clear that outside fundraisers had *no* responsibility for how KindHearts would spend monies raised and *no* operational role within KindHearts itself. *See* AR1577, 1579-81. Statements made by those fundraisers were not attributable to KindHearts and had no effect on how and where KindHearts disbursed donations. Moreover, those fundraisers sometimes used the opportunity of a KindHearts fundraiser to conduct their own fundraising on the side—an event that KindHearts could not control. AR1577, 1579-81.

In short, the FPI administrative record compiled by OFAC is one-sided and reflects the serious and numerous procedural flaws in OFAC's post-freeze process, including its refusal to consider exculpatory evidence in its possession or to grant KindHearts access to that evidence. Because the procedural and constitutional flaws in OFAC's freeze process prejudiced KindHearts, this Court's review of the merits of OFAC's decision is premature.

III. OFAC'S AUTHORITY TO DESIGNATE KINDHEARTS AS A SPECIALLY DESIGNATED GLOBAL TERRORIST IS UNCONSTITUTIONAL.

In addition to freezing its assets for nearly three years "pending investigation," OFAC now threatens to designate KindHearts as a "specially designated global terrorist." KindHearts challenges that threatened designation on substantive and procedural grounds. As a substantive matter, the designation criteria are impermissibly vague, the resulting freeze violates the Fourth Amendment, and the statutory authority to designate applies only to nation-targeted sanctions.

As a procedural matter, OFAC has violated KindHearts' due process rights by: (1) relying largely on classified evidence that neither KindHearts nor its counsel have had the opportunity to confront; (2) failing to provide adequate notice of the charges or a meaningful opportunity to respond; (3) further undermining KindHearts' right to respond by seizing all its documents and restricting its access to them, and requiring it to identify to OFAC any documents it finds through its own investigation; and (4) freezing all of its assets and barring it from using all but a demonstrably insufficient amount to pay for a legal defense. KindHearts seeks the Court's intervention with respect to its threatened designation now, and not after OFAC has designated it, because a designation will inflict irreparable injury to its reputation.

The Government contends that this challenge is premature, that the designation criteria are statutorily and constitutionally valid, and that it has provided KindHearts all the process it is due. For the reasons set forth below, these arguments are without merit.

A. KindHearts' Challenge to the Threatened Designation Is Ripe for Review.

The government's contention that this Court may not adjudicate KindHearts' challenge to OFAC's threatened designation because OFAC has not taken a "final" agency action, Gov't Br. at 26-27, ignores a long line of cases that permit pre-enforcement "judicial review of administrative actions [and that] have interpreted the 'finality' element in a pragmatic way." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1171 (6th Cir. 1983) ("The *Abbott* two-part test [for ripeness] remains the key to determining whether to permit pre-enforcement review of agency action."); *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003) (same). Pre-enforcement challenges to agency action are permitted when (a) the dispute is a "purely legal one" such that it is fit for judicial decision because the enforcing agency's legal position is not likely to change before

enforcement, *Abbott Labs.*, 387 U.S. at 149; *Brown & Williamson*, 710 F.2d at 1171-72, and (b) the balance of hardship to the parties of withholding judicial consideration favors adjudication, *Abbott Labs.*, 387 U.S. at 149; *Brown & Williamson*, 710 F.2d at 1172. Critically, when a law even "arguably" implicates a plaintiff's First Amendment rights, pre-enforcement standing is permitted. *Cal. Pro-Life Council, Inc.*, 328 F.3d at 1095. KindHearts' claims meet the test for a pre-enforcement challenge.

First, KindHearts raises "purely legal" challenges to the constitutionality of OFAC's designation authority and the process it affords. *Abbott Labs.*, 387 U.S. at 149; 5 U.S.C. § 706(2)(B) (APA permits challenges to agency actions that are "contrary to constitutional right"). OFAC's legal position with respect to its designation authority and process, which it has advanced here and in numerous prior challenges to its designations, is fully developed, and there is no indication that OFAC's "legal position is subject to change before enforcement." *Abbott Labs.*, 387 U.S. at 149-50; *Allsteel, Inc. v. U.S. Envtl. Prot. Agency*, 25 F.3d 312, 314-15 (6th Cir. 1994). KindHearts' designation claims challenge either the law on its face or settled OFAC policies that have already been applied in KindHearts' case, and do not rest on hypothetical scenarios or unsettled practices. The determinations OFAC has made regarding the process KindHearts has received are final, and have already had direct and legal consequences upon KindHearts. The legal analysis of KindHearts' challenges will not change if OFAC fulfills its threat to designate KindHearts, and no additional facts are needed to adjudicate KindHearts' constitutional challenges beyond those contained in KindHearts' statement of material facts, which the government does not dispute.

More specifically, the government has made crystal-clear through its pre-litigation conduct, its pleadings, and the Szubin Declaration, its legal position that OFAC's designation

authority under E.O. 13,224 is not unconstitutionally vague, that the process KindHearts has been provided is fully adequate and that KindHearts will receive no further process on critical aspects of its challenge. OFAC will not provide KindHearts or its counsel with access to the classified evidence supporting its threatened designation of KindHearts. It will not provide KindHearts with any further notice. It will require KindHearts to identify any documents KindHearts discovers while conducting its own investigation for its own defense. And it will radically limit KindHearts' ability to pay its attorneys out of its frozen funds. OFAC has already failed to provide sufficiently prompt notice of the factual or legal bases for its threatened designation; it has already ignored KindHearts' past attempts to raise substantive challenges to its actions; and it has never established a timeline for its resolution of KindHearts' case. All of these decisions have direct and actual legal consequences for KindHearts' ability to defend itself. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (final agency action is one by which "'rights or obligations have been determined,' or from which 'legal consequences will flow'" (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970))).

Second, KindHearts will suffer irreparable injury to its reputation if OFAC is permitted to designate it as a "specially designated global terrorist" before this Court adjudicates the legality of OFAC's authority to do so. *See Abbott Labs.*, 387 U.S. at 152-53. The government does not dispute KindHearts' claim that designation would inflict grievous injury to KindHearts' reputation as a charity, and therefore to its ability to recover from OFAC's 35-month long freeze. *See Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 173 (1967) (pre-enforcement challenge found to be ripe when "in a substantial and practical business sense plaintiffs are threatened with irreparable injury by obviously intended consequences of the challenged regulation" (quoting *Toilet Goods Ass'n v. Celebrezze*, 235 F. Supp. 648, 651 (S.D.N.Y. 1964))).

KindHearts also has pre-enforcement standing because the threatened designation implicates its First Amendment rights. Courts grant pre-enforcement standing for First Amendment claims where, even without a direct threat of enforcement, plaintiffs (1) challenge a "regulatory and proscriptive" statute (2) that has been enforced in the past, and (3) establish that they seek to engage in the proscribed conduct in the future but are chilled from doing so. *See American-Arab Anti-Discrimination Comm. v. Thornburgh*, 940 F.2d 445, 450-52 (9th Cir. 1991).

E.O. 13,224 covers First Amendment protected activity because it permits designation based on "associat[ions]," "services," and "material support," E.O. 13,224 § 1(d)(ii), all terms that encompass First Amendment activity, and all terms that have been declared unconstitutional by other courts.[12] *Steffel v. Thompson*, 415 U.S. 452 (1974) (granting pre-enforcement standing to challenge a trespass statute where authorities had threatened to enforce the statute against plaintiff if he did not stop hand-billing in protest of the Vietnam War); *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 950 (9th Cir. 1997) (facial First Amendment challenge was appropriate with respect to a curfew ordinance because the ordinance proscribed conduct that was "a necessary precursor to most public expression").

