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

KINDHEARTS FOR CHARITABLE HUMANITARIAN DEVELOPMENT, INC., Plaintiff, v. HENRY M. PAULSON, 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 MICHAEL B. MUKASEY, in his official capacity as the Attorney General of the United States, Defendants.	Civil No. 3:08-cv-2400 Chief Judge James G. Carr

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

On February 19, 2006, more than two and a half years ago, the Treasury Department's Office of Foreign Assets Control ("OFAC") froze all the assets of KindHearts for Charitable Humanitarian Development, Inc. ("KindHearts"), a non-profit corporation based in Toledo, Ohio. OFAC effectively shut KindHearts down—without notice, a hearing, a statement of reasons, any finding of wrongdoing, any time limit on the freeze, any judicial process, and without specifying or meeting any statutory criteria—simply by asserting that KindHearts was "under investigation." More than a year later, OFAC further threatened to designate KindHearts as a "specially designated global terrorist" ("SDGT"), again without providing the charity with adequate notice or a meaningful opportunity to defend itself. To this day, KindHearts' assets remain frozen and its operations shut down, even though it has never been charged with any wrongdoing. Since freezing KindHearts' assets, OFAC has taken a number of actions that make it impossible for KindHearts to defend itself, including: failing to notify KindHearts of the specific charges or factual allegations that might warrant its designation; relying almost exclusively on classified evidence without affording KindHearts a meaningful opportunity to respond; and seizing all of KindHearts' records and assets and then placing untenable restrictions on its ability to access its records, pay for its own defense, or conduct its own investigation.

KindHearts now moves for summary judgment on Counts I through VII of its complaint. It asks the Court to find that OFAC's freeze of its assets, the threatened designation, and OFAC's limitations on KindHearts' ability to defend itself, violate KindHearts' constitutional rights. It also asks the Court to find that the freeze and threatened designation of KindHearts are not authorized by statute, a finding that would enable the Court to avoid most of the constitutional questions raised here. As a remedy, KindHearts asks the Court to lift the "freeze pending

investigation" that has shuttered KindHearts for two years and nine months, and to enjoin OFAC from designating KindHearts. In the alternative, KindHearts requests that the Court enjoin designation until OFAC has provided KindHearts with constitutionally adequate process.

OFAC claims the authority to take its draconian actions against KindHearts under the International Emergency Economic Powers Act ("IEEPA") and Executive Order 13,224, in which the President assumed the power to impose economic sanctions on any organization or individual that he or the Secretary of the Treasury designates an SDGT. IEEPA's text, purpose, and legislative history all show that the statute was not intended to impose sanctions on groups and individuals that have no nexus to a nation-targeted economic embargo. A provision of the USA Patriot Act grants even more authority to the executive branch: it authorizes OFAC to freeze an organization's assets *without* designating it or otherwise finding any wrongdoing, based on nothing more than OFAC's assertion that the entity is under investigation. Nothing in IEEPA, the Executive Order, or in the applicable regulations articulates any substantive criteria for OFAC's decision to impose a freeze "pending investigation," requires any procedural safeguards, or imposes any time limit on such freezes.

The constitutional infirmities of the freeze and designation regime were recognized by the 9/11 Commission staff, which wrote that "[u]sing IEEPA at all against U.S. citizens and their organizations raises potentially troubling civil liberties issues . . . ." [1] With respect to the power to freeze an organization's assets, the Commission staff added:

> IEEPA's provision allowing blocking "during the pendency of an investigation" is a powerful weapon with potentially dangerous applications when applied to domestic institutions. This provision lets the government shut down an organization without any formal determination of wrongdoing. It requires a single piece of paper, signed by a midlevel government official. Although in

[1] Nat'l Comm'n on Terrorist Attacks upon the United States, *Monograph on Terrorist Financing: Staff Report to the Comm'n* 112 (2004) (last visited Nov. 20, 2008), *available at* http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

> practice a number of agencies typically review and agree to the action, there is no formal administrative process, let alone any adjudication of guilt.[2]

A regime that gives a midlevel government official such open-ended power to shut down organizations virtually at will violates fundamental precepts of the First, Fourth, and Fifth Amendments.

The authority to enter a "freeze pending investigation" ("FPI") violates multiple constitutional guarantees, both on its face and as applied. Because it contains no substantive criteria whatsoever, in violation of the First and Fifth Amendments, the statute forces ordinary citizens to guess at what might prompt an FPI, and gives OFAC unfettered discretion to shut down organizations for any reason or no reason at all. Because it provides for no notice or opportunity to respond, the FPI authority violates the Fifth Amendment's procedural due process guarantees. And because it authorizes seizures without probable cause or a warrant, it also violates the Fourth Amendment. The FPI statutory provision is also unconstitutional as applied: OFAC has frozen KindHearts' assets for more than 33 months without any of the substantive criteria or procedural safeguards required by the Constitution. KindHearts respectfully asks this Court to vacate OFAC's freeze.

OFAC's SDGT authority is unconstitutional on its face and as applied for many of the same reasons as the FPI. The authority to designate is unconstitutional because it does not adequately limit the discretion of the executive branch, and OFAC's designation process has failed to afford KindHearts adequate notice of the charges against it, or a meaningful opportunity to respond to OFAC's threatened designation. OFAC has never identified *either* the provisions of the Executive Order that KindHearts may be designated under, or the factual basis for its threatened designation. OFAC is relying largely on classified evidence to which KindHearts has

[2] *Id.*

no meaningful way to respond. And OFAC has denied KindHearts any meaningful opportunity to defend itself by placing arbitrary restrictions on its ability to use its own documents and resources in its legal defense. In addition, like the ongoing FPI, a designation would be an unreasonable seizure in violation of the Fourth Amendment. For these reasons, if the Court finds the designation authority unconstitutional or otherwise facially invalid, KindHearts respectfully requests the Court to enjoin OFAC from designating KindHearts. In the alternative, if the Court finds the designation authority constitutional but finds the process afforded KindHearts thus far insufficient, it should enjoin OFAC from designating KindHearts unless and until OFAC has provided constitutionally adequate process. Designation as an SDGT would do lasting and irreparable harm to KindHearts' reputation, and should not be permitted on the basis of the drastically inadequate process provided to KindHearts so far.

It is important to emphasize that on this motion, KindHearts challenges the FPI authority, the designation authority, and OFAC's reliance on these authorities to freeze its assets for 33 months and to threaten it with designation. It does *not* challenge the substantive *merits* of any designation.

Finally, the Court can also grant KindHearts' motion on statutory grounds because neither the FPI nor the threatened designation are authorized by statute in this context. IEEPA was intended to restrict the President's power to impose embargoes and economic sanctions on *nations*, not to create an unprecedented authority to blacklist, at will, disfavored organizations and individuals that lack any nexus to an embargo targeted at a foreign country.

STATEMENT OF UNCONTESTED FACTS[3]

I. Statutory and Regulatory Framework.

1. Congress enacted IEEPA in 1977 to clarify and limit the President's power to impose economic sanctions on "any foreign country or a national thereof" during times of national emergency. 50 U.S.C. § 1702(a)(1)(A)(ii); *Markup Before the H. Comm. on Int'l Relations*, 95th Cong. 4-5 (June 17, 1977) (statement of Rep. Jonathan Bingham, Comm. Chair). Upon formal declaration of a national emergency, the President can impose economic sanctions and block or prohibit any transaction "involving . . . any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1)(B).

2. Violation of IEEPA can result in both civil and criminal penalties. *Id.* § 1705.

3. Before IEEPA was enacted, Presidents, acting pursuant to the Trading With the Enemy Act ("TWEA"), 50 U.S.C. app. §§ 1-44, had imposed embargoes and sanctions on nations for decades, but had never used the authority under the TWEA against individuals or groups except when incident to a nation-targeted sanction. IEEPA was enacted to impose restrictions on the President's nation-targeted embargo authority. *See* 50 U.S.C. §§ 1701-1707. From its enactment in 1978 until 1995, all sanctions and embargoes imposed under IEEPA were, as under the TWEA, targeted at nations and "nationals thereof," as IEEPA provided. An embargo on trade with Cuba, for example, might include an embargo on trade with Cuban businesses. But the IEEPA authority was not employed to target individuals and groups except as an incident to a nation-to-nation diplomatic sanction. In 1995, however, for the first time, President Clinton invoked IEEPA to impose sanctions against foreign organizations instead of a nation state. *See* Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (Jan. 23, 1995).

[3] Citations in this memorandum to the Statement of Uncontested Facts are in the format, SOF ¶ xx.

4. After the terrorist attacks of September 11, 2001, President Bush invoked IEEPA to issue Executive Order 13,224, which froze the assets of twenty-seven organizations and individuals, and blocked U.S. persons from engaging in any transaction with them. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) ("E.O. 13,224" or "Executive Order"). The Executive Order contained no statement why any of these entities or individuals had been singled out. The term "specially designated global terrorists," or SDGTs, used for those on the list, is not defined by statute, but is a unilateral creation of the executive branch.[4]

5. The Executive Order also authorizes the Treasury Department to add to the designated-entities list anyone "owned or controlled by," acting "for or on behalf of," or assisting or supporting or providing "financial, material, or technological support for, or financial or other services to" others on the SDGT list. The terms "material support"[5] and "other services" are not defined, although OFAC has issued a regulation that provides non-exclusive examples of prohibited "services," including "public relations, education, or other services." 31 C.F.R. § 594.406(b).

6. More broadly, the Executive Order authorizes designation of those "otherwise associated" with designated persons. E.O. 13,224 § 1(c)-(d). In 2006, a federal court declared unconstitutional the "otherwise associated" criterion, holding that it impermissibly authorized designation based on mere association. *Humanitarian Law Project v. U.S. Dep't of the Treasury* (*HLP II*), 463 F. Supp. 2d 1049, 1070-71 (C.D. Cal. 2006). The Treasury Department subsequently issued a regulation that defined that provision as "(a) To own or control; or (b) To

[4] *See* 31 C.F.R. § 594.310 (defining "specially designated global terrorist" as anyone "listed in the Annex or designated pursuant to Executive Order 13,224"); *see also* Office of Foreign Assets Control, *Specially Designated Nationals and Blocked Persons* (2008), *available at* http://www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf (last visited Nov. 20, 2008) (listing designated persons and groups).

[5] The words "material" and "support" are separated in the Executive Order as part of a list of forms of support: "financial, material, or technological support." For ease of reference, however, plaintiff will quote the words as an un-separated phrase: "material support."

attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to."[6] 31 C.F.R. § 594.316. When OFAC froze KindHearts' assets, the "otherwise associated" criterion had not been narrowed, and OFAC expressly referred to this criterion as a basis for its action. Declaration of Jihad Smaili, dated Nov. 18, 2008 ("Smaili Decl.") ¶ 16, Ex. D.

7. Designation as an SDGT immediately results in the blocking of all the designee's property and interests in property within the United States or in the control of U.S. persons. E.O. 13,224 § 1. In addition, the Executive Order prohibits all transactions with designated entities, including "the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons." *Id.* § 2(a). While humanitarian aid is ordinarily exempted from such sanctions, 50 U.S.C. § 1702(b)(2), E.O. 13,224 specifically prohibits all humanitarian donations. E.O. 13,224 § 4. Designation effectively shuts down the organization because it can no longer engage in any transactions, and has no access to its own property.

8. Pursuant to an amendment made to IEEPA by the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), the Treasury Department may impose *all* the blocking effects of a designation—including freezing an organization's assets indefinitely and criminalizing all transactions with it—*without* designating the organization, but simply by stating that it is investigating whether it should be designated. *See* 50 U.S.C. § 1702(a)(1)(B); *id.* § 1705. IEEPA does not specify any standard of suspicion necessary for such a freeze, does not require that the entity be provided with notice or a meaningful opportunity to contest the freeze, requires no judicial approval, and contains no time limit on how long a freeze pending investigation may last.

[6] The same federal court then upheld the constitutionality of the "otherwise associated" provision as defined by the Treasury Department's regulation. *See Humanitarian Law Project v. U.S. Dep't of the Treasury*, 484 F. Supp. 2d 1099, 1106-07 (C.D. Cal. 2007). That decision is under appeal.

