

No. 10-35032

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL HARAMAIN ISLAMIC FOUNDATION, INC., et al.,
Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF THE TREASURY, et al.,
Defendants-Appellees.

On Appeal From the United States District Court
For the District of Oregon (No. 07-cv-1155)

REDACTED UNCLASSIFIED BRIEF FOR APPELLEES

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REDACTED UNCLASSIFIED BRIEF FOR APPELLEES

(U) INTRODUCTION

(U) Plaintiff Al Haramain Islamic Foundation, Inc. (“AHIF-Oregon”) was the United States branch of the Al Haramain Islamic Foundation (“Al Haramain” or “AHIF-SA”), a Saudi-based “charity” that acted as one of the leading financial supporters of al Qaeda throughout the world. Since 2004, AHIF-Oregon’s property and interests in property have been blocked under orders issued by the Treasury Department’s Office of Foreign Assets Control (“OFAC”) pursuant to Executive

Order 13224. AHIF-Oregon challenges the Secretary's decision to designate it as a Specially Designated Global Terrorist ("SDGT") under E.O. 13224,¹ and asks this Court to vacate OFAC's blocking orders, so that it may resume operations.

(U) The Administrative Record compiled by the Treasury Department reveals that Al Haramain and its officers, including AHIF-Oregon founder Aqeel Al-Aqil, had direct ties to al Qaeda and provided support for the bombing of United States embassies in Kenya and Tanzania, the bombing of a night club in Bali, Chechen separatists fighting in Kosovo, and numerous other terrorist acts.

(U) That record also demonstrates that AHIF-Oregon was founded and controlled by Al Haramain officials from Saudi Arabia, including Al-Aqil, who has been designated by the United States as an SDGT. Similarly, it shows that, through one of its directors, Soliman Al-Buthe (also an SDGT), AHIF-Oregon funneled approximately \$150,000 directly to Al Haramain's headquarters in Saudi Arabia for use in Chechnya at a time when the organization was supporting *both* humanitarian and terrorist activities there. Another AHIF-Oregon director – Pete Seda, who was recently convicted on federal criminal fraud and tax charges related to AHIF-Oregon's \$150,000 transfer – sent additional funds for the support of Chechen

¹ (U) The term "Specially Designated Global Terrorist" means any person "listed in the Annex to or designated pursuant to Executive Order 13,224 * * * ." 31 C.F.R. § 594.310.

separatists directly to the Al Haramain branch in Albania, which was reportedly started with funding from Osama Bin Laden and has also been designated as an SDGT.

(U) This evidence demonstrates that the district court correctly upheld the Treasury Department's action in designating the Oregon branch as an SDGT because it was part of the global Al Haramain organization.

(U) STATEMENT OF JURISDICTION

(U) The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. On November 12, 2009, the district court entered final judgment. ER 0004. Plaintiffs filed a timely notice of appeal, ER 0001, and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

(U) STATEMENT OF THE ISSUES

(U) The Office of Foreign Assets Control designated AHIF-Oregon as a Specially Designated Global Terrorist under Executive Order 13224 because of its provision of support to, and its control by, persons or entities designated under that Order. After AHIF-Oregon requested reconsideration, OFAC redesignated the organization based upon an updated administrative record, including substantial material added to the record by AHIF-Oregon itself. The questions presented in this appeal are:

1. (U) Whether AHIF-Oregon's designation is supported by substantial evidence in the record.
2. (U) Whether redesignation, by itself, violated due process or the Administrative Procedure Act.
3. (U) Whether OFAC properly relied upon classified evidence in designating AHIF-Oregon, as expressly permitted by statute.
4. (U) Whether the allegedly insufficient agency notice concerning the proposed redesignation violated AHIF-Oregon's due process rights and, if so, whether that error was harmless.
5. (U) Whether OFAC's blocking of AHIF-Oregon's property is susceptible to a Fourth Amendment challenge and, if so, whether it was reasonable.
6. (U) Whether E.O. 13224's ban on providing "services" to designated entities unconstitutionally restricts the right to free speech of an organization that wishes to collaborate with AHIF-Oregon and provide assistance directly to it.

(U) STATEMENT OF THE CASE

(U) OFAC designated AHIF-Oregon as an SDGT because the organization was controlled by, and provided support to, persons designated pursuant to that Order. AHIF-Oregon challenged the merits of that determination, and also raised various challenges concerning the designation process. Plaintiff Multicultural Association

of Southern Oregon (“MCASO”) separately alleged that IEEPA and E.O. 13224 violated its First Amendment rights.

(U) The Government moved to dismiss and for summary judgment. Plaintiffs cross-moved for summary judgment. The district court dismissed with prejudice all of AHIF-Oregon’s claims against OFAC. ER 0005. It also dismissed with prejudice all claims brought by MCASO, except as to a narrow portion of one count that is not at issue in this appeal. *Ibid.* Plaintiffs appeal.

(U) STATEMENT OF FACTS

I. (U) Statutory and Regulatory Framework

A. (U) International Emergency Economic Powers Act

(U) The International Emergency Economic Powers Act (“IEEPA”) authorizes the President to declare a national emergency with respect to any extraordinary threat to “the national security, foreign policy, or economy of the United States” if that threat “has its source in whole or substantial part outside the United States.” 50 U.S.C. § 1701(a).

(U) Once the President has declared such an emergency, he may, among other powers, investigate, block during an investigation, regulate, or prohibit exercise of any right, power, or privilege with respect to any property in which a foreign country or foreign national has an interest in the United States. *Id.* § 1702(a)(1)(B).

Violations of IEEPA are subject to civil and criminal penalties. *Id.* §§ 1705(b), (c).

(U) Terrorist designations under IEEPA may be challenged as final agency action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 702. IEEPA expressly provides that “[i]n any judicial review of a determination made under this section, if the determination was based on classified information * * * such information may be submitted to the reviewing court *ex parte* and *in camera*.” 50 U.S.C. § 1702(c).

B. (U) Executive Order 13224

(U) On September 23, 2001, the President issued Executive Order 13224, 66 Fed. Reg. 49,079, pursuant to his powers under the Constitution, IEEPA, and other laws. That Order declared a national emergency with respect to “grave acts of terrorism and threats of terrorism committed by foreign terrorists,” including the Sept. 11, 2001 terrorist attacks. *See* E.O. 13224, Preamble. It also blocked transactions “to or for the benefit of” 27 specifically-identified individuals and entities listed in the Annex to that Order. *See id.*, Annex.

(U) E.O. 13224 grants the Secretary of the Treasury power to designate additional persons or entities he determines “to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to this order” or otherwise subject to the Order. *Id.* § 1(c). The Order similarly empowers the Secretary to

designate persons who “assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to this order or determined to be subject to this order,” or are “otherwise associated with those persons.” *Id.* § 1(d)(i)-(ii).² The Order also forbids “any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to this order,” including “the making or receiving of any contribution of funds, goods, or services to or for the benefit of” persons designated under the Order. *Id.* § 2(a).