The government has all but assured KindHearts that it will be designated. AR1557-58, 669-70; Szubin Decl. ¶¶ 35-36, 46. To force KindHearts to await the inevitable would serve no purpose in terms of fleshing out the legal issues KindHearts' challenge presents, and would

[12] *See HLP II*, 463 F. Supp. 2d at 1070-71 (declaring "otherwise associated" provision unconstitutionally vague); *AHIF*, 585 F. Supp. 2d at 1268-69 (declaring "material support" unconstitutionally vague); *Humanitarian Law Project v. Mukasey* (*HLP III*), 509 F.3d 1122, 1135-36 (9th Cir. 2007), *amended on other grounds by* No. 05-56753, 2009 WL 18224 (9th Cir. 2009) (declaring prohibition on provision of "services" to terrorist organizations in 18 U.S.C. § 2339B unconstitutionally vague). OFAC's memorandum supporting the FPI expressly admits that it relied on KindHearts' associations, thereby directly implicating its First Amendment rights. AR22-DC.

allow OFAC to inflict irreparable injury on KindHearts' reputation. Accordingly, KindHearts' claims with respect to the threatened designation are ripe for review.

B. OFAC's Designation Authority Is Unconstitutional on Its Face.

KindHearts challenges the constitutionality of the Executive Order for authorizing designation (a) without any showing that an individual knew that a recipient group had been designated, and (b) because the Executive Order employs the unconstitutionally vague terms of "material support," "services,"[13] and "otherwise associated with." KindHearts agrees that cutting off financing of terrorist activity is a legitimate end, but the bludgeon-like means adopted here infringe impermissibly on constitutionally protected freedoms.[14] The government's responses to these challenges are unpersuasive. [15]

---

[13] KindHearts challenges the vagueness of the term "other services" as used in the Regulations to define "otherwise associated with" for the same reasons it challenges the term "services."

[14] The government correctly states that there is no constitutional right to "facilitate terrorism." Gov't Br. at 43 n.37 (quoting *HLP I*, 205 F.3d at 1133, concerning the constitutionality of the material support statute). If the Executive Order were limited to prohibiting the funding of terrorist acts or groups that had been designated for engaging in terrorism, it might be more analogous to the criminal material support statute. But as KindHearts demonstrated in its opening brief, Pl. Br. at 29-35, the Executive Order is far more expansive and vague in its reach. It permits designation of persons and groups that have never supported or facilitated terrorism, based merely on the fact that they have provided "material support" or "services" to someone else on the list, who may in turn be on the list merely for having made a donation to someone else on the list. Thus, organizations and individuals may be designated without any finding that they ever supported anyone who ever engaged in terrorist activity. If the Red Cross provided humanitarian aid to a Hamas hospital in Gaza, it could be designated, and then others could be designated merely for donating to the Red Cross, even though the Red Cross had never engaged in any terrorist activity.

[15] The government contests KindHearts' standing to bring a facial challenge to the Executive Order because, the government argues, it has applied the designation authority's criteria to its freeze of KindHearts. Gov't Br. at 36 & n.29. That argument fails for the reasons set forth in Part II.A.1.ii. But even if the Court finds that OFAC may apply the designation criteria to its freeze of KindHearts, KindHearts still has standing to bring its facial challenge to the Executive Order for two reasons. First, the government concedes that KindHearts was frozen on criteria challenged as vague. Gov't Br. at 36 n.29. Those criteria do not "clearly proscribe[]" KindHearts' alleged conduct, and KindHearts may therefore challenge their facial vagueness. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). Similarly with respect to the designation authority, the government has threatened to apply those criteria to KindHearts, AR670, 1557, and KindHearts has standing to bring a pre-enforcement vagueness challenge for the reasons set forth in Part III.A. Second, the vagueness of the criteria independently violates KindHearts' First Amendment rights and thus confers standing. *Supra* Part III.A.

It appears that the government's argument is less about standing to raise a facial vagueness challenge than it is about redressability—that if this Court were to invalidate some criteria (*e.g.*, those based on association and material support), the government may still designate KindHearts on other, unchallenged criteria. But the case law is clear that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original).

1. The Designation Authority Lacks A Knowledge Requirement.

The government does not contest that OFAC's designation authority requires no finding that a targeted individual or group know that the entity or person it supports or associates with is designated. Instead, the government argues that "neither the government nor Plaintiff can effectively control how terrorist organizations will make use of resources provided to them." Gov't Br. at 42 n.36. But imposing the penalty of designation on unknowing support or affiliation goes too far. Under the government's interpretation, a charity may be designated for providing aid to a designated entity without any knowledge that the recipient was designated or any intent that the aid be used for illegal purposes. Imposing such a draconian penalty on unknowing support is unconstitutional. *Humanitarian Law Project v. Mukasey*, No. 05-56753, 2009 WL 18224, at *5-6 (9th Cir. 2009); Pl. Br. at 32-33.

2. The Term "Material Support" Is Unconstitutionally Vague.

One court has already held the Executive Order's ban on "material support" to be unconstitutionally vague. *AHIF*, 585 F. Supp. 2d at 1268-69. This Court should do the same. The government argues, however, that the ban on providing "material support" is not vague because it appears in the Executive Order as one of several kinds of proscribed support and therefore its meaning can be gleaned from its context. Gov't Br. at 40. This argument defies logic. The Executive Order prohibits "financial, material or technological support," but that only confuses matters. If material support is not "financial" or "technological," what is it? The government has no answer. Ordinary citizens are forced to guess, and if they guess wrong, they can have the entirety of their assets frozen.

OFAC objects that not all forbidden conduct needs to be defined with "mathematical precision." Gov't Br. at 41 (quoting *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1108

(6th Cir. 1995)). But forbidden conduct must have *some* discernible definition, as *Columbia Natural Resources* itself holds. In that case, the Court upheld a provision of the Racketeer Influenced and Corrupt Organizations Act against a vagueness challenge because the operative terms of the provision were themselves precisely defined. *Id.* at 1106, 1107-08. "Material support," in contrast, is entirely undefined in the Executive Order.

The vagueness of "material support" is not cured, as the government argues, by the fact that the term is defined—in two different ways—in two different statutes, AEDPA and the Immigration and Naturalization Act ("INA"). Gov't Br. at 40-41. The fact that these statutes offer differing definitions of "material support" only underscores the need for a definition in the Executive Order. How is one to know whether the correct meaning of "material support" is that found in AEDPA, or in the INA, or somewhere altogether different?

3. The Term "Services" Is Unconstitutionally Vague.

The government similarly argues that the term "services," which is also undefined, should be upheld on the basis of (a) a regulation that offers only a non-exclusive list of "examples" of "services," and (b) the government's litigation position that "services" would not cover First Amendment protected "independent advocacy." Gov't Br. at 39 & n.33. These arguments also fail. The non-exclusive list is not an adequate substitute for a definition, especially when the examples of "services" in the Regulations on their face encompass First Amendment protected speech or advocacy. Pl. Br. at 34. Moreover, because OFAC has *never* issued a statement of reasons explaining any of its thousands of designations, it is entirely unclear what kinds of services are permitted or prohibited.

Nor does the government's litigation position regarding "independent advocacy" save the "services" provision. Nothing in the Executive Order, IEEPA, or the Regulations supports such

a carve-out. If educational or public relations services are proscribed, as the Regulations expressly provide, it is difficult to know what is permitted. It is clear, however, that "advocacy" is prohibited, and the First Amendment protects advocacy whether it is "independent" or coordinated with others. Even if the government's carve-out could be found in the text of the statute, the Executive Order, or the Regulations, which it cannot, it would force citizens to guess whether their advocacy was sufficiently "independent" or "coordinated," again risking designation if they guessed wrong. *Cf. HLP III*, 509 F.3d at 1135-36 (declaring unconstitutionally vague a more stringently limited ban on *knowing* provision of "services" to designated terrorist groups in 18 U.S.C. § 2339B).