9. Neither IEEPA, the Executive Order, nor the implementing regulations require OFAC to inform the affected entity of the alleged factual or legal basis for a freeze pending investigation or a designation. Nor is OFAC required to provide any statement of reasons explaining its actions. OFAC's practice with respect to FPIs, followed here, is to announce the freeze in a letter to the affected group and an announcement in the Federal Register. *See, e.g.*, 71 Fed. Reg. 39,857 (July 13, 2006) (reporting freeze on KindHearts' assets), *available at* http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=32848069744+0+1+0&WAISaction=retrieve. As a result, OFAC provides no guidance on the types of activities that are permitted or proscribed, or that might prompt a freeze pending investigation in the future. With respect to the SDGT designation, OFAC again serves a letter on the affected organization and publishes an announcement of its action in the Federal Register. *See, e.g.*, *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury* (*AHIF*), Civ. No. 07-1155-KI, 2008 WL 4849471, at *17 (D. Or. Nov. 6, 2008); 31 C.F.R. § 594.201(a) n.2. When an organization has a presence in the United States and is therefore entitled to due process, OFAC provides, in connection with designation, a copy of the unclassified documents in its administrative record. It does not disclose the classified evidence on which it relies, and it provides no statement of charges explaining the basis for its action.

10. The Treasury Department promulgated regulations implementing E.O. 13,224 on June 6, 2003. *See* 68 Fed. Reg. 34,196 (codified at 31 C.F.R. Part 594) (the "Regulations"). The Regulations set forth the procedures for imposing civil and criminal penalties on U.S. persons who engage in any transaction with an entity that has been designated or frozen pending investigation. *See* 31 C.F.R. §§ 594.701-.704. With respect to designation, 31 C.F.R. § 501.807 permits designated entities to seek administrative reconsideration by OFAC after they have been

designated and had their property frozen. However, this provision gives no opportunity for notice or a hearing; it does not require that OFAC consider or respond to a petitioner's request for administrative reconsideration in a timely fashion; and it does not establish any standards for the reconsideration. The Regulations contain no provision requiring judicial review of OFAC's FPI or designation determinations. Indeed, the Regulations contain no procedures whatsoever for a freeze pending investigation.

II. The Freeze and Threatened Designation of KindHearts.

11. KindHearts was incorporated on January 22, 2002, as a non-profit corporation under Ohio law. Smaili Decl. ¶ 4. KindHearts' goal was to provide humanitarian aid without regard to religious or political affiliation, "whenever and wherever the need arises at home and abroad." *Id.* Ex. A (mission statement filed with Articles of Incorporation).

12. Until OFAC shut it down in early 2006, KindHearts provided millions of dollars of in-kind humanitarian aid, principally to needy Palestinians in the West Bank, Gaza, and refugee camps in Lebanon. *Id.* ¶¶ 8, 15. KindHearts also supported relief efforts in the United States, such as after Hurricane Katrina, and in other parts of the world. *Id.* ¶ 8. For example, in the year before its assets were frozen, KindHearts raised substantial amounts of money for earthquake relief following a major earthquake in Pakistan. *Id.*

13. KindHearts was founded after several Muslim charities were shut down by OFAC in 2001, *id.* ¶ 4, and from its inception, KindHearts' officers and directors took great care to ensure that it did not fund any designated entities or otherwise violate federal regulations and laws regarding designated terrorists. It sought guidance directly from the Treasury Department to ensure full compliance with the law as it provided aid abroad, *id.* ¶ 10, and it adopted and implemented the Treasury Department's voluntary guidelines for charitable organizations. *See,*

e.g., *id*. ¶¶ 10-12 (KindHearts' Board of Trustees directed its employees in the United States and abroad to implement the Treasury Department's Voluntary Guidelines); *id.* ¶ 11 (KindHearts' Board specified an officer responsible for ensuring that KindHearts did not do business with designated persons or entities); *id.* ¶¶ 10-12, Exs. B, C (KindHearts' general counsel drafted memos for all KindHearts' personnel explaining and adopting as mandatory the Treasury Department's Best Practices Guidelines and Voluntary Guidelines). KindHearts also hired the Toledo-based accounting firm Gilmore, Jasion & Mahler, Ltd, and the international firm of Ernst & Young to audit its accounts. *Id.* ¶ 15.

A. The Freeze Pending Investigation.

14. Notwithstanding KindHearts' efforts, on February 19, 2006, OFAC froze all of its property and assets pending investigation into whether it was subject to designation under E.O. 13,224. *Id*. ¶ 16, Ex. D. On the same day that KindHearts' assets were frozen, the government executed search warrants at KindHearts' Toledo headquarters and the personal residence of its president, and removed all of KindHearts' records, computers, and a number of boxes of publications and documents. *Id.* ¶ 17.[7] The only reason OFAC gave for the freeze in its Blocking Notice was a boilerplate sentence generally reiterating all of the criteria in E.O. 13,224 and stating that KindHearts was being investigated "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." *Id.* ¶ 16, Ex. D. The letter set forth no facts to support its action. *See generally id.* According to the government, it did not provide KindHearts with notice of the

[7] Several days before the execution of those search warrants, the U.S. Department of Justice obtained two grand-jury subpoenas from the U.S. District Court for the Northern District of Ohio, requiring (1) Ernst & Young, KindHearts' accountant, to produce documents relating to KindHearts, and (2) a member of KindHearts' Board of Directors to produce all records of KindHearts from January 1, 2002 to February 17, 2006. Thirty-three months later, the government still has all of the above materials. No criminal charges have been filed against KindHearts.

freeze because "prior notice to [KindHearts] of OFAC's blocking would have rendered the sanctions in the Executive Order ineffectual." *Id.* The letter stated that if KindHearts sought to challenge the freeze, it could send a letter to OFAC, but established no procedure for the review of such a letter. *Id.* In fact, while KindHearts promptly filed such a letter, OFAC took no action for over a year in response to it. *Id*. ¶ 23, Ex. H; Declaration of Lynne Bernabei, dated Nov. 18, 2008 ("Bernabei Decl.") Ex. A.

15. As a result of the FPI, all of KindHearts' assets and property were frozen indefinitely, including about $1 million in bank accounts, and the organization was effectively shut down. Smaili Decl. ¶¶ 18-19, 21, Ex. F. The FPI has now lasted more than two years and nine months.

16. KindHearts repeatedly asked OFAC for the reasons for the FPI, for specification of the charges against it, and for notice of the factual basis for OFAC's actions. *See, e.g.*, *id*. ¶ 23, Ex. H; Bernabei Decl. Ex. B. On November 29, 2006, KindHearts' counsel specifically asked for a copy of the full administrative record being used by OFAC in its investigation. Bernabei Decl. Ex. B. Beyond the single boilerplate sentence quoted above, OFAC never provided any notice or specification of the reasons and facts underlying its decision to freeze KindHearts' assets pending investigation. KindHearts tried to guess at OFAC's reasons and sought to show OFAC why its suspicions (or what KindHearts conjectures them to be) were mistaken. *See, e.g.*, Smaili Decl. ¶ 23, Ex. H; Bernabei Decl. Ex. C. OFAC never addressed KindHearts' defense to the freeze, nor has it explained why it will not do so.

B. The Threat to Designate KindHearts.

17. On May 25, 2007, OFAC informed KindHearts that it had "completed its investigation" and had "provisionally determined" to designate KindHearts as an SDGT.

Bernabei Decl. Ex. A. KindHearts' assets nevertheless remain frozen "pending investigation," and KindHearts has not been designated as an SDGT.

18. With its May 25 letter, OFAC produced 35 documents that it identified as the "unclassified and non-privileged documents" upon which it relied in provisionally deciding to designate KindHearts. *Id*. Exs. A, V.[8] Most of the documents—21—did not even mention KindHearts, but concerned other entities altogether. Despite repeated requests from KindHearts' counsel, OFAC has provided no explanation of the specific charges it was considering against KindHearts, or why it thought the evidence supported a potential designation. *Id*. Exs. C-E.

19. In its May 25, 2007 letter, OFAC stated that it had "relied upon other classified and privileged documents obtained to date which are not authorized for disclosure, including material obtained or derived pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*" *Id*. Ex. A. OFAC produced a three-page "Unclassified Summary" of its classified evidence that made various vague and unsourced allegations regarding support KindHearts allegedly provided to Hamas in Lebanon. *Id*. KindHearts again sought the full classified and unclassified administrative record to defend itself, and an extension of time to respond to OFAC's unclassified submission, since "[t]he allegations made in OFAC's unclassified summary are of such a general nature that KindHearts is obliged to do substantial work to attempt to respond meaningfully." *Id*. Ex. F. Even though OFAC provided neither the full administrative record nor an extension, KindHearts' counsel sent OFAC a 28-page preliminary submission in which KindHearts attempted to guess at, and address, OFAC's concerns, as best it could make them out. *Id*. Ex. C. OFAC has never responded to KindHearts' defense, let alone rebutted it.

[8] The unclassified and non-privileged component of the administrative record accompanying OFAC's letter dated May 25, 2007 is attached as Exhibit V to the declaration of Lynne Bernabei. Citations to the administrative record are to the Bates-numbered pages of the document (e.g., CTI-1, CTI-2, etc.).

C. The Government's Restrictions on KindHearts' Ability to Defend Itself

20. Despite repeated requests from KindHearts, *see, e.g.*, *id*. Exs. D, G, OFAC has refused to provide an adequately detailed summary of the classified evidence that is part of the administrative record, or security clearances for KindHearts' counsel to review the underlying classified documents. On June 27, 2007, KindHearts also requested that OFAC perform a declassification review of the classified and privileged evidence relied upon by OFAC. *Id.* Ex. G. By letter dated August 10, 2007, OFAC agreed to KindHearts' request, *id.* Ex. H, and later stated orally that it would give KindHearts 30 days, after declassification review was completed, to submit a response, *id.* Ex. I. But OFAC reported no progress on the declassification review in the fourteen months between its agreement and the filing of this lawsuit. (After this lawsuit was filed, the government suggested that it could complete the declassification review within thirty days of a phone call with KindHearts' counsel on October 20, 2008. Declaration of Fritz Byers, dated Nov. 21, 2008 ("Byers Decl.") ¶ 7.).

1. Limits on Access to KindHearts' Own Documents.

21. In order to prepare its defense, on June 14, 2007, KindHearts requested access to its own records, which are in the government's possession. Bernabei Decl. ¶ F. OFAC waited eight weeks—until August 14, 2007—to tell KindHearts' counsel that OFAC possessed only a few of the records, and that the remainder were in the possession of the U.S. Attorney's office. *Id*. Ex. J. The U.S. Attorney's office, in turn, refused to provide KindHearts with a copy of the documents. *Id*. Ex. K. Finally, on April 11, 2008, more than two years after KindHearts' documents were seized, the U.S. Attorney's office reversed course and provided KindHearts with an electronic copy of a subset of the seized documents—but subject to onerous conditions

that made them virtually impossible to use. *Id*. Ex. L; Protective Order, *In re KindHearts for Charitable Humanitarian Dev., Inc.*, No. 3:06-MJ-7019-VKA-1 (N.D. Ohio Apr. 9, 2008).

22. Under a protective order obtained by defendants *ex parte*, counsel could review the documents only in the Washington, D.C. office of Bernabei & Wachtel and only electronically, without printing any document; KindHearts' directors and staff were not permitted even to review the documents without prior specific authorization from a court. *Id*.; Protective Order, *In re KindHearts for Charitable Humanitarian Dev., Inc.*, No. 3:06-MJ-7019-VKA-1 (N.D. Ohio Apr. 9, 2008). Because KindHearts' counsel are located in Ohio, New York, and London, as well as Washington, and because KindHearts' former directors and staff are in Ohio, California, and Lebanon, these restrictions posed nearly insurmountable hurdles to KindHearts' ability to prepare an effective defense. None of the documents are classified, and they all belong to KindHearts. KindHearts requested that the government reconsider, but on April 24, 2008, the U.S. Attorney's office refused to modify the terms of the Protective Order. Bernabei Decl. Ex. M.

23. On the morning of October 9, 2008, KindHearts' counsel called the U.S. Attorney's office to provide notice before filing this suit and an accompanying motion to amend the Protective Order. Byers Decl. ¶¶ 2-3. During that conversation, the AUSA assigned to the case indicated he would be willing to amend certain provisions of the Protective Order, and KindHearts' counsel agreed not to seek judicial intervention at that time. *Id.* Since then, the U.S. Attorney's office has agreed to modify the Protective Order, but only to permit counsel to view the subset of their clients' documents in each of their own offices, and only to permit KindHearts' former officers and employees to see those documents in counsel's offices. Amended Protective Order, *In re KindHearts for Charitable Humanitarian Dev., Inc.*, No. 3:06-

MJ-7019-VKA-1 (N.D. Ohio Oct. 15, 2008). The government refused to allow counsel to print documents, either for review or even as an attachment to a court filing. Even though the documents belong to KindHearts, and the government maintains the originals, it refuses to let KindHearts' officers and employees have access to the copies, except by traveling to their attorneys' offices and viewing them only on a computer. In addition, during the October 9, 2008 call, the government acknowledged that not all of KindHearts' materials in the government's possession have actually been provided to KindHearts' counsel, and it refuses to provide the remainder. Byers Decl. ¶ 4.