C. (U) The Office of Foreign Assets Control and Blocking Orders

(U) OFAC “is the office principally responsible for administering U.S. economic sanctions programs,” including the program established by E.O. 13224. Unclassified Supplemental ER (“USER”) 2 (¶3). As a declaration from the OFAC Director (Adam Szubin) explains in some depth, to carry out its responsibilities, OFAC issues “blocking orders” that “require holders of blocked property to freeze that property, including bank accounts, in their possession or control at the time of

² (U) The United Nations Security Council has also established a Committee Concerning Al-Qaida and the Taliban and Associated Individuals and Entities. *See* <http://www.un.org/sc/committees/1267/> (last viewed Sept. 28, 2010). Many persons and entities designated by the United States under IEEPA are also designated by the U.N. pursuant to this process, including AHIF-Oregon. *See* <http://www.un.org/sc/committees/1267/consolist.shtml> (last viewed Sept. 28, 2010).

the order, as well as property that later comes into the holders' possession." USER 4 (¶9).

(U) These blocking orders serve numerous "important objectives," including: "depriving the designated person of the benefit of the property * * * that might otherwise be used to further ends that conflict with U.S. interests"; preventing terrorists from using assets "in the orchestration, assistance, or support of unlawful and dangerous global terrorist plots"; allowing OFAC "to guard against the dissipation of assets to preserve assets for possible legal judgments"; and "preserv[ing] the President's ability to use the blocked assets as a bargaining chip or negotiation tool in resolving the national emergency that gave rise to the blocking." USER 4-5 (¶11). These important goals may be achieved "even when the amount of assets is small because terrorist activities often proceed on limited budgets and funding for such activities, in small amounts, can easily escape detection." *Ibid.* See also 9/11 Commission Terrorist Financing Monograph at 22 ("The amounts of money required for most operations are small, and al Qaeda can apparently still draw on hard-core donors who knowingly fund it and sympathizers who divert charitable donations to it.").³

³ (U) Available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf (last visited Sept. 28, 2010).

(U) Typically, OFAC does not give its targets prior notice that they are the subject of an investigation, because such notice would create “a significant risk that [the target] would transfer, hide, sell, or destroy assets that could be blocked, destroy or alter records relevant to the investigation, or otherwise frustrate or obstruct the investigation before the sanctions investigation, and the potential blocking of assets, can be completed.” USER 5 (¶12). Instead, notice and an immediate opportunity to contest a blocking or designation are normally provided after OFAC issues a blocking order. “Designated parties may submit arguments or evidence to challenge the basis for the blocking, to assert that the circumstances resulting in the designation no longer apply, or to assert mistaken identity.” USER 6 (¶16). This Court’s sister Circuits have found this post-deprivation process constitutionally sufficient to protect the rights of designation targets. *See, e.g., Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008); *Holy Land Found. for Relief and Development v. Ashcroft*, 333 F.3d 156, 163 (D.C. Cir. 2003); *Global Relief Foundation, Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002).

II. (U) Factual Background

A. (U) The United States and Saudi Arabian Governments’ Efforts to Dismantle Al Haramain’s Worldwide Network of Terrorist Financing

(U) The keystone for the Treasury Department’s action under attack in this case

is the conclusion that AHIF-Oregon is the United States branch of the Saudi-based Al Haramain Islamic Foundation. At its peak, this foundation operated in 50 countries worldwide, with an annual budget between \$30 and \$80 million. *See* ER 0752-0753; USER 12 (¶29).

(U) Al Haramain played a central role in financing terrorism around the world. *See* USER 12-18; Classified Supplemental ER (“CSER”) 1-26, 27-48.⁴ Al Haramain “is one of the principal Islamic N[on] G[overnment] O[rganization]s providing support for the al Qaida network” and has funded, and operated as a front for, numerous other terrorist organizations designated by the United States. USER 12 (¶29); ER 0325-0326. Indeed, the 9/11 Commission singled out Al Haramain by using it as one of three case studies for its Staff Monograph on Terrorist Financing. ER 0752-0768.

(U) Al Haramain and its branch offices had direct connections to numerous persons and entities designated by the President in the original Annex to E.O. 13224. For example, Osama Bin Laden is reported to have financed the establishment of Al Haramain’s branch in Albania, which has been used as a cover for terrorist activity

⁴ (U) For this Court’s convenience, the Government is lodging a Classified Supplemental ER (“CSER”) containing the classified materials from the record cited in this brief. The full classified Administrative Record can be provided to the Court upon request.

in that country and throughout Europe. USER 15 (¶40); ER 0452.

(U) Al Haramain also has numerous connections to al Qaeda. The organization's operatives and former officials had advanced knowledge of, and provided advice and financial support for, the al Qaeda bombings of United States embassies in Kenya and Tanzania in 1998. USER 12-14 (¶¶30-36); ER 0326. As a result of those attacks, 224 people died, including 12 U.S. Government employees and family members. USER 14 (¶36). Similarly, an Al Haramain branch provided financial support to the al Qaeda-affiliated (and U.S.-designated) terrorist group Jemaah Islamiya, which killed 202 people and injured an additional 300 during a 2002 bombing of a nightclub in Bali. *Id.* (¶37); ER 0326.

(U) Al Haramain also deployed a Bangladeshi national to conduct surveillance on U.S. consulates in India so that they might be targeted in terrorist attacks. USER 14 (¶38); ER 0452. The suspect, who first learned of the plan in the Al Haramain branch office in Bangladesh, was arrested in 1999 reportedly carrying explosives and detonators. *Ibid.* He subsequently confessed to training in al Qaeda training camps, where he personally met Bin Laden. *Ibid.*

(U) Al Haramain has further been linked to Makhtab al-Khidamat ("MK"), the Bin Laden-financed group that was precursor to al Qaeda and was designated by the President in the Annex to E.O. 13224. USER 14 (¶39); ER 0185, 0327, 0454, 2029.

An MK director instructed that the group's funds should be deposited with Al Haramain accounts in Pakistan, and transferred from there to other accounts. USER 14 (¶39); ER 0327. Al Haramain's branch in Ethiopia similarly provided support to another terrorist group listed in the original Annex to E.O. 13224 – Al-Ittihad Al-Islamiya. USER 15 (¶41); ER 0185, 0452.