4. The Term "Otherwise Associated With" Is Unconstitutionally Vague.

As the government acknowledges, Gov't Br. at 39 n.32, the court in *AHIF* recently held that the term "otherwise associated with" is unconstitutional because it contains the impermissibly vague "material support" term. The "otherwise associated with" ban also contains the vague term "services," and to that extent as well it violates the First and Fifth Amendments.[16]

5. Heightened Vagueness Scrutiny Applies Because the Executive Order Implicates First Amendment Activity and Is Quasi-Criminal.

The government argues that heightened vagueness scrutiny is not appropriate here because nothing in the Executive Order or IEEPA implicates First Amendment rights, and because KindHearts is not being charged with criminal conduct. Gov't Br. at 42 n.35. In fact, the Executive Order expressly targets association, material support, and services, all terms that implicate First Amendment protected activity. And the Regulations underscore that the

[16] KindHearts' challenge to the pre-definition use of the term "otherwise associated with" is not moot, Gov't Br. at 38 n.31, because that provision, in its unamended and indisputably unconstitutional form, was concededly a basis for OFAC's freeze of KindHearts, AR1-2, 22-DC. *See supra* note 14.

Executive Order reaches First Amendment protected conduct because it prohibits "educational, public relations, and legal" services.[17] 31 C.F.R. § 594.406.

Heightened vagueness standards also apply to civil statutes that, because of their "prohibitory and stigmatizing effects," are effectively "quasi-criminal." *Vill. of Hoffman Estates*, 455 U.S. at 498-99. IEEPA and the Executive Order are far more prohibitory and stigmatizing than the civil drug-paraphernalia ordinance in *Village of Hoffman Estates*. The Supreme Court treated that ordinance as quasi-criminal because it was designed to discourage the use of drug paraphernalia, and because "'few retailers are willing to brand themselves as sellers of drug paraphernalia.'" *Id.* at 499 n.16. The E.O. 13,224 is similarly designed to discourage support of designated groups, and the stigmatizing effect of being labeled a "specially designated global terrorist" is much greater than being labeled a seller of drug paraphernalia. *See also Jordan v. De George*, 341 U.S. 223, 231 (1951) (applying stringent vagueness test to civil immigration laws because of the drastic consequences of deportation); *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 121 (5th Cir. 1991) (applying heightened vagueness standards to civil penalty for failure to register as distributor of controlled substances because civil penalties were quasi-criminal).

6. The Opportunity to Consult Does Not Cure Vagueness.

The government argues that the vagueness of the above terms is mitigated by the fact that KindHearts could have consulted with OFAC about potential charitable donations and recipients. *See* Gov't Br. at 41-42; Szubin Decl. ¶¶ 63-64. In fact, KindHearts did consult with OFAC, but received no helpful advice. Smaili Decl. ¶¶ 10, 12. But in any event, the hypothetical

[17] Even if the Executive Order did not expressly target protected activity on its face, its terms are so vague that "[t]here is nothing to prevent [its] use . . . against activities that are entitled to protection under the First Amendment." *Leonardson v. City of E. Lansing*, 896 F.2d 190, 197-98 (6th Cir. 1990). In other words, the Executive Order "*could* be used," *id.* at 198 (emphasis added), to target protected activity.

opportunity to seek clarification does *nothing* to respond to one of the core concerns of the vagueness doctrine—limiting arbitrary enforcement by government officials granted too much discretion by open-ended laws. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In addition, the possibility of seeking guidance from authorities is available for every civil and criminal statute, so if that possibility were sufficient to defeat vagueness, no laws would be unconstitutionally vague. It is true that regulations governing closely regulated entities may be somewhat less clear, on the theory that the regulated entity has an ongoing relationship with its regulator that makes consultation more feasible. *Vill. of Hoffman Estates*, 455 U.S. at 498 (applying this rule to regulated businesses selling drug paraphernalia); *see also Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 49 (1966) (applying this rule to regulated liquor distillers and wholesalers). But that rule is limited to regulated entities that "have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Vill. of Hoffman Estates*, 455 U.S. at 498. It is not applicable where, as here, the law governs all citizens and organizations generally, not regulated entities in particular.

Thus, the designation authority is unconstitutional on its face, and the Court can enjoin any designation of KindHearts on that ground alone.

C. OFAC's Use of the Designation Authority Is Unconstitutional as Applied to KindHearts.

Like the defective process OFAC provided KindHearts with respect to the FPI, the process OFAC has provided in the 20 months since it informed KindHearts that it had provisionally designated it also falls constitutionally short. OFAC has not provided either adequate notice of the basis for its threatened designation or a meaningful opportunity for KindHearts to respond, and OFAC's contention that its "informal adjudication procedures" are constitutionally adequate, Gov't Br. at 50, is belied by the facts.

1. OFAC Has Failed to Provide KindHearts with Adequate Notice.

Until it filed this lawsuit, the only "notice" KindHearts received of the factual and legal bases for its threatened designation was a slew of documents—the "unclassified administrative record"—provided to KindHearts without any explanation of their significance. KindHearts literally had to guess the potential relevance of each document. Most did not even mention KindHearts by name. After KindHearts filed this suit, OFAC released further documents. But these documents are for the most part highly redacted, and continue to leave KindHearts in the dark regarding the precise legal and factual bases for OFAC's threatened action. Because KindHearts cannot meaningfully defend against charges that have not been made known to it, it has been denied constitutionally adequate notice.

OFAC argues that any deficiencies in its original "notice" were "cured" by disclosure of its internal memorandum in support of the provisional designation (the "PD Memorandum"), and of recently declassified portions of the administrative record. Gov't Br. at 48-49. But the PD Memorandum is so heavily redacted that it cannot constitute notice, as evidenced by the fact that the memorandum sets forth two reasons OFAC believes designation of KindHearts is justified—one of which is entirely blacked out.[18]

The newly provided declassified portions of the administrative record similarly remain so heavily redacted, vague, and conclusory that they do not remedy any deficiency of notice. *See,*

[18] The concluding paragraph of the memorandum sets forth the two reasons that OFAC believes justify designation of KindHearts:

> • [redacted]
>
> • KINDHEARTS provides financial or material support, or financial or other services to Hamas by providing funds to Hamas-affiliated entities, including Sanabil, the al-Salah Society, [redacted], among other activities.