2. Limits on KindHearts' Own Investigation.

24. In July 2007, KindHearts' counsel informed OFAC that as part of KindHearts' defense, counsel would need to interview former employees of KindHearts and ask them to search their own records for any documents that might assist in KindHearts' defense. Bernabei Decl. Ex. N. KindHearts' counsel sought OFAC's assurance that KindHearts' employees and officers had the right to engage in this activity without violating the law. *Id.* OFAC responded that the employees and directors could conduct such a search, but that any documents in the possession of third parties "are considered blocked property," which would require a separate OFAC license, and that all such documents would have to be identified to OFAC with information on "the owner, the property, its location, [and] any reference necessary to identify the property . . . ." *Id.* Ex. O.

25. After protests by KindHearts' counsel that OFAC's decision violated KindHearts' rights to investigate and present a defense, *see, e.g.*, *id*. Ex. P, OFAC clarified that only KindHearts' property would be subject to the reporting requirement, but did not explain how it

would determine whether a document was an individual's property or the property of KindHearts, and whether documents with unclear provenance must be reported. *Id*. Ex. Q.

3. Limits on KindHearts' Ability to Use Its Own Funds in Its Defense.

26. For over two years, OFAC refused to permit KindHearts to use its own funds to pay attorneys' fees for its challenge to OFAC's freeze pending investigation and threatened designation. *See, e.g.*, Smaili Decl. ¶ 22, Ex. G; Bernabei Decl. Exs. R-S. From OFAC's initial freeze of KindHearts in February 2006 to June 2008, it asserted that KindHearts could pay for legal services only if those payments did not originate from its own funds. *See*, *e.g.*, Smaili Decl. ¶ 22, Ex. G; Bernabei Decl. Exs. R, T-U (claiming authority to regulate attorneys' fees as blocked funds under 50 U.S.C. § 1702(a)(1)(B) and 31 C.F.R. § 594.201).

27. After its policy on attorneys' fees was challenged as unconstitutional in a separate lawsuit, OFAC changed the policy in June 2008. *AHIF*, 2008 WL 4849471, at *8; Bernabei Decl. Exs. T-U. OFAC will now permit KindHearts to use a limited amount of its funds to pay for legal expenses, but subject to stringent restrictions. KindHearts is permitted to pay only two lawyers, Bernabei Decl. Exs. T-U, even though the government typically assigns three or four times that many to cases of this nature. Declaration of Alan Kabat, dated Nov. 20, 2008 ("Kabat Decl.") ¶¶ 9-14. In addition, OFAC set an aggregate cap of $28,000 on administrative and judicial trial proceedings to challenge a designation, a figure that bears no relation to the amount that the government spends, that designated entities have spent in the past, or to the time that KindHearts' counsel have already devoted to the case. Bernabei Decl. Exs. T-U; Kabat Decl. ¶¶ 4-5, 7-8; Declaration of John Boyd, dated Nov. 18, 2008 ("Boyd Decl.") ¶¶ 3-5. Through this policy, OFAC has put itself in the position of reviewing and authorizing legal fee expenditures, even though it is adverse to KindHearts.

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *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 LIMITLESS AUTHORITY TO FREEZE KINDHEARTS' ASSETS PENDING INVESTIGATION IS UNCONSTITUTIONAL.

The statute pursuant to which KindHearts' assets were frozen empowers the President (and by delegation, OFAC) to "block during the pendency of an investigation" virtually any transaction involving "any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B). The statute requires no individualized suspicion that an entity has engaged in any wrongdoing of any kind, or has any relationship to terrorism. Indeed, it sets forth *no substantive criteria whatsoever*. It also does not contain any procedural safeguards. The statute imposes no time limits on the investigation, or the attendant freeze. It provides the affected party no notice or opportunity to respond. It requires no statement of reasons. It requires neither judicial approval nor probable cause. As the 9/11 Commission staff report stated, the provision gives a "midlevel government official" the power to "shut down an organization without any formal determination of wrongdoing." Nat'l Comm'n on Terrorist Attacks upon the United States, *Monograph on Terrorist Financing: Staff Report to the Comm'n* 112.

Because it vests government officials with virtually unfettered authority to seize property without a warrant, probable cause, or any substantive or procedural constraints, the statute on its

face violates the First, Fourth, and Fifth Amendments. OFAC's application of the statute to KindHearts in this case has only exacerbated these constitutional flaws. For more than two and a half years, OFAC has used its unfettered authority to shut KindHearts down without notice, a hearing, or a meaningful opportunity for KindHearts to defend itself. For these reasons, KindHearts asks this Court to vacate the freeze pending investigation. *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 750-51 (7th Cir. 2002) (courts have the authority to "order Treasury to end the freeze" of an entity's assets).

A. The FPI Authority Is Unconstitutional on Its Face.

1. No Substantive Criteria Limit OFAC's Authority to Impose a Freeze Pending Investigation.

Neither IEEPA, E.O. 13,224, nor the Regulations set forth any substantive criteria for imposing a freeze pending investigation. Accordingly, OFAC can impose an FPI for any reason or no reason at all, for as long as it likes, without any judicial oversight or approval. Such limitless discretion to shut down entities indefinitely violates the First and Fifth Amendments.[9]

A law violates due process if it "cause[s] persons 'of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application.'" *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (omission and alterations in original) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 184 (6th Cir. 1983) ("due process requires that government regulations and statutes provide adequate warning as to what they command or forbid such that persons of common intelligence will not have to guess as to their meaning and may act accordingly"); *Boddie v. Am. Broad. Cos.*, 881 F.2d 267, 270 (6th Cir. 1989). A central purpose underlying the First and Fifth Amendment prohibitions against vague statutes is to avoid subjective enforcement of the laws based on

[9] KindHearts' Fourth Amendment facial challenge to the FPI authority is discussed *infra*, Part II.C, together with its as-applied Fourth Amendment challenge.

"arbitrary and discriminatory enforcement" by government officers. *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 551 (6th Cir. 2007) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)) (internal quotation marks omitted). "Vague laws are subject to particular scrutiny when . . . constitutional rights are at risk," *United States v. Caseer*, 399 F.3d 828, 835 (6th Cir. 2005), as they certainly are here.

IEEPA section 1702(a)(1)(B)'s grant of authority to OFAC to freeze organizations pending investigation provides "no objective criteria for assessing compliance," and fails to "'afford[] fair warning of what is proscribed.'" *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 421-22 (5th Cir. 2001) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982)) (striking as facially invalid, under the Due Process clause, three Texas abortion-licensing regulations that gave the state standardless discretion to assess whether physicians had violated the regulations). IEEPA effectively permits OFAC to freeze the assets of any group or individual it chooses to target, without statutory guidance, without providing substantive charges, and without findings of wrongdoing.[10] *See HLP II*, 463 F. Supp. 2d at 1067 (describing IEEPA as giving the President the power to designate anyone he chooses for merely "associating," or for "no reason" at all). Such unlimited power to shut down disfavored organizations and individuals violates the Fifth Amendment.

IEEPA also violates the First Amendment because it invites discriminatory enforcement, which could be based on First-Amendment protected conduct. Using the limitless sweep of its authority, OFAC could target and ensnare any organization based solely on a government official's subjective determination or even whim. *Grayned*, 408 U.S. at 108-09. The First

[10] OFAC's decisions to freeze assets pending investigation are published in the Federal Register, but those notices simply announce the name of the entity or individual affected, and provide no indication of *why* the freeze pending investigation was imposed. SOF ¶ 9.

Amendment prohibits the standardless grant of authority to executive officials precisely to prevent such arbitrary enforcement. *See e.g.*, *City of Lakewood v. Plain Dealer Publ'g*, 486 U.S. 750, 769-72 (1988) (facially invalidating ordinance authorizing mayor to issue permits for newsracks because it gave mayor unchecked discretion); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking ordinance barring "annoying" conduct because "no standard of conduct is specified at all").

The standardless discretion of OFAC's freeze authority is underscored by comparing it to the Secretary of State's authority to designate "foreign terrorist organizations" under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 8 U.S.C. § 1189. Section 1189 authorizes the executive branch to block and designate only organizations that meet specific statutory criteria, and requires a finding that the organization engages in terrorist activity that threatens the security of the United States. *Id.* § 1189(a). Section 1189 also provides statutory guidance on the definition of "terrorist activity," as defined in the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B). Unlike the FPI authority under IEEPA, section 1189 "authorizes the Secretary to designate only those groups that engage in terrorist activities. This standard is not so vague or indeterminate as to give the Secretary unfettered discretion." *Humanitarian Law Project v. Reno* (*HLP I*), 205 F.3d 1130, 1137 (9th Cir. 2000). In contrast, section 1702(a)(1)(B) permits OFAC to freeze the assets of individuals and groups *without meeting any criteria whatsoever*, and therefore it is unconstitutional on its face.

2. No Procedural Safeguards Apply to OFAC's Authority to Freeze Pending Investigation.

Due process's most fundamental requirements are notice and "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *Women's Med. Prof'l Corp. v.*

Baird, 438 F.3d 595, 611 (6th Cir. 2006) (corporation has a due-process-protected "property interest in the continued operation of its business"). Section 1702(a)(1)(B) is unconstitutional on its face because it establishes *none* of the procedural safeguards required when the government seeks to deprive individuals or entities of their property.

The general rule is that the government must afford notice and a "meaningful opportunity" to be heard by a neutral tribunal *before* the government deprives an individual or entity of a property interest.[11] In exceptional circumstances, post-deprivation process is sufficient, but it must be *prompt*. *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 241-42 (1988) (promptness of post-deprivation review is an important consideration if no pre-deprivation review is given); *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (stating that where pre-deprivation review is not provided, prompt post-deprivation review is "paramount"). In *Barchi*, for example, the Court struck down a regulatory scheme that authorized the New York State Racing and Wagering Board to suspend horse-racers and then to provide a post-suspension hearing, because the regulation "specifie[d] no time in which the hearing must be held, and it afford[ed] the Board as long as 30 days after the conclusion of the hearing in which to issue a final order adjudicating the case." *Id.* at 61. According to the Court, the post-suspension administrative hearing provision "neither on its face nor as applied in this case, assured a *prompt* proceeding and *prompt* disposition of the outstanding issues." *Id.* at 66 (emphasis added).

[11] *Nat'l Council of Resistance of Iran v. Dep't of State* (*NCRI*), 251 F.3d 192, 205 (D.C. Cir. 2001) ("before the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him notice and a hearing" (citing *Mathews*, 424 U.S. at 334-35)); *see also Holy Land Found. for Relief & Dev. v. Ashcroft* (*Holy Land*), 333 F.3d 156, 163-64 (D.C. Cir. 2003) (applying *NCRI*'s pre-deprivation due-process requirement to SDGT designation); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."); *United States v. Real Prop. Known & Numbered as 429 S. Main St., New Lexington, Ohio*, 52 F.3d 1416, 1419 (6th Cir. 1995); *Silberstein v. City of Dayton*, 440 F.3d 306, 315-16 (6th Cir. 2006).

Failure to provide prompt due process is, on its own, a violation of the Due Process Clause. *Brock v. Roadway Express*, 481 U.S. 252, 267 (1987).

Section 1702(a)(1)(B) is even more fatally flawed than the regulation at issue in *Barchi*: IEEPA makes no provision for pre- or post-deprivation process of *any* kind, let alone a timely process. It does not require OFAC ever to notify the entity of the reasons for an FPI, to offer the entity an opportunity to respond, or to seek judicial authorization. The absence of *any* procedural safeguards violates the Fifth Amendment. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (striking statute as unconstitutional on its face because it "[did] not contain any provision whatsoever for notice and hearing"); *see also Vitek v. Jones*, 445 U.S. 480, 494-97 (1980) (striking statute that lacked constitutionally required "minimum procedures," including timely notice, a hearing, an opportunity to defend, and a written statement of factual findings and of reasons); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). Because section 1702(a)(1)(B) lacks any procedural safeguards, the statute is unconstitutional on its face.