(U) Al Haramain was thus not simply a charitable organization – it also financially and otherwise supported terrorists, such as separatist fighters in Chechnya. There, it “operat[ed] actively alongside * * * extremist field commanders,” by “gathering intelligence” that was used “to conduct not only combat operations but also an information war against Russia,” ER 1132, and provided \$1 million “earmarked for the purchase of weapons for the terrorists,” ER 0924; *see also Ibid.* (Mansour Al-Kadi, an AHIF-Oregon director, channeled 480,000 Saudi Riyals to Chechen separatists). Three groups of Chechen separatists were designated by Secretary of State Colin Powell under E.O. 13224. ER 0068 n.9; ER 0834.

(U) As OFAC Director Szubin explained, “[t]hese and other ties to terrorist acts and organizations – attested to in both classified and unclassified materials – prompted the U.S. Government to take action with respect to [Al Haramain].” USER 15 (¶42). In 2002, following two years of consultation with the Government of Saudi Arabia, the United States designated the Al Haramain branches in Somalia and

Bosnia as global terrorists. *Id.* (¶¶42-43). The following year, the Government of Saudi Arabia ordered Al Haramain to close all of its overseas branches. USER 16 (¶44); ER 0454. Nevertheless, monitoring by the United States and Saudi Arabia revealed that some branches and/or their former officials were continuing to operate; the Bosnian branch of Al Haramain, for example, reconstituted itself under an alias. *Ibid.*; ER 0321.

(U) Throughout 2004, the United States and Saudi Governments continued their efforts to shut down Al Haramain's world-wide terrorist financing network. That year, in conjunction with Saudi Arabia, the United States designated the Al Haramain branches in Afghanistan, Albania, Bangladesh, Ethiopia, Indonesia, Kenya, the Netherlands, Pakistan, Tanzania, and the United States. USER 16-20 (¶¶47, 51, 59); ER 0324, 0434, 0454. And, the Saudi Government dissolved Al Haramain, and folded the foundation's assets, along with those of other entities suspected of funding terrorism, into a new charity. USER 18 (¶51); ER 0433.

(U) In June 2008, the United States designated the Saudi headquarters of Al Haramain because of its extensive ties to terrorist activities. ER 0049. (The validity of neither that designation, nor the designations of AHIF-Oregon director al-Buthe and Al Haramain worldwide leader Aqeel Al-Aqil have been challenged in this suit.)

B. (U) AHIF-Oregon's Relationship to Al Haramain's Worldwide Network

(U) AHIF-Oregon was incorporated under Oregon law in February 1999. Its board of directors consisted of AHIF-Oregon's four founders: Aqeel Al-Aqil (the Director of Al Haramain's worldwide operations), Mansuor al-Kadi (Aqil's deputy), Soliman H.S. Al-Buthe, and Perouz Sedaghaty (a/k/a Pete Seda). ER 0201, 0648. Both Al-Aqil and Al-Buthe have been designated by the United States as Specially Designated Global Terrorists, ER 0451, 2051, and are similarly listed by the United Nations under U.N.S.C.R. 1267. Seda was recently criminally convicted on federal charges related to an incident, described below, in which he helped Al-Buthe transfer \$150,000 from AHIF-Oregon to Al Haramain in Saudi Arabia for activities in Chechnya. *See* 9/9/10 Verdict, No. 05-cr-60008 (D. Ore.), Dkt. 466 .

(U) AHIF-Oregon was directly controlled by the Saudi headquarters of Al Haramain and its Saudi Director, Al-Aqil, who "maintained 'tight control over the affiliated offices'" from Riyadh. ER 0049, 0711. Al-Aqil described the directors of Al Haramain's branches as "employees who follow the direction of the main office with regards to hiring workers at the offices and making any decisions on cooperation with any party." *Ibid.* Indeed, Al-Kadi, Al-Aqil's former deputy (and another of AHIF-Oregon's board members), resigned from the organization due to Al-Aqil's

“centralist governance.” ER 0352.

(U) Operating from Saudi Arabia, Al-Aqil was “the only individual with final decision making on spending” (*ibid.*), and his significant power over AHIF-Oregon’s operations is supported by the record in this case. For example, in 2001, Pete Seda applied to OFAC for a license to permit AHIF-Oregon to help Afghan refugees in Iran. ER 0049. In his request, Seda noted that he asked Al-Aqil to fund this project on behalf of AHIF-Oregon, and that Al-Aqil “has agreed to fund \$500,000 in aid from our organization to Afghani refugees in border camps in Iran * * *.” ER 0192.

(U) Al-Aqil resigned from the board of AHIF-Oregon in March 2003. ER 0546. In 2004, the Saudi Government purportedly removed him from his role as Al Haramain’s worldwide director. ER 0049. Until his departure in 2004, however – and, according to some reports, even after that time – Al-Aqil “retained effective control over the activities of all branches.” ER 2331 n.2. *Cf. also* ER 0338. The United States designated Al-Aqil as an SDGT in June 2004. ER 0451. Al-Aqil never challenged the merits of that designation, and his attempt to attack it on constitutional grounds was rejected. *See Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 73 (D.D.C. 2008).

(U) Besides Al-Aqil exercising governing power from Saudi Arabia, AHIF-Oregon was controlled by a second person designated under E.O. 13224, Soliman Al-

Buthe. Al-Buthe, though a citizen and resident of Saudi Arabia, was “primarily responsible for AHIF’s internet and charitable works in the United States”; signed contracts for AHIF-Oregon; was one of two people with access to its bank account; helped AHIF-Oregon purchase a mosque in Missouri; raised funds for AHIF-Oregon from Saudi Arabian sources; and “under the immediate and close supervision of Mr. Al-Aqil,” dispersed AHIF-Oregon’s operational funds. ER 0050, 0401-0430, 0716. Al-Buthe was designated in 2004 and, along with AHIF-Oregon, was redesignated in 2008. ER 0051, 2051.

(U) A critical fact demonstrating the support provided by AHIF-Oregon to Specially Designated Global Terrorists was the incident in 2000, in which Al-Buthe and Seda withdrew at least \$150,000 from AHIF-Oregon’s account, which Al-Buthe carried to Al Haramain’s Riyadh headquarters. ER 0053. This money had been provided by a donor who, in an email to AHIF-Oregon, stated that “[i]n regard to our previous correspondence * * * I have already asked my bank in London to make a transaction to your USA account, using the details you provided in an earlier e-mail * * * in order to participate in your nobel [sic] support to our muslim brothers in Chychnia.” ER 0052, 0816.

(U) AHIF-Oregon’s connection to Chechen separatist fighters was further revealed when the FBI executed a search warrant of the organization’s property in

Oregon. During that search, federal officials discovered “passports from deceased Russian soldiers, a map depicting mujahideen military engagements, videos showing mujahideen in Chechnya committing violent acts against Russian soldiers, and photographs of deceased mujahideen and Russian soldiers.” ER 0055; ER 0825-0832.⁵

(U) In sum, there is considerable evidence even in the unclassified record demonstrating that AHIF-Oregon was part of Al Haramain, was closely controlled by Al Haramain personnel in Saudi Arabia, and took actions to provide support to SDGTs. Al Haramain was indisputably involved in global terrorism, and, like the foundation’s other branches, AHIF-Oregon was linked to this activity through its parent in Saudi Arabia and by its own actions.