AR669-70. The unredacted portions of the PD Memorandum barely differ from the speculative and unsubstantiated allegations given to KindHearts at the time of the FPI and then again in May 2007, when OFAC provided the Unclassified Summary; the PD Memorandum fails to provide notice for the same reasons those documents fell short. *See generally* AR652-83; AR1280-82; AR1569-89; Pl. Br. 35-38; *supra* Part II.B.1-3.

e.g., PDM Ex. 19 (not Bates-stamped) (nine-page document dated January 26, 1998 and purportedly from the FBI that is entirely redacted except for a hearsay allegation from an unidentified source that a future KindHearts fundraiser was "reportedly assisted" in fundraising on behalf of Hamas); PDM Ex. 24 (not Bates-stamped) (June 1, 1995 document titled "Federal Bureau of Investigation" that is entirely redacted except for a hearsay allegation made by an unidentified source); AR886-88 (undated, untitled, and unsourced document that is entirely redacted except for a hearsay allegation apparently made by an unidentified source in 1994); AR879-85 (unidentified and unsourced document that refers to yet another unidentified document as providing a list of names obtained from an alleged Hamas "activist" in 1993); AR897-907 (eleven-page document that is entirely redacted except for a single sentence claiming that "it has been reported as early as 8/1/1994 by" a redacted individual that "the MB leadership in the United States has been instructed by its international leadership to obey the laws of the U.S. but to participate in the financial support of Hamas"). OFAC provides no explanation of how these documents relate to any charges alleged against KindHearts, or in the case of numerous documents that don't even mention KindHearts or that predate its formation, how they relate to KindHearts at all. It is simply impossible to respond to this unsubstantiated and anonymously sourced speculation. *AHIF*, 585 F. Supp. 2d at 1257 (OFAC violated due process when "a summary of OFAC's reasons for considering the designation prior to that decision would have saved [the designated charity] the effort of responding to imagined concerns and may have increased its likelihood of success").

2. OFAC Has Failed to Provide KindHearts with Adequate Process.

OFAC has also denied KindHearts a meaningful opportunity to respond, through a combination of actions that have served to delay the process unreasonably and to restrict the

tools KindHearts has to prepare and present a defense. For example, in June 2007, KindHearts' counsel sent a detailed 28-page legal and factual rebuttal of what counsel guessed OFAC's concerns to be, including a response to the documents that OFAC had disclosed as part of the provisional designation administrative record. AR1562-601. That letter was accompanied by, and its text repeatedly referred by specific Bates numbers to, 1,369 pages of exculpatory documents that KindHearts provided to OFAC for inclusion in the administrative record. *See* AR1568, 1571-73, 1577-78. OFAC never responded to the substance of the letter. On December 9, 2008, *eighteen months* after KindHearts sent the letter and the exculpatory documents, counsel for OFAC informed counsel for KindHearts for the first time that OFAC had no record of receiving the 1,369-page submission. *See* Second Declaration of Alan R. Kabat ¶¶ 2-4 & Ex. A, dated Feb. 2, 2009 ("Kabat Decl. II") (enclosing courier receipt showing delivery of the documents to OFAC in June 2007). It does not appear that any OFAC employee even read the 28-page letter or surely she or he would have asked for the specific exculpatory documents referred to in that letter before now.[19]

OFAC also failed to consider potentially exculpatory information in the government's exclusive possession, to which KindHearts as yet has had no access. In both 2006 and 2007, KindHearts emphasized to OFAC how important it was for the agency to consider (and KindHearts to have access to) all of the documents seized by the government. *See* AR597D (April 24, 2006 letter); AR1562, 1567-68 (June 25, 2007 letter). But as the government recently admitted in the context of this litigation, OFAC has only examined a subset of the "paper

[19] The government's recitation of the procedural history of this case at the agency level fails to convey that OFAC entirely ignored the substantive legal and factual arguments made by KindHearts until *after* this lawsuit was filed. KindHearts' counsel have sought since 2006 to raise key legal and factual issues with OFAC. *See, e.g.*, AR572-80 (February 24, 2006 letter seeking advice from OFAC regarding payment of attorneys' fees); AR597A-G (lengthy substantive response to OFAC's freeze of KindHearts pending investigation, submitted on April 24, 2006); AR1562-601 (lengthy response to OFAC's threatened designation of KindHearts, submitted on May 25, 2007); SOF ¶¶ 16, 19. While OFAC has responded to ministerial or procedural queries, it has never responded to KindHearts' legal and factual arguments.

documents that were seized" from KindHearts, and none of the *electronic* documents seized. Szubin Decl. ¶ 50; *see also* Declaration of Fritz Byers ¶ 4, dated Nov. 21, 2008 ("Byers Decl.").[20] OFAC's repeated and willful refusal to act upon KindHearts' request that OFAC review all documents seized by the government (and provide them to KindHearts) violates both KindHearts' due-process rights and OFAC's obligations under the APA.

OFAC further undermined KindHearts' ability to present a response by delaying its own actions in this process. KindHearts first requested that OFAC declassify classified materials in the administrative record on June 27, 2007. AR1603. OFAC agreed to do so on August 10, 2007, but did not even refer the documents for declassification for another four months (December 2007), Szubin Decl. ¶ 42, and reported no progress until December 12, 2008, when it finally released to KindHearts approximately 300 pages of declassified records.[21] Aside from the PD and FPI Memoranda and an internet article, AR8-32-DC, 652-83, 439-49, only about 34 pages of the 300 contain any declassification whatsoever. It is difficult to understand why declassifying these 300 pages took 18 months, and OFAC has offered no explanation. By way of comparison, in an equivalent amount of time and in compliance with a judicial order to process and produce documents responsive to a request by the ACLU under the Freedom of Information Act, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y.), the government released approximately 50,000 pages of documents relating to U.S. interrogation practices in Iraq,

[20] In a footnote, Szubin states that both OFAC and KindHearts now have access to the "full search take" in the possession of the U.S. Attorney's Office. Szubin Decl. ¶ 50 n.7. As this Court recognized in its recent order vacating the protective order, this statement is false. KindHearts has not been permitted access to any electronic documents seized from its office and the office of its President. Order, *In re Search of KindHearts for Charitable Humanitarian Dev., Inc.*, No. 3:06-MJ-7019 (N.D. Ohio Jan. 30, 2009)).

[21] OFAC released the declassified documents to KindHearts in three batches. The bulk of the documents were provided on December 12, 2008, with two supplemental productions on December 22, 2008 and January 8, 2009. The 300 pages are contained in approximately 30 exhibits, and there are approximately 60 exhibits in the administrative record that are still entirely redacted. KindHearts has no way of knowing the combined length of those exhibits. OFAC admits that it did not begin the declassification process for documents supporting its FPI decision until after this lawsuit was filed. Gov't Br. at 12 n.6.

Afghanistan, Guantánamo Bay, and other locations, many of which were subjected to declassification review.

The government claims that KindHearts has contributed to the delay by asking for "additional time and additional process." Gov't Br. at 51. But the government fails to acknowledge that it is responsible for *all* the delay between the initial freeze in February 2006 and its threatened designation 15 months later, in May 2007—a period of time in which KindHearts sought no extensions whatsoever. *See* SOF ¶ 14-16; *supra* Part II.B.5. KindHearts has asked for extensions of time to respond since the May 2007 threatened designation, but that is because OFAC has forced KindHearts to spend time fighting to obtain even the limited process it has received. For example, in response to KindHearts' request for copies of its own seized documents, OFAC waited two months before informing KindHearts that it should redirect its request to the U.S. Attorney's Office. *See* AR1560-61, 1618-19. And as discussed above, OFAC did not declassify the administrative record or provide the PD Memorandum until after KindHearts filed suit, and eighteen months after OFAC first threatened to designate KindHearts. *See supra* Part III.C.2. In yet another example, OFAC did not issue KindHearts a license to use its own documents in its own defense until December 26, 2007, nearly two years after it froze KindHearts. *See* AR1647-50. OFAC's delays cannot be attributed to KindHearts.[22]

In sum, OFAC has violated KindHearts' due process rights by denying it notice of the legal and factual bases for the threatened designation, the documents KindHearts needs for its defense, and a meaningful opportunity to have its defense heard. These violations have not been, as the government suggests, harmless, because OFAC's actions have seriously prejudiced KindHearts' ability to respond to OFAC's proposed designation.

[22] OFAC suggests that if KindHearts wanted more "prompt" process, it should have brought an APA action for issuance of a final agency action. Gov't Br. at 51 n.43. But KindHearts' interest is in a prompt and *fair* process, not in a prompt decision with *inadequate* process.