The absence of any safeguards in IEEPA stands in stark contrast to those provided in the civil forfeiture setting, for example. Civil forfeiture seizures may take place only if the government first obtains a warrant or the seizure is supported by probable cause. 18 U.S.C. § 981(b). After the seizure, the government must follow a detailed set of procedures to ensure the person from whom property has been seized—the claimant—has notice and a meaningful opportunity to be heard. *See* Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983 *et seq.* Under CAFRA, the claimant must be sent adequate notice within 60 days of the date of a seizure. *Id.* § 983. Once received, the claimant has 30 days to file a claim. *Id.* After a claim has been filed, the U.S. Attorney has 90 days to file a civil complaint in federal court. *Id.* If the U.S. Attorney does not file a civil complaint in that timeframe, forfeiture is barred. *Id.*

CAFRA thus requires probable cause, prompt notice, judicial review, and a prompt hearing. By contrast, section 1702(a)(1)(B) provides for no individualized suspicion, no notice, no judicial review, and no hearing whatsoever. No other federal statute gives a government official such unbridled authority.

B. OFAC Imposed the Freeze Pending Investigation on KindHearts in Violation of KindHearts' Constitutional Rights.

OFAC's actions in KindHearts' case illustrate the statute's constitutional flaws, and the FPI authority is also unconstitutional as applied to KindHearts. As a U.S. corporation, KindHearts is entitled to constitutional protections.[12] Yet OFAC failed to specify any objective criteria pursuant to which it froze KindHearts' assets, and failed to provide KindHearts with any pre-deprivation or post-deprivation process whatsoever. *Cf. AHIF*, 2008 WL 4849471, at *16 (U.S. charity frozen pending investigation was entitled to post-deprivation notice "without 'unreasonable delay'" and before it was designated (citing *Gete v. INS*, 121 F.3d 1285, 1296 (9th Cir. 1997))).

The only notice OFAC actually provided to KindHearts when it imposed the FPI was a single boilerplate sentence stating that KindHearts was being investigated for possible connections to Hamas, without any specification as to how, when, or in what capacity it was allegedly connected. SOF ¶ 14. The "notice" failed even to specify the Executive Order criterion or criteria that OFAC suspected KindHearts of violating, and instead simply repeated them all in a single sentence. If a notice does not inform an affected person of the government's charges and evidence against him, he is unable "to present his side of the story" to rebut that evidence and the notice is constitutionally inadequate. *Loudermill*, 470 U.S. at 546. KindHearts

[12] *Holy Land*, 333 F.3d at 163 (SDGT-designated organization with presence in United States entitled to due process); *NCRI*, 251 F.3d at 205 (same with respect to Secretary of State's designation of a "foreign terrorist organization").

repeatedly asked for a specification of the charges against it and the reasons for OFAC's freeze. *See, e.g.*, SOF ¶ 16. OFAC ignored its requests. Almost two years ago, KindHearts also asked for a copy of the full administrative record being used by OFAC in its investigation. SOF ¶ 16. To date, OFAC has failed to provide the full record to KindHearts.

The only opportunity OFAC afforded KindHearts to defend itself was the chance to submit a letter in response to OFAC's wholly inadequate notice. SOF ¶ 16. And when KindHearts did submit such a letter, OFAC simply ignored it and did nothing for more than a year. SOF ¶¶ 14, 16.[13] OFAC has never sought judicial approval for its freeze pending investigation.

KindHearts has now had its assets frozen for more than 33 months without adequate process. Such an extended delay in itself violates due process:

> In determining how long a delay is justified in affording a post-[deprivation] hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken.

Mallen, 486 U.S. at 242. Application of these factors to KindHearts' case makes clear that its rights have been violated.

The harm that delay has caused to KindHearts is manifest: KindHearts has been deprived of all of its property—including bank accounts—and has been effectively shut down. SOF ¶¶ 14-15; *NCRI*, 251 F.3d at 205 (recognizing organization's interest in frozen bank account as property interest); *see also N. Ga. Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) ("[A] bank account, surely a form of property, was impounded[.]"); *Fuentes*, 407 U.S. at 84-85 ("temporary, nonfinal deprivation of property" is sufficient to trigger due process protections).

[13] In addition, as explained more fully below, *see infra* Part III.B.3, defendants placed unreasonable restrictions on KindHearts' ability to use its own documents and assets in its own defense, further undermining any opportunity to respond that it might have had.

KindHearts has a substantial interest in obtaining meaningful notice in order to defend itself, and a timely response from OFAC to the defense it then makes. OFAC has failed to provide either. As a result, OFAC has not only shut KindHearts down indefinitely, it has also frustrated KindHearts' ability to investigate the bases of OFAC's charges, to effectively defend itself against those charges, and, ultimately, to obtain a timely resolution of its status.

The government has provided no justification for the delay. When OFAC initially blocked KindHearts' assets, it stated that it was dispensing with pre-deprivation notice because prior notice "would have rendered the sanctions in the Executive Order ineffectual." SOF ¶ 14. But even if such a conclusory statement—without any evidence to support it—were sufficient to dispense with *pre*-deprivation process, it would provide no justification whatsoever for delaying adequate *post*-deprivation process for more than two and a half years. Finally, the risks of erroneous deprivation are substantial because the OFAC process lacks *all* the safeguards generally employed to reduce error. The risks are exacerbated where, as here, OFAC has failed to specify the factual and legal bases for the freeze, and failed even to respond to KindHearts' defense. *AHIF*, 2008 WL 4849471, at *18. Section 1702(a)(1)(B) is unconstitutional both facially and as applied to KindHearts.

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

Section 1702(a)(1)(B) also violates the Fourth Amendment because it authorizes the government to seize the property of an individual or entity without a warrant or probable cause, and indeed without any individualized suspicion. *See* U.S. Const. amend. IV.

A seizure of property occurs when "there is some meaningful interference with an individual's possessory interest in that property." *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *see also Horton v.*

California, 496 U.S. 128, 133 (1990) ("a seizure deprives the individual of dominion over his or her person or property" (citing *Jacobsen*, 466 U.S. at 113)). KindHearts indisputably has a possessory interest in its assets; OFAC's action has effectively shut it down now for 33 months, and the FPI is indefinite in duration. OFAC's complete bar on KindHearts' ability to access its bank accounts and other assets or to conduct its mission for such an extended period is, at the very least, "some meaningful interference" with its interest in its property, and constitutes a seizure. *AHIF*, 2008 WL 4849471, at *24 (government's freeze of a designated entity's property under E.O. 13,224 is a seizure under the Fourth Amendment); *Colello v. U.S. Sec. & Exch. Comm'n*, 908 F. Supp. 738, 748-55 (C.D. Cal. 1995) (freezing of a bank account was an unconstitutional seizure under the Fourth Amendment because it was not predicated on probable cause); *Salmo v. United States*, No. 06-12909, 2006 WL 2975503, at *2-3 (E.D. Mich. Oct. 17, 2006) (government freeze of bank account was seizure in violation of Fourth Amendment); *United States v. $53,082.00 in U.S. Currency*, 985 F.2d 245 (6th Cir. 1993).[14]

[14] In two other SDGT-designation challenges, the courts have cursorily applied a Fifth Amendment takings analysis to find that blocking a designated entity's assets does not constitute a seizure under the Fourth Amendment because designation is temporary and title has not passed to the government. *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 analysis simply applies the wrong standards. *AHIF*, 2008 WL 4849471, at *24 ("The Fourth Amendment imposes a lower threshold than does the Fifth Amendment . . . ."). In the Fourth Amendment context, an unlawful seizure occurs even when, as in KindHearts' case, title to the assets does not pass to the government. *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005) (impounding a car is a seizure within the meaning of the Fourth Amendment even though title to the vehicle did not transfer). Indeed, *most* seizures under the Fourth Amendment do not involve a transfer of title. In the Fifth Amendment context, by contrast, the legal question is whether the government's deprivation of a private property interest is temporary or a vesting. In *Holy Land Foundation* and *IARA*, the courts wrongly cited takings cases for the proposition that "the case law is clear that a blocking of this nature does not constitute a seizure." *Holy Land Found.*, 219 F. Supp. 2d at 78-79; *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 48 (citing *Holy Land Foundation* without analysis). None of the cases the court in *Holy Land Foundation* cited in support of its conclusory statement even applied Fourth Amendment analysis. *See Than v. Regan*, 658 F.2d 1296, 1300 (9th Cir. 1981) (Fifth Amendment challenge to blocking of funds under the Trading With the Enemy Act); *D.C. Precision, Inc. v. United States*, 73 F. Supp. 2d 338, 343 n.1 (S.D.N.Y. 1999) (applying Fifth Amendment takings analysis); *IPT Co. v. U.S. Dep't of the Treasury*, No. 92-CV-5542-JFK, 1994 WL 613371, at *5-6 (S.D.N.Y. Nov. 4, 1994) (same); *Can v. United States*, 820 F. Supp. 106, 109 (S.D.N.Y. 1993) (whether action for return of blocked property may be brought under the Trading With the Enemy Act); *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas v. Newcomb*, Civ. No. 98-0949-LFO (D.D.C. Mar. 29, 1999) (whether blocking of transactions qualifies for an excessive-fine claim under the Eighth Amendment).

Seizures under section 1702(a)(1)(B) are unreasonable because the statute contains no requirement of a warrant, probable cause, or even individualized suspicion. Nothing in section 1702(a)(1)(B) requires OFAC: to make an administrative determination of individualized suspicion that the entity whose assets it has frozen engaged in terrorist activity; to seek judicial review of that determination; to specify assets or property OFAC believes may be used in furtherance of alleged illegality; or to limit the duration of the seizure. *Chandler v. Miller*, 520 U.S. 305, 313 (1997) ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing."); *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (requiring a showing of individualized suspicion even when a warrant is not required); *accord United States v. Watson*, 423 U.S. 411, 423-24 (1976); *Relford v. Lexington-Fayette Urban County Gov't*, 390 F.3d 452, 458 (6th Cir. 2004). Nothing in the Executive Order or the Regulations imposes any such requirements, either, and OFAC made no attempt to obtain a warrant here. *Cf.* 18 U.S.C. § 981(b) (requiring warrant or probable cause before civil forfeiture seizure). Although there are categorical exceptions to the warrant and probable cause requirement, such as "plain view," *Arizona v. Hicks*, 480 U.S. 321, 327 (1987), the government has not shown that any categorical exception applies in KindHearts' case. Warrant applications are typically conducted *ex parte*, and therefore they would pose no security risks in advance of freezing an entity's assets. And they would serve one of the Fourth Amendment's central purposes, which is to insert a judicial check between the state and the property and privacy of the people.

The Supreme Court has held that even a 90-minute detention of luggage is a seizure requiring probable cause. *United States v. Place*, 462 U.S. 696, 709-10 (1983). Surely, the wholesale shutting down of an entity for 33 months and the indefinite freezing of all its assets

requires no less. Accordingly, the FPI is an unreasonable seizure under the Fourth Amendment, and the FPI authority violates the Fourth Amendment on its face and as applied to KindHearts.

For the foregoing reasons, the Court should declare the FPI unconstitutional and order defendants to lift the freeze, returning control of KindHearts' assets to KindHearts.[15]

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

OFAC's authority to designate an organization an SDGT is, like its FPI authority, unconstitutional, and OFAC has threatened to designate KindHearts on the basis of this authority. *See* SOF ¶ 17; *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 529-31 (6th Cir. 1998) (pre-enforcement standing to challenge a statute exists when there is a credible threat of enforcement). Even though the SDGT designation scheme includes marginally better protections than the FPI authority, it violates the First and Fifth Amendments on its face because the criteria for designation are unconstitutionally vague. And as with the FPI authority, OFAC's application of its designation authority to KindHearts is unconstitutional because OFAC failed to meet due-process requirements. Here, too, OFAC has failed to provide adequate notice by failing to specify the legal and factual basis for its actions. Here, too, OFAC has denied KindHearts a meaningful opportunity to respond. And OFAC's actions with respect to KindHearts' assets and records have further undermined any chance KindHearts might have had to defend itself. Finally, OFAC's authority to prolong the seizure of KindHearts' assets without probable cause or a warrant violates the Fourth Amendment.