[REDACTED TEXT]

⁵ (U) In 1999, Pete Seda also wired \$2,000 directly to the Al Haramain branch office in Albania, which was the closest branch to the fighting in Kosovo, and was reportedly started with funding from Osama Bin Laden. ER 0055, 0452, 0742, 1204, 2037.

C. (U) AHIF-Oregon's Designation Process

(U) In February 2004, OFAC blocked “all funds and accounts and real property in which [AHIF-Oregon] has any interest, pending further investigation.” USER 17 (¶50), 33. Consistent with OFAC’s typical practice, the agency did not provide AHIF-Oregon with advance notice of the blocking action, which would have created a substantial “risk of asset flight.” USER 18 (¶54).

(U) OFAC then informed AHIF-Oregon that it was considering designating the group, and provided the foundation with the non-classified material that the agency had relied upon in blocking AHIF-Oregon’s assets pending investigation. USER 19 (¶54); ER 0173-0471, 2119. OFAC invited AHIF-Oregon to provide any material it wished OFAC to consider in that process. ER 2119.

(U) Over the next several months, “OFAC continued to share with AHIF-Oregon additional unclassified, non-privileged documents that it was considering.” USER 19 (¶55). AHIF-Oregon, in turn, continued to submit materials for OFAC’s consideration, providing materials on four separate occasions in May and June 2004. ER 0472-0508, 0509-0523, 0524-0536, 2127. Among other things, these materials attempted to justify AHIF-Oregon’s \$150,000 contribution to Al Haramain-Saudi Arabia for use in Chechnya. *See, e.g.*, ER 0476-0523.

(U) This exchange of information continued in July and August 2004. OFAC

twice provided AHIF-Oregon with additional unclassified material it was considering as part of its designation determination. USER 19-20 (¶¶57-58). AHIF-Oregon submitted in response extensive documentation and arguments contending that the material provided by OFAC improperly related to Al Haramain in Saudi Arabia and other branches, and not to AHIF-Oregon, and that its \$150,000 donation to the Saudi headquarters was proper. USER 20 (¶¶57-58); ER 0538-0707, 949-1130.

(U) In September 2004, after consultation with the Secretaries of State and Homeland Security, as well as the Attorney General, OFAC designated AHIF-Oregon under E.O. 13224. USER 20 (¶59). On that same date, the United States designated Al-Buthe and the Al Haramain branch in the Comoros Islands (which had connections to al Qaeda and provided support for the attacks on U.S. embassies in Kenya and Tanzania). ER 2020-2021. Also in September 2004, the United Nations “listed” AHIF-Oregon and Al-Buthe on its list of terrorist sponsors, pursuant to S.C. Res. 1267. USER 18 (¶52).

(U) OFAC’s designation of AHIF-Oregon was based on the unclassified material already provided to the organization; materials and arguments submitted by AHIF-Oregon’s counsel; and, as contemplated by IEEPA, 50 U.S.C. § 1702(c), classified material not provided to AHIF-Oregon. OFAC provided AHIF-Oregon with a blocking notice informing it that all of its property and interests in property

were blocked, and could not be transferred, paid, exported, withdrawn, or otherwise dealt in. USER 21 (¶¶59-60), 36. Moreover, OFAC informed AHIF-Oregon that all transactions involving U.S. persons were prohibited unless licensed by OFAC. *Ibid.*

(U) Al-Buthe requested that OFAC reconsider his designation, explaining that Al-Aqil “was solely responsible for making the decision to establish a branch in Ashland, Oregon, and he decided that [Al Haramain] should do so.” ER 0716. In his request for reconsideration, Al-Buthe admitted that he had “made arrangements to travel to Ashland to obtain [a \$150,000] contribution for the purpose of turning it over to one of the fundraisers in the [Al Haramain] central office in Riyadh.” ER 0717.

(U) AHIF-Oregon similarly requested reconsideration from OFAC, asking to supplement the administrative record with materials provided by the organization. ER 0926-1130. AHIF-Oregon once more discussed its “understanding of the use to which its funds were put in Chechnya,” and asserted that it “had no control over what types of activities the Saudi headquarters pursued.” USER 21 (¶61).

(U) In November 2007, OFAC notified AHIF-Oregon that the agency was considering redesignating the group, and provided it with the additional unclassified evidence OFAC was considering. USER 22 (¶66); ER 2300-2301. AHIF-Oregon again supplemented the administrative record with extensive arguments and material

in opposition to its proposed redesignation. ER 1248-2018.

(U) In February 2008, OFAC redesignated both AHIF-Oregon and its director, Al-Buthe, as SDGTs, thereby superseding the original designations. ER 2026-2051. In determining that they met the criteria for designation under E.O. 13224, OFAC relied upon all of the unclassified evidence contained in the record, including AHIF-Oregon's lengthy submissions. As permitted by IEEPA, OFAC also relied upon classified evidence that was made available to the district court for *in camera* review. USER 23-24 (¶¶67-68).⁶

(U) Subsequently, in June 2008, the United States designated the Saudi headquarters of Al Haramain. ER 0048. That designation has not been challenged, and its validity is thus not at issue here.

⁶ (U) During the redesignation process, certain classified materials were removed from the Administrative Record, and thus played no role in OFAC's decision on redesignation. USER 24 (¶69). Included among them was a classified document that had been inadvertently disclosed to plaintiffs (over which the state secrets privilege has been upheld, *see Al Haramain Islamic Foundation v. Bush*, 507 F.3d 1190 (9th Cir. 2007)).

III. (U) Prior Proceedings

(U) AHIF-Oregon filed this action in August 2007 to challenge its original designation on various substantive and procedural grounds, and alleged that the blocking of its assets was a warrantless seizure in violation the Fourth Amendment. ER 0138-0167. MCASO joined the suit, arguing that the President's designation authority is both vague and overbroad and that the Treasury Secretary's designation authority under E.O. 13224 violated its constitutional rights. As described above, OFAC superseded the original designation when it redesignated AHIF-Oregon in February 2008.

1. (U) In November 2008, the district court issued a partial ruling on the parties' summary judgment motions. ER 043-105; *see Al Haramain Islamic Found., Inc., v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233 (D. Or. 2008). The court upheld the redesignation of AHIF-Oregon in light of the substantial evidence in the administrative record "demonstrating that AHIF-Oregon supported SDGTs as a branch of [Al Haramain]," which, in turn, provided "financial, material, technological, and other support to SDGTs." ER 0067. As the court noted, "AHIF-Oregon has not attempted to separate itself from the larger organization"; was "founded with money from the larger organization"; shares the same name; was headed by board members who were leaders of the larger organization; and made

clear in its communications to OFAC that it “is part and parcel of AHIF [in Saudi Arabia].” ER 0067-68.