3. OFAC's Threatened Designation of KindHearts on the Basis of Classified Evidence Violates Due Process.

The government also violated due process and the APA by resting its threatened designation on classified evidence, without providing KindHearts or its counsel with adequate substitutes or reasonable alternatives.[23]

That IEEPA authorizes the use of secret, classified evidence, Gov't Br. at 53, does not affect the *constitutional* question whether such use violates due process. The Ninth Circuit's decision in *American-Arab Anti-Discrimination Committee v. Reno* (*ADC*), 70 F.3d 1045, 1070 (9th Cir. 1995), is particularly instructive:

> Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process. We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved.[24]

The circumstances here are, if anything, more compelling than in *ADC*. That case involved aliens who were illegally present in the United States, and who sought an immigration benefit—amnesty. By contrast, KindHearts is a charity lawfully present and constituted under

---

[23] For the same reasons, KindHearts objects on constitutional grounds to this Court's consideration of any information or argument presented by the government *ex parte* and *in camera* in this Court. The government has filed classified evidence under seal and a brief that includes sections—of undisclosed length—that have been redacted from the brief served on KindHearts. In the first place, the classified evidence is presumably included in support of the government's merits-based defense of its decision to designate KindHearts, and it is premature for the Court to adjudicate the merits for the reasons set forth above, *supra*, Part II.D.. Second, KindHearts' due process rights include the right to confront the evidence used against it in this Court, as well as before OFAC in its administrative determinations, and therefore KindHearts respectfully urges the Court to refuse to consider the government's classified evidence on due process grounds, especially in light of OFAC's refusal to permit less-restrictive alternatives, including giving KindHearts' counsel access to the documents subject to a security clearance.

[24] OFAC's suggestion that this was a statutory, not a constitutional, decision, is belied by the language of the decision itself, which expressly finds that the government's reliance on secret evidence violated due process. 70 F.3d at 1066, 1070 (holding, in a section of the brief entitled "THE DUE PROCESS CHALLENGE TO THE USE OF CLASSIFIED INFORMATION," that "the district court did not err in deciding that use of undisclosed classified information under these circumstances violates due process").

the laws of the United States that has never been found to have violated any laws. And instead of merely denying KindHearts a benefit, the government has effectively closed the charity down, frozen all of its property, criminalized all transactions with it, and threatened to stigmatize it further as a "specially designated global terrorist," based primarily on evidence to which KindHearts has no access and against which it cannot defend itself.

The cases on which the government relies are not persuasive. The government does not address the fact that the D.C. Circuit in *HLF*, 333 F.3d at 164, did not undertake the due process balancing analysis required by *Mathews*, 424 U.S. 319. And none of the other cases to which the government points—*Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *Peoples Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003); *Patterson v. Fed. Bureau of Investigation*, 893 F.2d 595 (3d Cir. 1990); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001)—involved the designation process under IEEPA.[25]

Most importantly, none of the cases upon which the government relies addressed the possibility of alternatives that might more fairly balance the government's interest in confidentiality and KindHearts' interest in fair adjudication. The government does not dispute that there are ways to provide KindHearts with a more fair opportunity to contest the classified evidence, including an adequate unclassified summary and authorizing counsel with security clearances to view and respond to the classified evidence. Nor does the government contend that these options would impair any of its interests.

Instead, the government simply insists that no court has yet required OFAC to provide "alternative procedure, such as granting Plaintiff's counsel security clearances." Gov't Br. at 56. Although no court has yet required this procedure in a case against OFAC, neither has any court

[25] The court in *GRF*, 315 F.3d at 754, addressed a different question—whether the statute's authorization to the *district court* to consider classified evidence *ex parte* and *in camera* violated due process. And, as in *HLF*, the court engaged in no analysis or *Mathews v. Eldridge* balancing.

declined to require such a process. The issue has not been presented. And similar mechanisms are routinely employed in a variety of other contexts implicating national security concerns. OFAC offers no explanation as to why such procedures could not be used here.

Recently, for example, a federal judge ordered the government to provide counsel for a charity designated as an SDGT with security clearance in order to effectively litigate the case on their client's behalf. *In re Nat'l Sec. Agency Telecomms. Records Litig.* (*AHIF II*), MDL Docket No. 06-1791, at *22-23 (N.D. Cal. Jan. 5, 2009) (attached as Kabat Decl. II Ex. C). The plaintiffs in that case, the charity AHIF and two of its counsel, brought a challenge to the government's warrantless electronic surveillance of their communications. After balancing the need to protect classified information with the ability of "plaintiffs to prosecute their action," the court in *AHIF II* found that it would violate due process for the litigation to continue essentially *ex parte*, without participation by AHIF's counsel. *Id*. The D.C. Circuit has also ordered security clearances for petitioners' counsel in the Guantánamo Bay detention cases, despite the government's assertions in those cases that the detainees are "enemy combatants" and threats to U.S. security interests. Finally, the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, provides clear precedent for balancing the interests of due process and confidentiality.

Providing KindHearts' counsel with access to classified evidence after the appropriate security clearances would improve adversarial testing of the evidence and reduce the risk of error at little or no cost to the government's interest in confidentiality. Indeed, the government already allows access to such evidence for lawyers with security clearances on its side of the dispute. It has made no showing why the same access cannot be provided to lawyers with security clearances acting on KindHearts' behalf.[26]

[26] Although the government has conducted a declassification review of the classified evidence it has against KindHearts, it appears from the newly declassified portions of the documents that the documents were, and likely

OFAC's use of secret evidence in KindHearts' case violates KindHearts' due process rights.

4. The Government's Restrictions on KindHearts' Ability to Present a Defense Violate Due Process.

i. The Government's Restrictions on KindHearts' Access to Its Own Documents Are Unreasonable.

For close to three years, the government refused to provide KindHearts with access to its own documents, which are the core of its defense against OFAC's freeze and threatened designation. While this Court's January 30, 2009 decision has now ordered the government to disclose to KindHearts copies of all of KindHearts' own seized documents without imposing unreasonable restrictions, KindHearts is still subject to similarly onerous restrictions imposed by OFAC's license. SOF ¶¶ 24-25; Gov't Br. at 57; Szubin Decl. ¶¶ 52, 54. OFAC has licensed KindHearts' counsel to receive and use KindHearts' documents, but subject to two conditions: (i) copies of KindHearts' documents provided by the government to KindHearts' counsel may only be reviewed by KindHearts' representatives under counsel's supervision,[27] and (ii) KindHearts' counsel must identify to OFAC any of KindHearts' documents it receives from former employees in the course of preparing its defense of KindHearts. AR 1699-701.

OFAC's requirement that KindHearts' representatives (located in Ohio, California, and Lebanon) review copies of its business documents—none of which are classified—under the supervision of counsel (who are located in Washington, D.C., New York, and Ohio) violates

---

remain, over-classified. *See, e.g.*, AR8-9-DC, 652-53 (newly declassified information provides statutory background and publicly available information about KindHearts); AR10-12-DC, 654-56 (newly declassified information concerns general background information about Hamas and the Muslim Brotherhood dating, in parts, to the 1920s, 1980s, and 1990s); AR665 (newly declassified information describes the public federal indictment of an individual); AR669 (newly declassified information describes the U.S. Senate Finance Committee's publicly conducted probe into the finances of U.S. charities). In other words, the government originally "classified" large swaths of publicly available information that should not have been classified in the first place.