[15] KindHearts would, of course, be obligated to abide by all federal laws regarding the use of its assets, including laws that ban the support of terrorism or terrorist organizations. If the government chose to appeal, and although KindHearts does not believe any reporting is required by law or regulation, KindHearts would be willing during the pendency of the appeal to report to OFAC on its expenditures on a monthly basis; if OFAC found any of the expenditures problematic, it could raise any concerns with KindHearts and even, if appropriate, seek judicial intervention. Such a regime would fully protect the government's interest in ensuring that donations do not support terrorism. At the same time, OFAC has no legitimate interest in stopping KindHearts from humanitarian activities that do not contravene any law.

For these reasons, KindHearts asks this Court to find the SDGT designation authority unconstitutional and to enjoin OFAC from designating KindHearts. In the alternative, KindHearts asks the Court to enjoin OFAC from designating KindHearts, and therefore doing irreparable harm to KindHearts' reputation, until OFAC has provided constitutionally adequate process with respect to the threatened designation.

A. The SDGT Designation Authority Under IEEPA and the Executive Order Violates the First and Fifth Amendments on Its Face.

Under both IEEPA and the Executive Order, the executive branch's authority to designate an organization as an SDGT violates the First and Fifth Amendments because the terms of OFAC's designation authority give it virtually unfettered reach, and specific terms of IEEPA are unconstitutionally vague and encroach on core speech and associational rights.[16]

Under IEEPA, the President's authority to designate an individual or entity as a global terrorist is virtually limitless: he could designate anyone or everyone. IEEPA itself is not directed at "terrorism" and never even uses that term; it therefore contains no statutory guidance on such critical terms as "terrorist organizations," "specially designated global terrorists," or any other term relating to "terrorism." Without any specified substantive criteria, IEEPA permits the President to shut down disfavored groups and individuals without substantive charges and without findings of wrongdoing, and it is unconstitutional for that reason.

OFAC's designation authority under the Executive Order is almost as expansive as the President's and is similarly vague in violation of the Fifth Amendment.[17] In particular, the

[16] KindHearts' Fourth Amendment facial challenge to the designation authority is discussed *infra*, Part III.C, together with its as-applied challenge.

[17] While IEEPA and E.O. 13,224 impose civil as well as criminal sanctions, the same stringent vagueness standard applies to both. First, stringent standards are required by civil laws that affect First Amendment rights: "The requirement of clarity is enhanced . . . when the statute [a]buts upon sensitive areas of basic First Amendment freedoms." *Info. Providers' Coal. for Def. of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) (internal quotation marks and citations omitted) (alteration in original); *see Vill. of Hoffman Estates*, 455 U.S. at 499

Executive Order permits OFAC to designate organizations that have *never* engaged in or supported terrorism or terrorist acts, or any other illegal conduct. This is because E.O. 13,224 § 1(d)(ii) allows OFAC to designate an organization based merely on that organization's "associat[ion] with" or support to another entity or person that has in turn provided "services" or "other support" (which need not be terrorism-related) to a designated person or entity. E.O. 13,224 § 1(d)(i) (prohibiting "material support" or "other services" to persons "determined to be subject to this order").[18]

The vague scope and virtually unlimited reach of the Executive Order is like the vagrancy statutes that the Supreme Court struck down in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In *Coates*, the Court addressed a Cincinnati ordinance that made it a criminal offense for three or more people to assemble and conduct themselves "in a manner annoying to persons passing by." 402 U.S. at 611. The Court struck down the statute explaining that "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.* at 614. The Court added that although "the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit . . . , [i]t cannot constitutionally do so

("perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights"). Second, stringent vagueness standards apply to civil laws that impose "quasi-criminal" penalties or have "prohibitory and stigmatizing effects." *Vill. of Hoffman Estates*, 455 U.S. at 499. The civil provisions at issue here are not designed to compensate the government, but explicitly to penalize. 50 U.S.C. § 1705(a) (authorizing a "civil penalty"). The designation sanction is in many respects more draconian than a criminal penalty because it effectively shuts down the organization and criminalizes transactions with it.

[18] OFAC's definition of "to be otherwise associated with," 31 C.F.R. § 594.316, fails to cure the vagueness of the Executive Order because it defines the phrase using two equally vague terms: "material . . . support" and "other services." Neither is defined by IEEPA, the Executive Order, or OFAC's regulations and, as discussed below, both are so vague as to permit the designation of individuals on the basis of constitutionally protected association.

through the enactment and enforcement of an ordinance whose violation may entirely depend on whether or not a policeman is annoyed." *Id.*

A comparison to AEDPA's designation authority under 8 U.S.C. § 1189, which has been upheld against a vagueness challenge, further illustrates starkly the sweeping nature of the designation authority under the Executive Order. The Ninth Circuit has ruled that the Secretary of State may "designate only those groups that engage in terrorist activities. This standard is not so vague or indeterminate as to give the Secretary unfettered discretion." *HLP I*, 205 F.3d at 1137. AEDPA sets forth specific criteria for what constitutes a "foreign terrorist organization," and includes a specific definition of the "terrorist activities" that an organization must be found to have engaged in to warrant designation. As a result, the Ninth Circuit noted, "the Secretary could not, under this standard, designate the International Red Cross or the International Olympic Committee as terrorist organizations." *Id*.

Executive Order 13,224, by contrast, does not require any finding that an organization has engaged in terrorist activity. Under the Executive Order, OFAC has such open-ended designation authority that it could, in fact, designate the International Red Cross for providing "material support" or "other services" to members of an alleged terrorist group. For example, the United States considers as a terrorist group the Liberation Tigers of Tamil Eelam ("LTTE"), an organization fighting the government of Sri Lanka for secession. The Red Cross might provide humanitarian services to LTTE members in Sri Lankan prisons or, in the event of a natural catastrophe such as the 2004 tsunami, provide humanitarian aid to individuals in LTTE-controlled territory. Under the Executive Order, OFAC could designate the Red Cross an SDGT for either kind of support or service. OFAC would also have authority to designate a U.S.-based charity that worked with the Red Cross—or even individuals who simply made a charitable

donation to the Red Cross. OFAC need not show that the Red Cross ever engaged in terrorism, nor does it have to show that either the U.S. charity or the donors were aware of the Red Cross's designation. OFAC could then designate anyone it deemed to have provided "other services" or "material support" to the U.S. charity or the donors. The chain of potential designations-by-association is never-ending, and citizens are left to guess at the kinds of connections that might cause OFAC to designate them. The fact that OFAC has designated literally thousands of individuals and groups, and without issuing statements explaining its actions, only exacerbates the chill, as citizens are left without any guidance.

OFAC's authority under E.O. 13,224 to designate on the basis of the undefined (or inadequately defined) terms "material support," "services," and "associat[ion]," E.O. 13,224 §§ 1(d)(ii), 2(a), is also unconstitutionally vague for several other reasons; this Court should strike the terms in the Executive Order as unconstitutional, and enjoin OFAC from designating KindHearts based on these terms. *Cf.* SOF ¶ 14 (OFAC claimed to impose the freeze pending investigation on KindHearts "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."); *Humanitarian Law Project v. Mukasey* (*HLP III*), 509 F.3d 1122, 1135-36 (9th Cir. 2007) (declaring unconstitutional a similar ban in 18 U.S.C. § 2339B on providing "services").

First, the bans against the provision of "material support" and "services" require *no showing of any knowledge whatsoever* that the support or services are to a designated organization, nor do they require any showing of intent. *Cf.* 18 U.S.C. § 2339B(a)(1) (requiring proof of knowing provision of support to a designated group); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994) (reading *mens rea* requirement into statute to avoid constitutional

difficulties). The absence of even a knowledge requirement greatly expands the sweep of the statute and its consequent chilling effect on First Amendment protected activity.

Second, the term "material support" itself is unconstitutionally vague. *AHIF*, 2008 WL 4849471, at *29-30. As the court held in *AHIF*, "material support" is nowhere defined in IEEPA, the Executive Order or the Regulations, and "[s]ince the term 'material support' lacks standards for OFAC and the public to employ, the term is impermissibly vague both as applied and facially." *Id.* at 30. By contrast, other statutes, *see, e.g.*, 18 U.S.C. § 2339A(b)(i), contain lengthy definitions of "material support," and even these definitions have been successfully challenged as vague. *HLP III*, 509 F.3d at 1135-36. In the absence of any statutory definition in the Executive Order, OFAC recently resorted to a dictionary definition for the term "material support," arguing that it means anything done "to promote the interests or cause of" a designated group that has "real importance or great consequences," or any act that has the "natural tendency" to promote a group's interests. *AHIF*, 2008 WL 4849471, at *29. But as the court found in *AHIF*, these definitions are confusing, and leave citizens to guess at what is permitted or proscribed. *Id.* at 29-30. Would donations to a U.S. charity that built and maintained a hospital in Gaza that provided medical treatment to a Hamas member for pneumonia, count as promoting Hamas's cause? If the medical treatment saved the member's life, would that count as being of "real importance or great consequence" to the organization? What about an op-ed that criticized the U.S. government's refusal to recognize the elections in Gaza because they resulted in Hamas's election? Would such advocacy constitute "material support" if it resulted in a protest that created pressure for the government to change its policy? Would the newspaper editor who ran such an op-ed also have engaged in "material support"? There is simply no way, short of

guessing, to know the kind of conduct or activity that is prohibited "material support" and for which an organization may effectively be shut down. The term is unconstitutionally vague.

Third, the Executive Order provision authorizing designation and civil penalties based on the provision of "services" also forces citizens to guess about what kind of activity is prohibited. Although the Regulations provide "examples" (but not a definition) of prohibited "services," 31 C.F.R. § 594.406, the examples are explicitly non-exclusive, and encompass activity that could be pure First-Amendment protected speech or advocacy, such as "educational," "public relations," or "legal" services. *Id.* Two district courts have found that the term "services" was not unconstitutionally vague. *AHIF*, 2008 WL 4849471, at *30-31; *HLP II*, 463 F. Supp. 2d at 1058-64. But both cases rest on a determination, wholly unsupported by any language in the text of IEEPA, the Executive Order, or the Regulations, that "independent advocacy" on behalf of a group is *not* prohibited. *AHIF*, 2008 WL 4849471, at *31; *HLP II*, 463 F. Supp. 2d at 1060. Moreover, even if one were to accept that the Executive Order somehow permitted "independent advocacy," it still leaves citizens guessing what type of advocacy might be permissibly independent as opposed to advocacy that might be "for the benefit of" a designated group and thus prohibited. That line is impossible to draw.

Finally, the provision permitting designation based on a finding that a group or individual is "otherwise associated with" another designated organization or person is also vague, a concern that is heightened when, as here, the prohibition could encompass First Amendment protected speech and association. *HLP I*, 205 F.3d at 1133-34 (upholding AEDPA because it prohibited financial and other tangible support, not association); *In Re Primus*, 436 U.S. 412, 432 (1978) (prohibiting government-imposed burdens on association that are not "'closely drawn to avoid unnecessary abridgement of associational freedoms'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-

45 (1976)). OFAC "provisionally" decided to designate KindHearts at a time when "otherwise associated with" was not defined. Although the Treasury Department defined "otherwise associated with" by regulation after a court found the phrase to be constitutionally problematic, *HLP II*, 463 F. Supp. 2d at 1070-71, the new definition includes the undefined and vague terms "material support" and "other services," 31 C.F.R. § 594.316(b). *See AHIF*, 2008 WL 4849471, at *31 (declaring "otherwise associated" provision unconstitutional to the extent that it incorporates a reference to "material support," but otherwise upholding it). KindHearts challenges both the original "otherwise associated with" term to the extent that it supported the FPI, and the term as subsequently defined.

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

1. OFAC Failed to Provide KindHearts Adequate Notice with Respect to the Threatened SDGT Designation.

Due process requires, at a minimum, "notice of the action sought" by the government and "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333-34 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 536-37 (2004) (holding that alleged enemy combatant has a due process right to notice of the factual and legal basis for the charges against him, a meaningful opportunity to rebut the charges, and a neutral fact-finder); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). KindHearts has received neither notice nor a meaningful opportunity to respond to OFAC's threatened designation.