(U) The court also concluded that the delivery of “\$150,000 to [Al Haramain] from AHIF-Oregon’s bank account [by Al-Buthe] could reasonably be construed by OFAC as evidence of financial support for terrorist activities.” ER 0068. The court rejected AHIF-Oregon’s argument that it should not be designated because it purportedly intended those funds to be used for peaceful purposes. The court reasoned that, because IEEPA and E.O. 13324 “prohibit[] giving *any* financial support ‘to or in support of’ terrorist acts,” it is “sufficient that AHIF-Oregon engaged in affirmative conduct in providing financial support and services to AHIF, which in turn supported SDGTs and terrorist acts.” ER 0069-0070 (emphasis in original) (citing *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), *aff’d in part*, 393 F.3d 902 (9th Cir. 2004) (*en banc*)).⁷ The district court also noted that this “financial assistance occurred during a time when [Al Haramain] was providing both humanitarian support in Chechnya as well as supporting terrorist activities there,” and that “in 2004, well after the donation,” federal officials found at AHIF-Oregon’s offices “photographs of mujahideen leaders * * * along with passports

⁷ (U) The Supreme Court recently affirmed this reasoning in *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2725 (2010).

belonging to deceased Russian soldiers, a map noting the location of mujahideen military battles, videos showing violence against Russian soldiers by mujahideen in Chechnya, and photographs of deceased mujahideen and Russian soldiers.” ER 0068.

(U) The district court also held that the designation of AHIF-Oregon was justified by Al-Buthe’s control over the activities and accounts of AHIF-Oregon; his role in raising money from Saudi sources for AHIF-Oregon; and his continuing relationship with AHIF-Oregon even after his own designation as an SDGT. ER 0066-0067. The court added that “there is also evidence in the classified record to give the government reasonable concern about Al-Buthe’s activities.” ER 0067.⁸

(U) The court also rejected AHIF-Oregon’s claim that OFAC lacked authority to redesignate it, finding that OFAC “has reasonably concluded that a redesignation process benefits the affected entity” by giving it more process than it would receive under regulations that permit modification of an existing designation order at any time. ER 0061. The court further ruled that the re-designation of AHIF-Oregon was not a post-hoc rationalization, but instead “*is* agency action” that may be challenged under the APA. ER 0061.

(U) The district court similarly rejected AHIF-Oregon’s challenge to the use of classified information in the administrative record. The court explained that:

⁸ [REDACTED TEXT]

IIEPA expressly authorizes *ex parte/in camera* submissions to a reviewing court; all courts to have considered the question have rejected such challenges; and this practice comports with due process under the balancing test required by *Mathews v. Eldridge*, 424 U.S. 319 (1976). ER 0079-0081.⁹

(U) In its November 2008 ruling, the district court reserved judgment on two of AHIF-Oregon's claims. First, after concluding that OFAC failed to provide AHIF-Oregon with adequate notice of the basis of its proposed designation and redesignation, the court asked the parties for supplemental briefing on whether that error was harmless in light of the court's conclusion that the designation was supported by the evidence in the administrative record. ER 0071-0077. The court also asked the parties to brief whether OFAC's blocking of AHIF-Oregon's assets without a warrant, which the court found to be a "seizure," was nonetheless reasonable under the Fourth Amendment. ER 0081-0088.

(U) The court then considered MCASO's separate First and Fifth Amendment claims. The court found that MCASO had standing to challenge E.O. 13224's

⁹ (U) The court also rejected arguments that AHIF-Oregon does not press in this appeal, including the contention that IIEPA does not allow the President to designate organizations (as opposed to individuals), ER 0082-0084, as well as the claim that E.O. 13224 is overbroad or vague in its use of the terms "services" and "otherwise associated with," ER 0091-0096. Given that AHIF-Oregon has not raised them in its opening brief, these issues are no longer in the case.

provisions as vague, even though there has been “no specific threat of prosecution or designation [of MCASO] by the Secretary of Treasury or OFAC.” ER 0090.¹⁰ The court denied MCASO’s vagueness challenge to the constitutionality of the term “services,” finding that term was clearly defined in regulation. ER 0098-0100. The court ruled for MCASO on the merits of its separate vagueness challenge to the term “material support.” ER 0096-0098. Subsequently, the Government issued a new regulation clarifying that term, as used in E.O. 13224. *See* 31 C.F.R. § 594.317.

2. (U) On November 5, 2009, the district court issued a final order resolving all remaining issues in the case. ER 0007-0042.

(U) The court first held that any due process violation with regard to notice to AHIF-Oregon concerning the basis for a proposed redesignation was harmless because AHIF-Oregon could not offer any evidence to explain away its “provision of funds to Chechnya” and “its relationship to the larger organization.” ER 0024. The court also rejected the argument that Al-Buthe’s resignation might have made a difference in the analysis; in light of Al-Buthe’s extensive control over AHIF-Oregon, “the government could have a rational concern about Al-Buthe acting

¹⁰ (U) In contrast, the court found MCASO’s alleged fear of designation by the *President* not to be credible, and thus denied the organization standing to challenge the President’s designation authority under IEEPA. ER 0091. MCASO does not challenge that ruling on appeal.

through AHIF-Oregon” even if he were no longer on the board of directors of the organization. ER 0024.

(U) The court also ruled that OFAC’s blocking action was reasonable under the “special needs” exception to the Fourth Amendment’s warrant requirement. ER 0025-0036. The court found that OFAC’s blocking order served an important purpose not related to criminal law enforcement – “to withhold assets to ensure future terrorist acts are not committed” – and that it would be impractical, if not impossible, to meet “the specificity requirements in an application for a warrant” in the terrorism financing context. ER 0032-0033.

(U) SUMMARY OF ARGUMENT

I. (U) As the district court recognized, substantial evidence in the administrative record demonstrates the reasonableness of OFAC's decision to designate AHIF-Oregon as a Specially Designated Global Terrorist for being owned or controlled by other SDGTs and for providing support to SDGTs and acts of terrorism. This evidence shows a close relationship between AHIF-Oregon and the larger Al Haramain organization, such that AHIF-Oregon identified and conducted itself as a part of the Al Haramain network, which has indisputably supported global terrorism. Indeed, AHIF-Oregon provided direct financial support to the Al Haramain headquarters in Saudi Arabia, as well as a sister branch in Albania, both of which were actively supporting Chechen separatist fighters. Moreover, the evidence shows that Al-Aqil and Al-Buthe exercised strict control over Al Haramain's branch in Oregon. This evidence, by itself, amply supports OFAC's designation of AHIF-Oregon.