[27] Consistently with OFAC's past practice, KindHearts expects OFAC would issue a license to KindHearts' counsel authorizing the receipt of the documents released by the Court's January 30, 2009 order. To the extent that license includes similarly onerous conditions, KindHearts expects to challenge those conditions.

KindHearts' due process and Sixth Amendment rights for the same reasons the Protective Order did. Order at 7-9, *In re Search of KindHearts for Charitable Humanitarian Dev., Inc.*, No. 3:06-MJ-7019 (N.D. Ohio Jan. 30, 2009); *see also* Pl. Br. at 46-48.

The government's restriction on KindHearts' ability to obtain information in its defense from former employees and other third parties is similarly unjustified. Disclosure to OFAC—the adverse party—of information about documents KindHearts' counsel obtain in the course of preparing its defense prejudices KindHearts' ability and right to defend itself. The government now claims that the disclosure requirement is as simple as stating that counsel possess three boxes of KindHearts' documents. Gov't Br. at 58. But this is at least the third variation of the disclosure requirement that OFAC has announced. *See also* SOF ¶¶ 24-25. The parameters of the obligation remain impermissibly unclear and subject to OFAC's whim, especially given that the plain terms of the regulation—to which OFAC originally cited in support of its burdensome disclosure requirement, SOF ¶ 24—require additional disclosures beyond the mere enumeration of boxes. 31 C.F.R. § 501.603(b)(ii) (requiring reports on blocked property to describe the owner, the property, its location, and contact information for the holder of the property).

ii. OFAC's Restrictions on KindHearts' Use of Its Own Funds Are Unreasonable.

Throughout the two years after OFAC froze KindHearts' assets in February 2006, it radically restricted KindHearts' right to defend itself by barring it from using its own funds to pay for its challenge to OFAC's actions against it. SOF ¶ 26. KindHearts has a due process right to a meaningful opportunity to respond to OFAC's actions, but by seizing all its assets and restricting its ability to spend those assets on its response, OFAC has directly infringed upon KindHearts' due process rights.

In June 2008, after its attorney fees policy was challenged in the *AHIF* litigation, OFAC belatedly revised its policy on the use of frozen funds by blocked entities to pay for legal fees and costs. *See* AR1681-82 (undated OFAC letter to KindHearts' counsel describing recent finalization of new policy); AR1704-06 (OFAC's new policy). The new policy continues to impose severe and arbitrary restrictions, permitting KindHearts to pay only two lawyers an aggregate cap of $38,000 for all administrative and judicial challenges (including appeals) to designation. AR1706. As KindHearts argued in its opening brief, these restrictions, combined with OFAC's seizure of the *entirety* of KindHearts' assets, are arbitrary and capricious and unconstitutionally infringe on KindHearts' due-process right to meaningfully respond to OFAC's freeze and threatened designation. *See* Pl. Br. at 48-43. The restrictions have no correlation to the costs of a meaningful defense against OFAC's actions, and they impermissibly place OFAC in the driver's seat of KindHearts' defense. In response, the government makes four arguments, none of which justify OFAC's intrusion on KindHearts' right to defend itself against OFAC's actions.

First, the government argues that KindHearts has no constitutional right to use its funds to pay for its legal defense. Gov't Br. at 70. This argument is predicated on a mistaken premise. The critical right at stake for KindHearts is not merely, as the government suggests, a generic entitlement to counsel in civil matters, or simply a general right to pay counsel (although both rights are implicated here). Instead, OFAC's wholesale freeze of KindHearts' assets triggers a due process right, and the restrictions on using KindHearts' own funds to defend itself violate that right. *See* Pl. Br. at 49.

KindHearts' due process right to defend itself is distinguishable from the Sixth Amendment right at issue in the criminal cases cited by the government. *See Caplin & Drysdale,*

Chartered v. United States, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989); *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005). In those cases, the Supreme Court rejected the claims of criminal defendants that the Constitution guarantees them the right to use criminally forfeitable assets to pay for their criminal defense. *See, e.g.*, *Caplin & Drysdale*, 491 U.S. at 632. The fundamental distinction between those cases and this one, however, is that criminal defendants "who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Id.* at 624. In other words, they are protected by a right to demand representation at government expense should criminal forfeiture leave them insolvent. KindHearts, in contrast, must rely upon its own assets to defend against OFAC's actions.[28]

The government's reliance on *Beobanka D.D. Belgrade v. United States*, No. 95 Civ. 5138 (HB), 1997 WL 23182 (S.D.N.Y. Jan. 22, 1997), and on *AHIF*, is similarly unpersuasive. As an initial matter, the government does not address the crux of KindHearts' distinction of *Beobanka*. *See* Pl. Br. at 50 n.23. That case involved a designated entity's attempt to use blocked funds in *other* litigation, not the entity's due process right to defend itself against OFAC's freeze. *Beobanka*, 1997 WL 23182, at *1. The distinction makes all the difference because KindHearts' claim here is that OFAC may not impose upon it a severe deprivation of property and at the same time prohibit KindHearts from using its assets to respond to *that deprivation*. The court in *AHIF* failed to recognize the distinction.[29] *See AHIF*, 585 F. Supp. 2d

[28] For this reason, the government's citation to *Anderson v. Sheppard*, 856 F.2d 741 (6th Cir. 1988) for the proposition that civil litigants do not have a right to government-provided representation also does not help it. KindHearts does not make such a claim.

[29] The court in *AHIF* also relied upon another case, *Federal Sav. and Loan Ins. Corp. v. Ferm*, 909 F.2d 372 (9th Cir. 1990), which also presents a factually distinct scenario. *Ferm* involved a challenge to a *district court's* (and not an agency's) monitoring of the use of frozen assets in defense of individuals charged with fraud and a conspiracy to defraud. *Id.* at 373-75. Moreover, *Ferm* is a criminal case and is distinguishable for the same reasons that *Caplin & Drysdale* does not apply here.

at 1270. In any event, the constitutional conclusion in *AHIF* is dicta because the court found OFAC's fee limitations to be arbitrary and capricious as applied to AHIF. *Id.* at 1272.[30]

Second, the government incorrectly argues that OFAC's fee policy represents a reasonable balance of interests. Gov't Br. at 72-73; *see also* Pl. Br. at 50-53. According to the government, OFAC's policy is reasonable in part because OFAC does not "sift through" KindHearts' legal invoices and "only" pays fees up to a capped amount. Gov't Br. at 72-73. But this argument ignores the primary vice in the scheme: it is *OFAC* that sets the level of compensable fees in the first instance, giving it complete control over how much a party adverse to it may spend in challenging its own actions. *See* Pl. Br. at 50. Moreover, OFAC is free to change its fee policy at any time, as it has done during this litigation, SOF ¶ 26-27, making its control over KindHearts even more unfettered and constitutionally problematic. Decisions about fee caps should be made by a court, not the administrative agency whose actions are being challenged.

The government also claims its actions are reasonable because its goal is to prevent the dissipation of assets pending investigation. AR3; Gov't Br. at 67. Allowing the use of those assets to pay for reasonable attorneys' fees and costs does not interfere with that goal, however, or any other legitimate interest of the government. Rather, the payment of legal fees serves the vital interests of KindHearts as well as the public in testing OFAC's actions and ensuring that only properly frozen entities are targeted.