To this day, 33 months after its assets were frozen, and more than a year after OFAC threatened to designate it, KindHearts still does not know the most basic elements of OFAC's

legal or factual case against it. When OFAC first froze KindHearts' assets "pending investigation" on February 19, 2006, it provided nothing more than a single boilerplate sentence simply restating all of the criteria of E.O. 13,224 and referring to unspecified connections with Hamas. SOF ¶ 14. Fifteen months later, when OFAC informed KindHearts that it had "provisionally" decided to designate it an SDGT, OFAC again failed to provide any statement of the factual or legal basis for its actions. SOF ¶¶ 17-18. Despite repeated requests from KindHearts over more than two and a half years, SOF ¶¶ 16, 18-20, OFAC has still failed to provide notice that would permit KindHearts to prepare a meaningful response.

OFAC's May 25, 2007 letter to KindHearts threatening designation was accompanied by the unclassified portions of OFAC's administrative record. SOF ¶ 17 (cover letter stating OFAC had "completed its investigation into whether KindHearts should be designated as an SDGT and has provisionally determined that designation is appropriate"). Both the letter threatening designation and the administrative record fall far short of constitutional requirements. Neither the letter nor the administrative record informed KindHearts of the charges against it or of the factual basis for the charges, leaving KindHearts to guess at the significance of the documents in the record. Faced with a similarly deficient record in the *AHIF* SDGT-designation case, the court held that 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." *AHIF*, 2008 WL 4849471, at *18. OFAC's practice of simply dumping on the affected organization a ream of documents, without elaboration, is patently insufficient; it is as if a plaintiff in a civil suit simply produced evidence to the defendant but never provided it with a complaint notifying it of what was at issue.

Moreover, most of the documents disclosed in the administrative record do not even refer to KindHearts. They include criminal indictments in trials that do not involve KindHearts, court decisions from cases having nothing to do with KindHearts, a print-out of OFAC's list of designated entities, and press releases and other accounts of the designation of other entities having nothing to do with KindHearts. *See generally* Bernabei Decl. Exs. A, V. These documents are not evidence at all, but merely reiterations of government *allegations*. *See Parhat v. Gates*, 532 F.3d 834, 846-50 (D.C. Cir. 2008) (government record consisting of indictments and allegations does not constitute adequate evidence, because it simply reiterates government allegations). The documents contain no allegation or evidence that KindHearts provided material support to, or engaged in transactions with, any of the entities named in these documents; indeed, KindHearts was formed well *after* most of the events discussed in the indictments and press releases.

The few documents in the administrative record that actually mention KindHearts provide no clue as to the purported basis for OFAC's provisional decision to designate. For example, the administrative record includes two copies of KindHearts' newsletters. *See* Bernabei Decl. Ex. V (CTI-12) (Oct. 2003 issue); *id*. (CTI-13) (Summer 2005 issue). But the newsletters indicate no illegal activity, and simply demonstrate that KindHearts funded a wide range of legitimate charitable activities. KindHearts is left to guess at why they were included. Similarly, a newspaper article generally discusses KindHearts' activities, but also contains no inculpatory information. *See id.* (CTI-14) (D. Yonke, "Local Muslim charity denies it has any links to terrorism; U.S. Senate panel quietly drops investigation into group," *Toledo Blade*, Dec. 7, 2005). Finally the administrative record includes an exchange of emails from January 2006, between the Board of KindHearts and the former manager of the Palestine office, Ghalib

Abushaban. *See id.* (CTI-22) ("Message from the Board of Trustees") (Jan. 19-25, 2006). But again, these emails do not indicate any support of designated entities. To the contrary, they demonstrate that KindHearts' directors, concerned about a possible unauthorized financial transaction, took prompt action to investigate and remedy what they believed to be improper conduct by the former manager, over his strong objections. Thus, the only documents that even mention KindHearts contain no clue as to what OFAC's legal and factual basis for designating KindHearts might be.

In short, the letters and "documentation" OFAC sent to KindHearts during the designation process provided no substitute for notice of the factual and legal basis for OFAC's provisional decision to designate. The government has no legitimate interest in "hiding the ball" in this manner, and accordingly its failure to provide adequate notice invalidates its actions.

2. OFAC's Reliance on Classified Evidence Violates Due Process.

In addition to producing unclassified documents, OFAC notified KindHearts that it was relying on certain classified evidence for its provisional decision to designate KindHearts. It has provided an "Unclassified Summary" of those documents, SOF ¶ 19, but the summary consists of vague and conclusory allegations and provides no detail as to the source of the allegations, their credibility, or the basis for the sources' knowledge. Reliance on such classified evidence violates KindHearts' due process rights because KindHearts has no meaningful opportunity to respond to evidence that it cannot see, and defendants have made no effort to mitigate the unfairness, by, for example, authorizing KindHearts' counsel to review the evidence subject to security clearances and a protective order. *EEOC v. Monarch Mach. Tool Co.*, 737 F.2d 1444, 1448 (6th Cir. 1980) (use of secret evidence in civil disputes is "inherently unfair"); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) (deprivation of

property or liberty on the basis of secret evidence is "presumptively unconstitutional"); *see also Goss v. Lopez*, 419 U.S. 565, 580 (1975).

i. Secret Evidence Undermines the Adversarial Process and Increases the Risk of Error.

Courts strongly disfavor reliance on secret evidence for two reasons—fairness in the adversarial process and avoiding error—each of which is implicated in KindHearts' case.

The Supreme Court has warned that secret evidence undermines the fairness of the adversarial process. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951). As the Court has explained:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. McElroy, 360 U.S. 474, 496 (1959); *see also United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004) ("due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other"); *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) (open proceedings "preserve both the appearance and the reality of fairness"), *aff'd by an equally divided Court*, 484 U.S. 1 (1987).

The concern for fairness applies with equal force in the national security context. Thus, the use of secret evidence to deport a foreign national accused of terrorist ties violated due process because the foreign national, "like Joseph K. in *The Trial*—can prevail . . . only if he can rebut the undisclosed evidence against him, *i.e.*, prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden." *Rafeedie v. INS*, 880 F.2d

506, 516 (D.C. Cir. 1989); *see also American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1070 (holding that use of secret evidence to deny an immigration benefit to foreign nationals allegedly tied to a terrorist organization violated due process). The Fourth Circuit further explained the court's role in national security cases in *In re Washington Post Co.*, 807 F.2d 383, 391-92 (4th Cir. 1986):

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, . . . [] blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In a few D.C. Circuit cases, all but one of which were decided soon after the September 11, 2001 tragedy, the court upheld the government's reliance on classified evidence in designating organizations as terrorists. *See Holy Land*, 333 F.3d at 164; *Peoples Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003); *NCRI*, 251 F.3d at 208-09; *see also Global Relief Found., Inc.*, 315 F.3d at 754 (relying, in part, on decision in *NCRI*). This Court should decline to follow these cases. In none of the cases did the D.C. Circuit give adequate consideration to the due process consequences of denying a party knowledge of the charges and evidence against it. In each case, the D.C. Circuit simply deferred, with little analysis, to the power of the executive to classify information and to conduct foreign policy. In the first of the cases, the D.C. Circuit simply stated—in a total of two sentences without citation to any authority—that the Secretary of State "need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute." *NCRI*, 251 F.3d at 208-09. The court did not evaluate the possibility of substitute access to the classified information, and later

D.C. Circuit panels felt bound by the two-sentence holding. *See, e.g.*, *Peoples Mojahedin*, 327 F.3d at 1242-43; *Holy Land*, 333 F.3d at 164.[19]

Since the few D.C. Circuit designation cases were decided, the Supreme Court has made clear that the courts have a critical role to play in adjudicating constitutional challenges even in the face of government claims of authority based on foreign policy and national security. *Hamdi*, 542 U.S. at 536 ("a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens"); *see also Boumediene v. Bush*, 128 S. Ct. 2229 (2008). Following the guidance of the Supreme Court in the national security context, in its recent *Bismullah* decision on the detention of enemy combatants, the D.C. Circuit itself was less deferential to the government's claimed need for secrecy, and required the government to provide security-cleared detainees' counsel access to classified documents. *Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007), *vacated*, 128 S. Ct. 2960 (June 23, 2008) (mem.), *reinstated*, No. 06-1197 (D.C. Cir. Aug. 22, 2008) (per curiam).

The second reason courts disfavor *ex parte* evidence is because it creates an intolerable risk of error. Our system of justice relies principally on the adversarial system to reduce the risk of error. *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 171-72 (Frankfurter, J., concurring). Secret evidence short-circuits that process entirely. *Id.* at 172-73; *American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069. As the D.C. Circuit held recently, in order for a judge

[19] In the recent *AHIF* case, the federal district court in Oregon permitted the use of classified evidence *after* the organization had been designated and after the court concluded that the organization was "owned or controlled by a designated terrorist, and has provided support to designated terrorists." *AHIF*, 2008 WL 4849471, at *21. Because of the district court's factual finding, it held that the government's interest in maintaining the secrecy of information about the organization took precedence over AHIF's due process right to access the full record against it. *Id.* No factual finding has been made in KindHearts' case and any finding would be premature given that the government's allegations against KindHearts are not specific enough even to provide notice of wrongdoing. In these circumstances, KindHearts' interest in defending against the government's closure of its business, together with the risk that its property has been erroneously deprived because of the government's reliance on classified information, take precedence over the government's interest in secrecy. *See American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069.

to make an independent and accurate determination of whether the government has sufficient evidence to support the designation of a Guantánamo detainee as an "enemy combatant," the government must provide to petitioners' counsel the sources of the government's information and a basis for finding that the evidence is reliable. *Bismullah*, 501 F.3d at 187 (failure to disclose classified evidence creates intolerable risk of error because "[c]ounsel [for the detainees] simply cannot argue, nor can the court determine, whether" designation of the detainees was proper).

Without any access to the evidence "described" in the summary, KindHearts' ability to defend itself is meaningless because it is being asked to prove a negative by disproving multiple hearsay allegations without access to the evidence, without discovery, and without knowing the identity of its accusers. *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 414 (D.N.J. 1999) (rejecting unclassified summary that was "lacking in either detail or attribution to reliable sources which would shore up its credibility"). For example, in the Unclassified Summary, OFAC makes the allegation that KindHearts "coordinated with Hamas leaders and made contributions to Hamas-affiliated organizations." Bernabei Decl. Ex. A. In support of this allegation, OFAC recites a phrase it frequently uses throughout the Unclassified Summary: "according to information available to the U.S." *Id.*; *cf. Parhat*, 532 F.3d at 846-47 (criticizing government's reliance on documents that describe the alleged activities of the detainee "as having 'reportedly' occurred, as being 'said to' or 'reported to' have happened, as things that 'may' be true or are 'suspected of' having taken place"). Neither the allegation nor its purported support allow KindHearts a meaningful opportunity to defend itself. KindHearts has no means of ascertaining the identity either of the "leaders" it is accused of communicating with or of the organizations OFAC refers to only as "affiliated" with Hamas. Nor does the government provide even an inkling of the

basis for its accusation: KindHearts does not know who the United States obtained the information from, when it obtained the information, or the circumstances under which the information was acquired. *Kiareldeen*, 71 F. Supp. 2d at 413 ("The petitioner has been compelled by the government to attempt to prove the negative in the face of anonymous 'slurs of unseen and unsworn informers.'" (internal citation omitted)).

ii. OFAC Has Refused to Provide Reasonable Alternatives to Secret Evidence.

The D.C. Circuit has noted that several alternatives to the use of classified evidence are available to the executive branch, including providing cleared defense counsel access to classified information, "appropriate nonclassified substitutions under the Classified Information Protection Act," and other means that "will permit an appropriate assessment of the information's reliability while protecting the anonymity of a highly sensitive source." *Parhat*, 532 F.3d at 849-50 & n.18.[20] KindHearts has proposed to OFAC reasonable alternatives to the disclosure of classified evidence, but without success.