(U) Even apart from these ties and contributions to the larger Al Haramain organization, AHIF-Oregon was properly designated because it was controlled by two individuals designated under E.O. 13224 in their own right: Al-Aqil and Al-Buthe. Al-Aqil made the decision to found the branch and exercised control over its funding and activities. Al-Buthe acted for the branch, entering into contracts on its behalf and

raising and dispersing its funds. Al-Buthe remains on the Oregon branch board today, long after his designation and redesignation.

II. (U) AHIF-Oregon's procedural challenges to the redesignation process are without merit. OFAC properly decided to engage in a redesignation procedure, thereby giving the organization *more* process than it would have received if OFAC had simply amended the existing designation and supplemented the record, as permitted by the agency's regulations.

(U) Nor did OFAC violate due process rights by relying on classified information in the agency process or in the district court. IEEPA expressly permits such reliance, and all courts to consider the question have upheld that practice against constitutional attack. This Court, too, has approved the *ex parte* use of classified information in various national security contexts.

(U) OFAC similarly did not offend due process in the notice that it provided to AHIF-Oregon concerning the proposed redesignation. The record demonstrates that AHIF-Oregon was in fact aware of the key issues on which its redesignation was ultimately based, and that the organization submitted lengthy arguments and materials in an unsuccessful attempt to rebut the evidence against it. And, if there were a due process violation, it was harmless; even in this Court, AHIF-Oregon does not dispute the facts that led to its redesignation and fully justify OFAC's action.

III. (U) AHIF-Oregon's Fourth Amendment claim also lacks merit. The Fourth Amendment requires only that Government actions be "reasonable" – a test that requires courts to balance the Government's interests against an individual's privacy rights. Here, the Government's paramount interest in stopping the flow of terrorist financing easily outweighs plaintiffs' asserted privacy claim. But even if the Fourth Amendment's warrant requirement did apply in this context, OFAC's actions would nevertheless be justified by the "special needs" doctrine. Obtaining a warrant in the terrorism financing context is impractical, if not impossible, in light of the large number of property interests and transactions subject to IEEPA blocking orders, and the fact that the Government cannot know in advance where all such assets are located. Moreover, imposing a warrant requirement would make it difficult or impossible for the Government to prohibit future transactions with blocked entities, and would seriously undermine the United States' effective conduct of foreign relations and defense of national security.

IV. (U) Finally, MCASO's First Amendment claim must fail. As the Supreme Court's recent opinion in *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010), and this Court's opinion in *Humanitarian Law Project v. Dep't of Treasury*, 578 F.3d 1133 (9th Cir. 2009), make clear, the prohibition in E.O. 13224 on providing "services" to designated global terrorists in no way interferes with

MCASO's right to engage in constitutionally protected speech.

(U) STANDARD OF REVIEW

(U) OFAC's designation decision is reviewed under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and must be upheld if it was not "arbitrary and capricious," and was "based on substantial evidence" in the Administrative Record. *Holy Land Found.*, 333 F.3d at 162. "The standard is a narrow one, and the reviewing court may not substitute its judgment for that of the agency." *Public Utility Dist. No. 1 v. FEMA*, 371 F.3d 701, 706 (9th Cir. 2004). The Court reviews MCASO's legal challenge to the executive order *de novo*. *See United States v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998).

(U) ARGUMENT

I. (U) The District Court Correctly Concluded that OFAC's Decision to Designate AHIF-Oregon Is Supported by Substantial Evidence in the Administrative Record

(U) There can be no serious dispute here with the district court's determination that the agency record supports AHIF-Oregon's designation as a global terrorist organization. The unclassified record by itself shows that AHIF-Oregon was controlled by persons designated under the Executive Order, and acted for or on behalf of, and provided support for, persons and entities designated under the order. *See* E.O. 13224 §§ 1(c), (d)(i)-(ii); 31 C.F.R. §§ 594.201(a)(3), (a)(4)(i).

(U) First, AHIF-Oregon was properly designated because it was a branch of the larger worldwide Al Haramain organization, which has been designated as a sponsor of terrorism by both the United States and the United Nations.¹¹ This was the same rationale used by OFAC and upheld by the District of Columbia Circuit in *Islamic American Relief Agency v. Gonzales*, 477 F.3d 728, 733 (D.C. Cir. 2007). In that case, the D.C. Circuit concluded that the Islamic American Relief Agency was a branch of the world-wide Islamic African Relief Agency, which was designated a terrorist entity, and thus “it was proper for OFAC to subject IARA-USA to the blocking as a result of IARA’s designation,” even though OFAC did not maintain that the United States branch had itself independently supported terrorism. *Id.* at 733-35.

(U) Quite similar to the situation in *Islamic American Relief Agency*, AHIF-Oregon was formed by senior officials from the broader organization’s headquarters and was incorporated with a name drawn from its parent organization. And, like the U.S. branch in that case, AHIF-Oregon identified itself as the “Oregon Chapter” of Al Haramain-Saudi Arabia when it submitted a license request to OFAC. *See* ER 0192. Similarly, AHIF-Oregon maintained financial connections with other Al Haramain branches through its contributions to Al Haramain’s Saudi headquarters

¹¹ (U) As discussed below, the fact that Al Haramain’s Saudi headquarters was not yet designated at the time of AHIF-Oregon’s designation does not undermine the Secretary’s decision.

and its branch in Albania. And, again as in *Islamic American Relief Agency*, Al Haramain's promotional materials identified AHIF-Oregon its United States branch office. *IARA*, 477 F.3d at 733; ER 0217. Moreover, AHIF-Oregon's articles of incorporation provided that "[a]ll powers shall be exercised by [its] Board of Directors," ER 0637, three-fourths of which were senior officials from Al Haramain's Saudi headquarters.

(U) AHIF-Oregon never severed its ties to Al Haramain, even after it knew that "its relationship to the larger organization, which funded terrorism, was of concern [to OFAC]." ER 0021. As the D.C. Circuit found in *Islamic American Relief Agency*, it is manifestly reasonable under these circumstances for OFAC to rely on the relationship between the subject organization and its parent organization overseas. ER 2051.

(U) OFAC's redesignation determination is also justified by Al-Aqil's ownership and control of AHIF-Oregon. ER 2051. As described above, Al-Aqil "was solely responsible for making the decision to establish [an Al Haramain] branch in Ashland, Oregon," ER 0716, and "maintained 'tight control over the affiliated offices'" from Saudi Arabia. ER 0049, 0711. He was "the only individual with final decision making [authority] on spending," ER 0352.