The government claims that frozen funds must be preserved for purely speculative and hypothetical ends, such as use by the President as a negotiating tool or to deprive a "sanctioned"

[30] The *AHIF* court found OFAC's fee limits arbitrary and capricious because OFAC's own actions had caused unnecessary additional litigation, by failing to give AHIF adequate notice and by taking other procedurally unorthodox steps. *Id.* at 1272. Similar problems infect OFAC's actions against KindHearts, which are also arbitrary and capricious. *See supra* Parts II.B, III.C.

entity of the use of its property, or for future legal judgments; it does not explain how, even if those interests validly applied to KindHearts, the payment of *reasonable* fees would intrude upon the interests.[31] The government also ignores that those interests are only ripe after a properly reviewed and procedurally constitutional determination of wrongdoing, which OFAC's restrictions on KindHearts' defense prevent.

Finally, the government cannot justify its particular limits on fee amounts or the number of attorneys who may be paid. *See* Kabat Decl. II ¶¶ 6-7, Ex. B; Pl. Br. at 51-53 (discussing costs incurred in other SDGT cases); *see also AHIF*, 585 F. Supp. 2d at 1272. The caps bear no relationship to the cost of a meaningful defense, or to the resources the government itself uses in defending such challenges. Declaration of Alan R. Kabat ¶¶ 9-10, dated Nov. 20, 2008 ("Kabat Decl."). The government offers literally no evidence whatsoever to support the adequacy of its caps.

The government cannot defend its limitation of payment to two attorneys, particularly in light of its own employment of many more, including attorneys from multiple agencies such as the Department of Justice, OFAC, the State Department, and the Federal Bureau of Investigation, in defending such challenges. Kabat Decl. ¶¶ 12-14. In another display of its unfettered and arbitrary discretion, the government now suggests that OFAC's fee policy refers only to "representation by a hypothetical two attorneys" and that KindHearts may pay as many attorneys as it wants up to the capped amount. *See* Gov't Br. at 72. This new position flies in the face of

[31] The cases the government cites in support of its argument that the executive branch has unfettered discretion to use a frozen entity's assets as a negotiating tool are simply inapplicable here. In each of those cases, the courts discussed the President's ability to negotiate with a *specific foreign government* as partial justification for limitations on the use of the assets. *See Dames & Moore v. Regan*, 453 U.S. 654, 670-74 (1981) (discussing the use of Iranian assets as a "bargaining chip"); *Tran Qui Than v. Regan*, 658 F.2d 1296, 1305-06 (9th Cir. 1981) ("Because the [Provisional Revolutionary Government of Vietnam] is in a position to assert an interest in the Bank's assets held in this country, it is conceivable that the United States could use the blocked funds as a diplomatic negotiating tool."); *Miranda v. Sec'y of Treasury*, 766 F.2d 1, 4 (1st Cir. 1985) (discussing the use of "blocked funds for negotiation purposes in discussions with the Cuban government"). No such interests are implicated in the case of KindHearts, a domestic U.S. corporation.

the plain language of the policy, which references the payment of "up to a maximum of two" attorneys numerous times. AR1705-06. Moreover, the new position contradicts OFAC's June 2006 letter to KindHearts' counsel, in which OFAC specifies that "only two attorneys for KindHearts would be eligible to apply for the limited payment from blocked funds," and that KindHearts must notify OFAC "as to which two attorneys, if any," should be paid from the blocked funds. AR1681; *see also AHIF*, 585 F. Supp. 2d at 1272 (recognizing that OFAC's policy "limits the number of attorneys who are paid out of blocked funds").

Third, the government argues that KindHearts' challenge to the fee policy is not ripe because KindHearts has not yet been denied a request for fees. Gov't Br. at 69. That argument fails because KindHearts is not challenging a fee-denial; it challenges the fee policy itself as unconstitutional and arbitrary and capricious.[32] Moreover, OFAC's issuance of a fee policy is certainly challengeable agency action within the meaning of the APA, and KindHearts' status as a frozen entity incurring legal fees presents a case of real and redressable injury.

The government's **fourth** and final argument—that KindHearts has not been prejudiced by the fee policy because it is represented by seven attorneys—is frivolous and effectively faults KindHearts for finding counsel willing to represent it despite an unconstitutional limit on its use of its own funds to compensate counsel. The government's argument sets up an impermissible Catch-22 because corporations cannot represent themselves *pro se* or through their officers; they may only appear in federal court through counsel. *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202 (1993) ("a corporation may appear in the federal courts only through licensed counsel"); *Ginger v. Cohn*, 426 F.2d 1385, 1386 (6th Cir. 1970). The fee

[32] The cases cited by the government on this point are inapposite. *HLP II* involved organizations that had not been frozen or targeted by OFAC, and the court simply held the organizations lacked standing, 463 F. Supp. 2d at 1072, and *Freedom to Travel* declined to address the validity of a provision of a regulation that OFAC had never relied upon, 82 F.3d at 1441. KindHearts, in contrast, has been frozen and contends that the fee policy is unconstitutional and arbitrary and capricious.

policy's arbitrary and unreasonable restrictions prevent frozen corporations from using their own assets to retain counsel, and thus require those entities to seek either *pro bono* representation or counsel willing to take on representation and the risk of an unsuccessful challenge to the fee policy. KindHearts was able to retain counsel willing to proceed on the possibility of future payment, even though they have not yet been paid a cent. Because of the burden the policy imposed, KindHearts' counsel eventually had to seek *pro bono* assistance from the ACLU. *See* Kabat Decl. II ¶ 6. To fault KindHearts' efforts to find counsel willing to put off their right to compensation and *pro bono* services when they proved necessary would effectively insulate the fee policy from any form of judicial review.

OFAC's fee policy is unconstitutional and arbitrary and capricious. OFAC's simultaneous ability to impose the most severe deprivation of property and liberty upon a corporation and to deny it access to its assets necessary for a meaningful defense, violates KindHearts' right to due process.

D. OFAC's Designation Authority Violates the Fourth Amendment.

OFAC's authority to designate under the Executive Order violates the Fourth Amendment for the reasons set forth *supra* Part II.C and in KindHearts' opening brief. Pl. Br. at 53-54.

IV. IEEPA DOES NOT AUTHORIZE THE FREEZE OR DESIGNATION OF KINDHEARTS.

The government does not dispute that before 1995, no President had ever employed economic sanctions except as a tool of nation-to-nation diplomacy. The government also does not dispute that since Congress passed the Trading With the Enemy Act in 1917, only nation-targeted sanctions were imposed under it. It does not dispute that IEEPA was designed to *restrict* that power, not to expand it. And it does not dispute that for its first seventeen years on

the books, IEEPA was employed only for nation-targeted sanctions. Nonetheless, it argues that the executive branch should be free to use IEEPA outside the context in which it was enacted, to target not nations as a matter of diplomacy, but disfavored individuals and groups, including domestic charities like KindHearts.

The government objects that construing IEEPA in accordance with its language, purpose, and legislative history would leave the President "powerless to impose economic sanctions" against Osama bin Laden, al-Qaeda, and other terrorists. Gov't Br. at 28. That is simply not the case; the President has a variety of tools at his disposal to address terrorism and terrorist acts. For example, Congress has authorized the President to use "all necessary and appropriate military force" against al-Qaeda, an authorization that on its face would support actions against al-Qaeda and Osama bin Laden. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) .. Congress has also specifically granted the executive branch power to designate "foreign terrorist organizations" and to criminalize material support to them—but under an entirely different statute, 18 U.S.C. § 2339B, which the government fails to mention. Moreover, a finding that IEEPA was not intended to target individuals and groups outside the context of nation-targeted sanctions would still leave Congress free to enact such legislation—if it so chose. Such a finding would simply require Congress to actually address that issue, which it did not do in enacting IEEPA. Given the grave constitutional implications that the power the government asserts would pose— the power to blacklist anyone the executive branch chooses, without trial, without a hearing, without any finding of wrongdoing—the Court should not find that Congress authorized such power unless it does so expressly. It did not do so in IEEPA.