KindHearts first asked the government to conduct a "declassification review" of its classified evidence on June 27, 2007. SOF ¶ 20. OFAC agreed to do so on August 10, 2007, SOF ¶ 20, but in the fourteen months between that agreement and the filing of this lawsuit, OFAC reported no progress and produced no further evidence. After this lawsuit was filed, however, the government indicated that a declassification review could be completed within approximately 30 days. SOF ¶ 20. The government has never provided an adequate summary of the evidence as a substitute for access to the classified evidence. *See, e.g.*, *Abuhamra*, 389 F.3d

[20] The few other statutes that contemplate consideration of *ex parte* evidence explicitly require courts to consider alternatives that would mitigate the unfairness of secrecy. *See, e.g.*, 50 U.S.C. § 1806(f) (providing that court can order partial release of classified material previously submitted by government to FISA court); 8 U.S.C. § 1534(e)(3) (requiring an unclassified summary in summary terrorism removal proceedings and in some cases designation of counsel with security clearance); 18 U.S.C. app. 3 § 4 (requiring summaries or substitute admissions). IEEPA, in contrast, does not require the court to consider alternatives to total secrecy. As to classified evidence, the statute appears to contemplate proceedings that are entirely one-sided. 50 U.S.C. § 1702(c).

at 321 (due process requires, at a minimum, some "substitute disclosure").[21]

Finally, despite repeated requests from KindHearts' counsel, SOF ¶ 20, the government has made no provision for counsel to review the classified evidence pursuant to a security clearance and protective order. *Bismullah*, 501 F.3d at 180 (holding that Guantánamo detainees' counsel were entitled to review the classified evidence relating to their clients in order to ensure meaningful judicial review of the entire record); *see also United States v. Lockheed Martin Corp.*, No. 1:98-cv-00731-EGS, 1998 WL 306755, at *1-12 (D.D.C. May 29, 1998) (setting parameters of protective order to protect any classified information that may come out in depositions of defense contractors in civil litigation).

OFAC's refusal to allow KindHearts' counsel to review the evidence subject to security clearances increases the risk of error, because it means that there is *no adversarial testing of the evidence at all*. *Bismullah*, 501 F.3d at 185 (without access to classified evidence, counsel "is in no position to aid the court" in determining whether exculpatory evidence was withheld). KindHearts cannot meaningfully argue that designation would be inappropriate, or that potentially exculpatory evidence is being ignored or withheld,[22] without first reviewing the evidence against it. That concern is heightened because the unclassified portion of the administrative record produced to KindHearts contains no inculpatory evidence, and the unclassified summary is vague, conclusory, and fails to identify its sources, how the sources allegedly obtained their information, or why they should be considered reliable. *Parhat*, 532

[21] In the immigration and criminal contexts the government is statutorily required to produce adequate summaries. *See* 18 U.S.C. app. 3 (Classified Information Procedures Act, Pub. L. No. 96-456); 8 C.F.R. § 1240.11(c)(3)(iv) (unclassified summary of evidence in immigration proceeding); *id.* § 1240.33(c)(4) (same); *id.* § 1240.49(c)(4)(iv) (same). While CIPA and the INA do not apply here, they illustrate that such an option is available. And as a matter of due process, if the government were to provide an adequate unclassified summary, it would in no way undermine its interests (since by definition the information in the summary is unclassified), and would reduce the risk of error by providing an organization with *some* idea of the evidence being used against it.

[22] As discussed below, in Part III.B.3.i, it appears that OFAC has selectively used KindHearts' own documents against it in the unclassified administrative record. KindHearts currently has no way of knowing whether the same is true with respect to the classified portion of OFAC's administrative record.

F.3d at 836, 845-50 (rejecting government assertions for which there were no independent sources identified and that could have been based on hearsay and speculation).

Where, as here, the vast majority of the evidence relied upon is classified, the unclassified evidence is insufficient to permit KindHearts to understand and defend against the threatened designation, and defendants have not established that less restrictive alternatives are unavailable, OFAC's reliance on classified evidence violates due process.

3. OFAC's Restrictions on KindHearts' Ability to Present a Defense Violate Due Process.

OFAC has also imposed unreasonable restrictions on KindHearts' ability to defend itself, further undermining its due process rights. The government has severely compromised KindHearts' ability to respond by denying it any access to its own documents for over two years, placing unreasonable restrictions on its ability to review and use the documents ever since, and requiring counsel to give the government the results of any independent investigation undertaken in furtherance of KindHearts' defense. These restrictions deprive KindHearts of its constitutional right to a meaningful opportunity to defend itself.

i. OFAC's Restrictions on KindHearts' Access to Its Own Documents.

In February 2006, when OFAC froze KindHearts' assets, federal agents seized all of KindHearts' records from its headquarters and from the house of its President and Chief Executive Officer. SOF ¶ 14. Those records are the core of KindHearts' defense—they document precisely what KindHearts did with the funds that it collected, and are necessary to demonstrate that its funds were not expended to support terrorism, or any designated organization or individual, or for any unlawful purposes. Yet for over two years, the government refused to provide KindHearts even with copies of its own records. SOF ¶¶ 21-22. To accuse a corporation of wrongdoing and then require it to defend itself without access to its own records is

fundamentally unfair, and deprives KindHearts of the due process right to a meaningful opportunity to respond.

Even as the government denied KindHearts access to its own documents, OFAC itself appears to have selectively used those documents in connection with the designation process, for a few of the seized documents were included in the administrative record. The government's selective reliance on KindHearts' documents violates due process because an agency may not skew the record in its favor by excluding pertinent but unfavorable information. *Kent County, Del. Levy Court v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992) (agency cannot "exclude[] from the record evidence adverse to its position"); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (supplementation of the administrative record proper when "the agency failed to consider factors which are relevant to its final decision"); *Carlton v. Babbitt*, 26 F. Supp. 2d 102, 107 (D.D.C. 1998) (ordering agency to include relevant public documents and court records that undermine the agency's administrative record).

After initially refusing to give KindHearts access to its own documents, the government reversed course in April 2008 without explanation and provided KindHearts' counsel with an electronic copy of a subset of its own documents, subject to a Protective Order. SOF ¶¶ 21-22. That Protective Order placed unreasonable restrictions on counsel's storage, copying, analysis, and use of the records. SOF ¶ 22 (Protective Order forbade KindHearts' members and officers from viewing any of their own documents without court approval, and prohibited counsel from printing out, or electronically copying, documents). Some of KindHearts' documents are in Arabic, and many of them pertain to financial and organizational activities that require the clients' input, analysis, and explanation in order for counsel to understand their significance. KindHearts' counsel and former officers are scattered among several states and three countries

(Washington D.C., New York, Ohio, California, the United Kingdom, and Lebanon) and the Protective Order's restrictions made it impossible for all of them to review the materials and for KindHearts' members and officers to assist in its defense.

When KindHearts lawyers provided notice of the filing of this lawsuit to the U.S. Attorney's office on October 9, 2008, the AUSA assigned to the case indicated his willingness to discuss amendments to the Protective Order. SOF ¶ 23. After some discussion, the government agreed to amend the Protective Order, to permit each of KindHearts' lawyers an electronic copy of the documents, and to allow KindHearts' former officers and employees to review the seized documents in counsel's offices. SOF ¶ 23. But the government has refused to lift any of the other unreasonable restrictions on counsel's ability to prepare a defense. SOF ¶ 23. The government's refusal to allow KindHearts' former officers and employees to review KindHearts' own documents outside of counsel's offices, makes it virtually impossible for counsel to prepare an effective defense. Prohibiting counsel from printing the documents for review or to attach to pleadings is also unreasonable. The government has also acknowledged that it has provided KindHearts' counsel with only a subset of the materials it seized, and refuses to provide the remainder, even under the restrictive terms of the Protective Order. SOF ¶ 23.

The government cannot justify denying KindHearts full access to its own documents, particularly when the documents are not classified, and when KindHearts has never been found to have engaged in any wrongdoing. The government has not advanced any justification for preventing KindHearts from reviewing its own business records. And the government retains the originals, so there can be no concern about document preservation. Concurrent with this motion, KindHearts is seeking modification of the Protective Order to allow KindHearts' counsel and former officers and employees meaningful and effective access to KindHearts' own documents.

ii. OFAC's Restrictions on KindHearts' Investigation.

The government has also unreasonably restricted KindHearts' counsel's ability to gather evidence for its defense from third parties, including former employees of KindHearts. The outreach to former employees was especially necessary because the government had seized all of KindHearts' records, and counsel had no access to the documents to prepare a defense. OFAC has told KindHearts' counsel that if they obtain documents from former employees in the course of investigating KindHearts' case, the documents would have to be identified to OFAC, with detailed information on the owner, the document, its location, and other information necessary to identify the document(s). SOF ¶ 24.

Although OFAC has modified the restriction, SOF ¶ 25, the parameters of the modification and the obligations of KindHearts' counsel remain unclear and, in any event, are subject to OFAC's unilateral determination and interpretation, which may be inconsistent with the Protective Order as entered by the Court. In addition, OFAC's demand that KindHearts' counsel turn over to it the fruits of counsels' investigation on their clients' behalf is an arbitrary and capricious exercise of the authority granted to it under the Regulations. 31 C.F.R. § 501.603 (governing reporting requirements with respect to blocked property). It also impermissibly interferes with KindHearts' due process right to a meaningful defense because it creates a conflict of interest for KindHearts' counsel by making them agents of the government. Declaration of Ellen Yaroshefsky, dated Nov. 18, 2008 ¶¶ 19-20.

iii. OFAC's Restrictions on KindHearts' Use of Its Own Funds to Finance Its Defense.

For more than two years, OFAC absolutely prohibited KindHearts from using any of its own funds to pay for its legal expenses in defending itself. SOF ¶ 26. In June 2008, after its attorneys' fees restrictions were challenged as unconstitutional in a separate lawsuit, OFAC

changed its policy. SOF ¶ 27. OFAC's new policy permits some expenditure of blocked funds on legal expenses, but continues to impose arbitrary and unconstitutional limits on KindHearts' ability to defend itself: (1) OFAC has placed itself, the adverse party in this litigation, in charge of approving plaintiff's legal expenditures, creating a fundamental conflict of interest; (2) OFAC limits payment by KindHearts to two attorneys, even though the government typically employs many more attorneys in connection with issuing and defending SDGT designations; and (3) OFAC caps the amount of fees payable to each attorney at each stage of the proceedings at unreasonably low rates of $7,000 per attorney, rates that have no basis in experience, logic, law, the economics of practice, or actual cost. SOF ¶ 27. None of OFAC's restrictions on the payment of attorneys' fees has any support in IEEPA, the Executive Order, or the Regulations.

OFAC's restrictions on KindHearts' ability to retain and compensate counsel implicate KindHearts' due process right to access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977). Representation by counsel is an important part of this access. *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 872-73 (D.C. Cir 1984) (stressing that "in our complex, highly adversarial legal system, an individual or entity may in fact be denied the most fundamental elements of justice without prompt access to counsel"); *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) ("undeniable" right of private parties to hire an attorney to determine legal rights). A civil litigant has a constitutional right, inherent in the concept of due process, to retain counsel. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980); *see also Goldberg*, 397 U.S. at 270-71 (claimant "must be allowed to retain an attorney if he so desires [because] [c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests" of the claimant).

OFAC's current fee policy also violates KindHearts' due process rights by arbitrarily undermining its ability to defend itself, and is an arbitrary and capricious exercise of OFAC's authority under the statutory and regulatory framework, for three reasons.[23] *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998) ("agency's discretion to make the final substantive decision under its program authorities does not mean that the agency has unlimited, unreviewable discretion"); *Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2005) ("although the APA's arbitrary and capricious standard is ordinarily a deferential one, such deference is not unfettered nor always due" (citation omitted)).

First, OFAC's new policy places itself, the *defendant* in this adversary proceeding (and in the preceding administrative proceedings as well) in charge of the resources that the *plaintiff* may employ against it in that very proceeding. This is an inherent conflict of interest that violates due process and is arbitrary and capricious in violation of the APA. Although in one case, *AHIF*, the court found OFAC's interest in preserving funds and paying fees to a capped amount was not arbitrary and capricious, *AHIF*, 2008 WL 4849471, at *33, decisions about legal expenses should be made by the courts, not the administrative agency whose actions are being challenged. Not surprisingly then, there is no other precedent to support a rule that gives one party the unfettered right to determine the opposing party's ability to retain and compensate counsel in adverse proceedings. In all other attorneys' fees contexts of which counsel are aware, it is the judge who decides the fees, not the adverse party.

[23] In *Beobanka d.d. Belgrade v. United States*, No. 95 Civ. 5138 (HB), 1997 WL 23182 (S.D.N.Y. Jan. 22, 1997), a district court held that OFAC's denial of a designated entity's request to use its blocked fund for *other* litigation was not invalid. That case, however, does not raise the due process issues presented here, because the designated entity there was not seeking to challenge its designation. In *AHIF*, the court erroneously relied on *Beobanka* to find that a designated entity's Fifth Amendment rights were not violated when OFAC refused to release blocked funds to pay attorneys' fees. *AHIF*, 2008 WL 4849471, at *32-33. Even so, the court in *AHIF* held that OFAC's restrictions on attorneys' fees were arbitrary and capricious under the APA. *Id.*

Second, OFAC has no legitimate basis to restrict KindHearts' use of its funds to pay attorneys' fees. The government's interest in KindHearts' assets is not to obtain them for itself (as it would be, for example, in the forfeiture context). Nor does the government have any interest in acting as a fiduciary or otherwise preserving KindHearts' assets for third parties, because there have been no allegations whatsoever that the blocked funds were obtained through illegal conduct or need to be returned to wronged donors or depositors; nor has anyone sued KindHearts. The government's sole legitimate interest is to stop the assets from being used to support terrorism. Spending KindHearts' funds on its own legal defense does not undermine that interest in any way. To the contrary, the counsel to whom fees would be paid are already licensed by OFAC, which protects the government's interest in ensuring that blocked funds are not used for improper purposes.