(U) Al-Buthe – whose designation has never been challenged – similarly

exercised control over AHIF-Oregon. ER 2051. He was one of four original board members of AHIF-Oregon, ER 0638, and remains on the board. ER 0025. Al-Buthe signed contracts for AHIF-Oregon; was one of two people with access to its bank account; helped AHIF-Oregon purchase a mosque in Missouri; raised funds for AHIF-Oregon from Saudi Arabian sources; and, “under the immediate and close supervision of Mr. Al-Aqil,” ER 0716, dispersed AHIF-Oregon’s operational funds. ER 0050, 0401-0430.

(U) AHIF-Oregon also took affirmative steps “for and on behalf of” persons designated pursuant to E.O. 13224. For example, the organization does not dispute that it transferred \$150,000 to Al Haramain’s Saudi headquarters, (ER 0053, 0717, 0817-0818, 0931-0938) at a time when the latter “was providing both humanitarian support in Chechnya as well as supporting terrorist activities there.” ER 0068, 0924, 1132. AHIF-Oregon, through Seda, also provided direct financial support to its sister branch in Albania – reportedly started with funding from Osama Bin Laden, ER 0452 – to support separatists fighting in Kosovo. ER 0055, 0742, 1204, 2037. That branch, too, has been designated by the United States. *See* USER 17 (¶51); ER 0434.

(U) AHIF-Oregon nevertheless argues (Br. 35-36, 57-58) that OFAC’s reliance on certain of this evidence is inappropriate because some of the persons and groups

were not designated at the time that AHIF-Oregon was controlled by them, or provided support to them. The D.C. Circuit has rejected this argument in a like context. *See, e.g., Holy Land Found.*, 333 F.3d at 162; *see also IARA*, 477 F3d at 734. As that court explained, it is “clearly rational for Treasury to consider” the designated entity’s “genesis and history,” especially where, as here, it “closely connect[s]” that entity with another entity or individual that has been designated because of involvement with global terrorism. *Holy Land Found.*, 333 F.3d at 162. Moreover, if AHIF-Oregon’s argument were correct, OFAC would not be able to take into account if AHIF-Oregon had provided substantial funds to a terrorist group shortly before it carried out an attack that led to its designation. Given the illogical nature of plaintiffs’ argument, it is no surprise that the D.C. Circuit has found it wanting.

(U) In its brief (at 59), AHIF-Oregon also asserts that its transfer of funds to Al Haramain for use in Chechnya was intended only for humanitarian purposes, and that this claim undermines the validity of the OFAC designation. This argument is wrong because, as the district court correctly held, “[t]he law prohibits giving *any* financial support ‘to or in support of’” terrorist groups. ER 0069 (citing E.O. 13224 § 1(d)(i)). Accordingly, in deciding whether or not AHIF-Oregon is linked to international terrorism and SDGTs, the question is whether an entity has provided

funds to SDGTs, regardless of whatever intent the donor might have had for use of those funds by the recipient.

(U) As the Supreme Court has observed in upholding the validity of a related statutory scheme designed to impede financing of international terrorism from the United States – “[m]oney is fungible.” *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2725 (2010). Although “foreign terrorist organizations * * * highlight the civilian and humanitarian ends to which such moneys could be put * * * there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations.” *Id.* at 2725-2726 (alterations and citation omitted). Thus, “funds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.” *Ibid.* (alterations and citation omitted).

(U) This Court and its sister Circuits have also recognized the fallacy in plaintiffs’ reasoning that the Government cannot act to stop the flow of money to foreign organizations linked to international terrorism unless the U.S. donor has a bad intention for those funds. This Court has rejected the argument “that the First Amendment requires the government to demonstrate a specific intent to aid an organization’s illegal activities before attaching liability to the donation of funds.”

Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134 (9th Cir. 2000), *aff'd en banc*, 393 F.3d 902 (9th Cir. 2004); *see also IARA*, 477 F.3d at 737 (“[W]e do not require a showing that IARA-USA intended its funding to support terrorist activities.”). As the *en banc* Seventh Circuit explained, because the charitable activities of terrorist groups like Hamas “reinforce its terrorist activities both directly * * * and indirectly,” “[t]o require proof that the donor intended that his contribution be used for terrorism – to make a benign intent a defense – would as a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent.” *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 698-99 (7th Cir. 2008) (*en banc*).

(U) In short, even if OFAC fully accepted AHIF-Oregon’s assertion that the organization and its leaders in Saudi Arabia and the United States did not intend to fund terror, that contention would in no way undermine the validity of OFAC’s designation of AHIF-Oregon. As the district court noted, it is “sufficient that AHIF-Oregon engaged in affirmative conduct in providing financial support and services to [Al Haramain], which in turn supported SDGTs and terrorist acts.” ER 0069-0070. *See also Humanitarian Law Project*, 205 F.3d at 1134; *IARA*, 477 F.3d at 737.

[REDACTED TEXT]

(U) The district court correctly rejected plaintiffs’ arguments on these scores,

finding that AHIF-Oregon's relationship with and support of Al Haramain in Saudi Arabia, as well as its control by Al-Buthe, support the designation. Although the district court refused to rely on Al-Aqil's control over AHIF-Oregon, ER 0065-0066, the evidence of that relationship also provides support for OFAC's action; Al-Aqil made the decision to found AHIF-Oregon and maintained tight control over it until – and, according to some reports, even after – he was removed from his position as head of Al Haramain in Saudi Arabia. ER 0716, 0711, 2331.

[REDACTED TEXT]

II. (U) OFAC Permissibly Redesignated AHIF-Oregon Based on an Updated Administrative Record

(U) As described above, in February 2008, OFAC redesignated AHIF-Oregon based upon an updated administrative record that included material submitted by AHIF-Oregon when it requested reconsideration of OFAC's original designation decision. As OFAC Director Szubin explained, redesignation is "a process whereby OFAC updates and supersedes its original designation on the basis of a revised administrative record," and is conducted "pursuant to the same standards as apply to any designation action under E.O. 13224." USER 22 n.5. AHIF-Oregon alleges that the decision to redesignate it, by itself, was unlawful. The district court correctly rejected this claim. ER 0061.

(U) OFAC's regulations provide that an original designation order "may be amended, modified or revoked at any time" without advance notice to the designated party. 31 C.F.R. § 501.803. In this instance, the redesignation mechanism utilized by OFAC provided AHIF-Oregon with "more process * * * than [it] would receive were OFAC simply to amend the record administratively, as the regulations provide for." USER 22 n.5. OFAC notified AHIF-Oregon that the agency was considering a redesignation, and provided additional unclassified materials to AHIF-Oregon at that time. ER 2300. In response, the organization submitted nearly 800 pages of

additional materials it wished OFAC to consider. *See* ER 1248-2018.