The government seeks to justify the power it claims for the executive branch in IEEPA by pointing to post-1995 statutes, Gov't Br. at 29 n.23, but it is black letter law that one cannot

discern the intent of the 1978 Congress that enacted IEEPA by looking to actions that post-date enactment. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980). Similarly, the government's argument that Congress's amendment of IEEPA, since 1995 and since President Bush issued E.O. 13,224, indicates Congress's approval of its use to "target non-state actors," Gov't Br. at 29 n.23, also fails. The government cites no evidence that Congress even considered the propriety of the sanctions at issue here, and instead asks this Court to presume such consideration and approval from *silence*. *United States v. Wells*, 519 U.S. 482, 496 (1997) ("we have 'frequently cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."'" (quoting *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-30 (1971))). The key point is that Congress has never amended the IEEPA language permitting sanctions against "a foreign country or a national *thereof*." 50 U.S.C. § 1702(a)(1)(A)(ii).

The government's reliance on *Dames & Moore*, 453 U.S. 654, Gov't Br. at 29, similarly misses the mark. In *Dames & Moore*, the Court found that the actions taken by the President were authorized by specific language permitting him to "transfer" and "nullify" holdings in connection with a *nation-targeted* sanction against Iran. *Id.* at 660-63. KindHearts acknowledges that two courts have held that IEEPA properly authorizes designation, but for the reasons set forth in KindHearts' opening brief, Pl. Br. at 55, it respectfully disagrees with the courts' analyses in those cases, which are not binding here.

Finally, the government argues that the construction proposed by KindHearts would not save the statute from its constitutional infirmities. Gov't Br. at 28 n.22. But such a result would allow the Court to avoid resolution of constitutional questions in this case, and that is all the

doctrine of avoidance requires. *United States v. Perry*, 360 F.3d 519, 536 (6th Cir. 2004) ("we must construe statutes to avoid constitutional doubt when it is reasonably possible to do so.")

Moreover, most of the constitutional challenges KindHearts raises stem from the fact that the government has employed IEEPA for purposes it was never designed to serve—to target disfavored groups and individuals, without any connection to a nation-based economic sanction. The language, history, and purpose of IEEPA all confirm that it was intended to impose additional limits on the President's power to impose economic sanctions on nations, and not to give the President unprecedented power to blacklist groups. If IEEPA is construed consistently with its language, history, and purpose, the freeze and threatened designation of KindHearts are invalid on statutory grounds, and this Court need not reach KindHearts' constitutional claims.

Given the statutory language, the restrictive purpose of the statute, its legislative history, and the grave constitutional concerns that would be raised by construing IEEPA to give the President carte blanche to blacklist disfavored groups, this Court should rule that IEEPA authorizes only economic sanctions targeted at nations, and that therefore E.O. 13,224 is invalid with respect to KindHearts.

V. THIS COURT SHOULD LIFT THE FPI AND EITHER PERMANENTLY ENJOIN THE THREATENED DESIGNATION OR ENJOIN IT UNTIL OFAC HAS PROVIDED KINDHEARTS WITH CONSTITUTIONALLY ADEQUATE PROCESS.

The government does not dispute that if KindHearts prevails on its legal challenges, the Court has authority to vacate the FPI and enjoin OFAC from freezing or designating KindHearts in the future unless it satisfies constitutional dictates. Yet it argues that the Court should not lift the freeze, even if its actions have been unconstitutional.

OFAC has frozen KindHearts' assets and effectively shut it down for nearly three years under an unconstitutional statute that guarantees neither adequate notice of the basis for its

actions or a meaningful opportunity to respond. The government should not, as the government requests, simply give OFAC another chance by leaving the FPI in place and "remanding" the matter back to the agency. Three years is enough.

OFAC's concern that vacatur of the freeze would not preserve its control over KindHearts' assets or would be dangerous, Gov't Br. at 75-76, is without basis. Most conspicuously, this concern ignores the fact that, after three years of investigation, neither OFAC nor the Department of Justice has designated or indicted KindHearts. More fundamentally, OFAC's concern misunderstands the basis of its authority. Neither a freeze pending investigation nor an SDGT designation amounts to a determination worthy of any deference *unless* subjected to and validated by "the crucible of adversary proceedings." Order at 9, *In re Search of KindHearts for Charitable Humanitarian Dev., Inc.*, No. 3:06-MJ-7019 (N.D. Ohio Jan. 30, 2009). OFAC has through its own actions prevented any such testing of its theories, and this Court should therefore reject its after-the-fact plea for *de facto* validation. Finally, the government's remaining arguments, at their core, attack the Court's authority to fashion a remedy tailored to the wrong OFAC committed against KindHearts.[33] The violation here is ultimately quite simple, albeit severe, and the remedy is also simple and well within this Court's authority: the FPI should be vacated. *See GRF*, 315 F.3d 750-51 (court could lift OFAC's freeze if it so chose).

Should the Court find that the process afforded by OFAC with respect to the threatened designation falls below constitutional standards, the appropriate remedy is fully outlined in

[33] The government's sole support for its argument that lifting the freeze might be dangerous is a concern created by the government's own conduct. KindHearts believes that amounts in its overseas accounts dissipated, Compl. ¶ 46, and that is because once OFAC froze KindHearts, its Board of Directors in the United States no longer had any control over overseas accounts or branches. KindHearts' board could not ensure funds in overseas accounts were spent for charitable purposes, nor could they know what would happen to those funds—the board could take no action.

KindHearts' opening brief. Pl. Br. at 56-57. KindHearts respectfully suggests that the Court enjoin any designation pending the Court's determination of the constitutionally required process due to KindHearts, and OFAC's provision of that process.

CONCLUSION

KindHearts respectfully asks the Court to grant its motion for partial summary judgment on Counts I through VII and to deny the government's motion to dismiss and cross-motion for summary judgment.

Dated: February 2, 2009

Respectfully submitted,

/s/ Hina Shamsi

HINA SHAMSI
(admitted *pro hac vice*)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 519-7886
Fax: (212) 549-2583
hshamsi@aclu.org

FREDRICK BYERS
(Ohio Bar No. 0002337)
The Spitzer Building, Suite 824
520 Madison Avenue
Toledo, OH 43603
Telephone: (419) 241-8013
Fax: (419) 241-4215
fbyers@cisp.com

DAVID D. COLE
(admitted *pro hac vice*)
Georgetown University Law Ctr.
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 662-9078
cole@law.georgetown.edu

LYNNE BERNABEI
(admitted *pro hac vice*)
ALAN R. KABAT
(admitted *pro hac vice*)
Bernabei & Wachtel, PLLC
1775 T Street, N.W.
Washington, D.C. 20009
Telephone: (202) 745-1942
Fax: (202) 745-2672
bernabei@bernabeipllc.com

JEFFREY M. GAMSO
(Ohio Bar No. 0043869)
CARRIE L. DAVIS
(Ohio Bar No. 0077041)
American Civil Liberties Union of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, OH 44103
Telephone: (216) 472-2220
Fax: (216) 472-2210
jmgamso@acluohio.org

Counsel for KindHearts for Charitable Humanitarian Development, Inc.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Reply Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment and Its Memorandum in Opposition to Defendants' Motion to Dismiss, or in the Alternative, For Summary Judgment on All Counts and a supporting declaration were filed electronically this 2nd day of February 2009. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties.

/s/ Hina Shamsi
HINA SHAMSI
(admitted *pro hac vice*)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 519-7886
Fax: (212) 549-2583
hshamsi@aclu.org