Third, defendants have arbitrarily restricted KindHearts to $28,000 in aggregate, a figure that bears no relation to the amounts actually spent on designation challenges, and to compensating two attorneys, even though the government itself has no such restrictions for this litigation, at the administrative level, or for any purpose whatsoever. The decision to release funds to only two attorneys is irrational. It is merely, and purely, an interference with KindHearts' right to defend itself, a right it is entitled to pay for with its own funds.

Other designation cases illustrate the stark difference between the manpower the government deems necessary to defend itself and the two-attorney limit it seeks to impose on KindHearts. There are at least 13 attorneys, from both the Department of Justice and OFAC, assigned to the designation challenge brought by the Oregon-based charity, the Al Haramain Islamic Foundation, Inc. ("AHIF"). Kabat Decl. ¶¶ 9-10. Based on the court filings in three other designation challenges, the Department of Justice alone has assigned multiple attorneys to

defend OFAC's designations: eight DOJ attorneys represented the government at the district court level in the challenge by the charity Benevolent International Foundation; a total of ten DOJ attorneys were assigned to the district court and appellate proceedings in the Global Relief Foundation's designation challenge; and a total of six DOJ attorneys were assigned to the district court and appellate proceedings in the Islamic American Relief Agency's designation challenge. *Id.* ¶¶ 12-14. By way of further comparison, counsel in this case have spent over 800 hours defending KindHearts since June 2006. *Id.* ¶ 15.

Other designation cases also show that OFAC's fee restriction—an aggregate cap of $28,000 for two attorneys to cover both the administrative designation challenge and judicial review of designation at the district court level—simply has no relation to the reality of time, fees, and expenses required to effectively represent a client in a designation case. For example, in the challenge to a freeze and subsequent SDGT designation brought by AHIF, two of the five attorneys representing AHIF have provided to date almost 650 hours of legal services, totaling $210,802.00 in legal fees, and have incurred expenses of $10,448.13. Kabat Decl. ¶¶ 4-5. [24] These amounts reflect only the resources expended by two attorneys in the initial stages of the challenge.[25] In another example, that of the Holy Land Foundation for Relief and Development ("HLF"), which was designated an SDGT in 2001, counsel for HLF spent approximately 4,286 hours litigating the designation through to a petition to the Supreme Court for certoriari review,

[24] The legal fee amount is based on the government-calculated market rate for attorneys in private practice in Washington, D.C., where the two attorneys, Lynne Bernabei and Alan Kabat (who are also counsel to KindHearts in the instant challenge), practice. Kabat Decl. ¶ 4.

[25] The hours, fees, and expenses cover a four-year period, from May 2004 (when the attorneys were retained to challenge the initial freeze) to August 2008, by which time both parties had moved for summary judgment on the constitutionality of the designation and are now awaiting the district court's decision. Kabat Decl. ¶¶ 4-5; *see also* Pl.s' Reply Mem. in Supp. of Mot. for Summ. J. 3-6, *AHIF*, 2008 WL 4849471 (D. Or. June 20, 2008) (government designated AHIF after a seven-month long freeze; after AHIF challenged the freeze, the government designated and then "re-designated" AHIF).

and incurred total fees and expenses of $894,899.20. Boyd Decl. ¶ 4. OFAC permitted HLF's counsel to be paid from HLF's blocked funds for most of this amount. *Id*. ¶ 5.

OFAC's restrictions on KindHearts' use of its own funds to defend itself violate due process and the APA and must be lifted.

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

OFAC's authority under the Executive Order to designate an organization or entity an SDGT violates the Fourth Amendment for the same reasons that its FPI authority does. *See supra* Part II.C. The one difference between the designation authority and the FPI authority is that the designation authority requires OFAC to make an individualized determination that the targeted organization provided "support" or "services" to, or is "otherwise associated with," terrorism or entities designated under the Executive Order. E.O. 13,224 § 1(d)(i). That difference is not enough to satisfy the Fourth Amendment because the designation authority still permits seizures without a warrant, probable cause, judicial review, limit on duration, or specification of assets OFAC reasonably believes may have been used to further illegal activity. *See supra* Part II.C.

IV. THE FREEZE PENDING INVESTIGATION AND THE THREATENED DESIGNATION ARE NOT AUTHORIZED BY STATUTE.

OFAC's FPI and the threatened SDGT designation are also statutorily invalid. IEEPA's language, history, and purpose make clear that it authorizes the designation of organizations and individuals only as an incident to an economic sanction against a foreign country. 50 U.S.C. § 1702(a)(1)(A), (B) (limiting sanctions authority to foreign countries and their nationals, and to properties in which a foreign country or a national thereof has an interest).

OFAC's action against KindHearts, however, is not incident to any nation-targeted economic sanction, but pursuant to E.O. 13,224, which targets no nation, but an undefined group

of "terrorist" entities and those associated with them. Because IEEPA was not intended to give the President the power to target disfavored organizations and individuals except incident to a nation-targeted sanction, OFAC's designation of KindHearts is invalid on statutory grounds.

Statutes should be construed to avoid serious constitutional questions. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems" (internal citation omitted)); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (same); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006). The statutes at issue in *St. Cyr*, *Zadvydas*, and *Nadarajah* contained no limiting language on their face, but the courts nonetheless read limitations into the statutes to avoid the serious constitutional questions that would otherwise have been presented. Here, serious constitutional questions are raised by the scope of authority conferred by IEEPA. Those questions should be avoided, and IEEPA contains limiting language on its face that allows such avoidance: it authorizes actions only against a "foreign country or a national thereof." Thus, 50 U.S.C. § 1702(a)(1)(B) empowers the President, *inter alia*, to "prevent or prohibit[] any . . . transactions involving[] any property in which *any foreign country or a national thereof* has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." (emphasis added). Similarly, 50 U.S.C. § 1702(a)(1)(A)(ii) empowers the President to block "transfers or payments [to the extent they] involve any interest of *any foreign country or a national thereof*." (emphasis added). Notably, IEEPA *never* refers to foreign nationals generally, absent a connection to foreign countries, but *always* uses the phrase "foreign country or a national *thereof*."

IEEPA was designed to codify and rein in the longstanding practice of economic sanctions on foreign nations. All the discussion in IEEPA's legislative history concerns sanctions on nations. *See, e.g.*, *Markup Before the H. Comm. on Int'l Relations*, 95th Cong. 4 (June 17, 1977) (statement of Rep. Bingham) (providing example of a national emergency unrelated to war that would fall within IEEPA: "A very obvious example would be a case where the United States was engaged in hostilities where there was no declaration of war, such as the war in Korea, or the war in Vietnam . . . ."). No one, in any of the debates on IEEPA, even mentioned the possibility that it would empower the President to target disfavored political organizations and individuals, without any nexus to an embargo on a foreign country.

The freeze and threatened designation of KindHearts are entirely unrelated to any nation-targeted sanction; KindHearts is not a "national thereof" of any foreign country targeted by an IEEPA sanction. Accordingly, its freeze and designation is not authorized by IEEPA.

This interpretation makes constitutional sense. It is well-established that the President has far broader leeway in imposing sanctions on foreign nations than on political groups. Thus, in *Regan v. Wald*, 468 U.S. 222, 241-42 (1984), the Supreme Court upheld a general ban on travel to Cuba, but carefully distinguished restrictions on travel by Communist Party members, imposed "on the basis of political belief or affiliation," which were previously invalidated in both *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964), and *Kent v. Dulles*, 357 U.S. 116, 127-30 (1958). S*ee also Zemel v. Rusk*, 381 U.S. 1, 13, 17-18 (1965) (same). Two courts have held that IEEPA properly authorizes designation. *See HLP II*, 463 F. Supp. 2d at 1072-73; *AHIF*, 2008 WL 4849471, at *22-23. But these courts' interpretation should be rejected because it would give the executive branch nearly limitless—and unconstitutional—authority to designate disfavored entities and individuals.

V. THE COURT SHOULD LIFT THE FREEZE PENDING INVESTIGATION AND EITHER PERMANENTALY ENJOIN THE THREATENED DESIGNATION OR ENJOIN IT UNTIL OFAC HAS PROVIDED KINDHEARTS WITH CONSTITUTIONALLY ADEQUATE PROCESS.

KindHearts has challenged the FPI and SDGT designation authorities as invalid on their face and as applied to KindHearts. If the Court concludes that the FPI authority is unconstitutional, unconstitutionally applied to KindHearts, or statutorily unauthorized as applied to KindHearts, the proper remedy would be to lift the freeze. KindHearts would then be free to use its funds as it deems fit, complying, of course, with all federal laws, including those that bar material support of terrorism or terrorist groups.[26]

If the Court concludes that the designation authority is also unconstitutional, unconstitutionally applied to KindHearts, or statutorily unauthorized as applied to KindHearts, it should enjoin OFAC from designating KindHearts.

In the alternative, if the Court were to conclude that KindHearts' challenges to OFAC's designation authority on constitutional or statutory grounds are unsuccessful, but does find that OFAC has not provided KindHearts with due process in connection with OFAC's threatened designation, KindHearts respectfully asks the Court to enjoin OFAC from designating KindHearts unless and until OFAC has provided a constitutionally adequate process. *Vitek*, 445 U.S. at 494-95 (setting forth the minimum required process before a prisoner may be involuntarily transferred to a mental hospital). KindHearts does not, of course, seek permanent protection from the Court, but it does respectfully request a ruling that bars OFAC from designating it under a regime that is constitutionally inadequate. KindHearts suggests that the Court order OFAC to propose a specific process within thirty days of the Court's decision, allow

[26] As noted above, *supra* n.18, if the government were to appeal, KindHearts would be willing, for the duration of the appeal, to notify OFAC on a monthly basis of its funding decisions. Although OFAC has no right to approve or disapprove of KindHearts' funding decisions, if it considered any of them problematic, the notification would permit OFAC to take action and would protect any interest it has in ensuring that the funds are not improperly used.

KindHearts to respond, and thereafter review the adequacy of the proposed process. At a minimum, the process should provide:

- meaningful notice of the specific legal and factual basis of OFAC's contemplated designation;
- disclosure of the evidence in support, including access, or an adequate substitute for access, to the classified evidence relied upon by OFAC;
- full access to KindHearts' own documents for KindHearts' counsel and its directors and employees;
- adequate time for KindHearts to respond to OFAC's threatened designation;
- a prompt review of KindHearts' response by OFAC and a prompt decision that includes a written statement as to the evidence relied upon and the reasons for the decision, to allow for meaningful judicial review; and
- in the event OFAC decides to designate, adequate time for KindHearts to seek judicial review of the decision.

An injunction preventing OFAC from designating KindHearts pending its provision to KindHearts of constitutionally adequate process is necessary to protect KindHearts from the irreparable injury of an illegal designation. Designation as a "specially designated global terrorist" would do irreparable harm to KindHearts' most valuable asset—its reputation. *Cf. Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972) ("'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential'" (quoting *Constantineau*, 400 U.S. at 437)); *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992) (loss of customer goodwill can become an irreparable injury because the resulting losses are difficult to quantify); *see also Gateway E. Ry. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) (injury to goodwill constitutes irreparable harm and money damages may be inadequate if they are too late to save a plaintiff's business).

CONCLUSION

For the reasons discussed above, KindHearts respectfully requests that this Court enter summary judgment in its favor on Counts I to VII.

Dated: November 21, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion for Partial Summary Judgment, the accompanying Memorandum of Points and Authorities in Support of the Motion and supporting declarations were filed electronically this 21st day of November, 2008. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties

I further certify that I caused a true and correct copy of the manually-filed Exhibit V to the Declaration of Lynne Bernabei in support of the Motion to be served by email and courier this 21st day of November, 2008, on counsel for defendants to:

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