(U) The resulting redesignation was not some *post hoc* rationalization of a prior agency action. Instead, it was a new final, agency action that can be challenged in court. In fact, OFAC's redesignation order is the *only* agency action properly before this Court, because the original designation has been superseded. Thus, the Administrative Record in this case consists only of the final record upon redesignation.

(U) In an analogous IEEPA challenge brought by the Holy Land Foundation, the D.C. Circuit reviewed only the record on redesignation, which had been compiled by OFAC after the group was redesignated during the course of the litigation. *See Holy Land Found.*, 333 F.3d at 164. And it found that the procedure on redesignation, which comported with due process, mooted any alleged due process violation occurring in the initial designation process. *Id.* at 163. Similarly, the Seventh Circuit held that a superseding action by OFAC – the decision to designate the Global Relief Foundation after the group had filed suit challenging OFAC's blocking of its assets pending investigation – mooted many of the plaintiff's challenges to the prior agency action. *See Global Relief Found.*, 315 F.3d at 750-51.

(U) Finally, were there any ambiguity about whether E.O. 13224 and OFAC's regulations permit such redesignations, it would have to be resolved in favor of the

agency because controlling deference must be accorded to OFAC's reasonable interpretation of its own regulations. *Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999).

III. OFAC Properly Relied Upon Classified Evidence in Considering Whether to Redesignate AHIF-Oregon

(U) Review of the Secretary's decision to designate AHIF-Oregon must be based on the final administrative record. *See Holy Land Found.*, 333 F.3d at 162. The Government may include in that record "a broad range of evidence, including intelligence data and hearsay declarations." *Ibid.* As in this case, some of that intelligence information may be classified.

(U) IEEPA anticipates that the Government will sometimes need to rely on classified evidence when designating a person or entity, and it expressly provides that, "[i]n any judicial review of a determination made under this section, if the determination was based on classified information * * * such information may be submitted to the reviewing court *ex parte* and *in camera*." 50 U.S.C. § 1702(c). This Court's sister Circuits have uniformly rejected due process challenges to this provision, as well as to a similar provision governing review of terrorism designations under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 8 U.S.C. § 1189(b)(4). *See Holy Land Found.*, 333 F.3d at 164 (IEEPA); *People's Mojahedin*

Organization of Iran v. Dep't of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (AEDPA); *Global Relief Found.*, 315 F.3d at 754 (IEEPA); *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001) (“NCRF”) (AEDPA); *see also Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (“[T]he court has inherent authority to review classified material *ex parte*, *in camera* as part of its judicial review function.”).

(U) In analogous circumstances, this Court too has rejected due process challenges to the use of *ex parte* classified evidence. In *United States v. Ott*, 827 F.2d 473 (9th Cir. 1987), for example, an Air Force Officer faced court-martial charges for allegedly offering to sell information to a foreign government. The Government’s case was based in part on surveillance information obtained under the Foreign Intelligence Surveillance Act (“FISA”), and pursuant to that statute, the Government submitted that intelligence information *in camera* and *ex parte*. This Court rejected a due process challenge to that evidence, finding that “Congress has a legitimate interest in authorizing the Attorney General to invoke procedures designed to ensure that sensitive security information is not unnecessarily disseminated to *anyone* not involved in the surveillance operation in question, whether or not she happens for unrelated reasons to enjoy security clearance,” as Ott’s attorney did. *Ott*, 827 F.2d at 477. Similarly, this Court has held that “the practice of *in camera*, *ex parte* review

remains appropriate in certain FOIA cases,” even though FOIA’s *in camera* review provision, 5 U.S.C.A. § 552(a)(4)(B), does not squarely address the question of whether such review may be conducted *ex parte*. *Pollard v. FBI*, 705 F.2d 1151, 1153 -1154 (9th Cir. 1983).

(U) The principal case cited by plaintiffs to support their due process claim – *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1068 (9th Cir. 1995) (“ADC”), *case subsequently dismissed on jurisdictional grounds*, 525 U.S. 471 (1999) – is readily distinguishable. In direct contrast to IEEPA, the immigration regulations at issue in ADC *precluded* the use of *ex parte* classified evidence in making “eligibility for immigration benefits, including legalization.” *See ADC*, 70 F.3d at 1067-68 (discussing, *inter alia*, 8 C.F.R. § 103.2(b)(3)(ii) (1990)).¹² The Court’s comment about the “presumptive” unconstitutionality of *ex parte* evidence therefore is of limited relevance to the statutory schemes where Congress has specifically permitted *ex parte* use of classified information, and would, if interpreted as plaintiff suggests, be in conflict with numerous decisions of this Court and its sister Circuits upholding the use of classified *ex parte* evidence in national security

¹² (U) *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989) similarly concerned the question of whether a resident alien could be subject to summary “exclusion” proceedings in which *ex parte* evidence was permitted. The court noted that the alien was entitled to due process, but stopped short of deciding what process was due, and whether that constitutional guarantee had been violated. *Id.* at 525.

cases.

(U) *Mathews v. Eldridge*, 424 U.S. 319 (1976), does not call these numerous precedents into doubt. As *Mathews* explained, “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 334. It thus requires analysis of both “the governmental and private interests that are affected” in a particular case. *Ibid.* Plaintiffs’ argument, which focuses entirely on the risk of an erroneous designation (Br. 38-39 & n.12), ignores the Government’s “*compelling interest* in withholding national security information from unauthorized persons in the course of executive business.” *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (emphasis added) (quotation marks and citation omitted). As Congress recognized in drafting IEEPA, that compelling interest must outweigh the plaintiffs’ interest in accessing classified information. “The Constitution would indeed be a suicide pact if the only way to curtail enemies’ access to assets were to reveal information that might cost lives.” *Global Relief Found.*, 315 F.3d at 754 (citation omitted).

(U) Thus, in applying the *Mathews* factors to terrorism financing cases, courts have held that due process does not require “disclos[ur]e [of] the classified information to be presented *in camera* and *ex parte* to the court under the statute.” *NCRI*, 251 F.3d at 208; *cf. also Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968)

(while “[d]isclosures in camera are inconsistent with the normal rights of a plaintiff of inquiry and cross-examination,” where “the two interests cannot be reconciled, the interest of the individual litigant must give way to the government’s privilege against disclosure of its secrets of state”).

(U) Plaintiffs’ claim that Congress could have made IEEPA less like AEDPA and FISA, and instead more like CIPA or the immigration statute at issue in *ADC*, (Br. 40-41), is beside the point. Congress properly concluded that the harm to the United States of disclosing national security information far outweighs a private party’s interest in accessing that information in the context of litigation against the government.

IV. (U) OFAC Did Not Violate AHIF-Oregon’s Due Process Rights, And Any Such Violation Was Harmless

A. (U) OFAC Provided AHIF-Oregon With Ample Opportunity To Participate In the Administrative Process

(U) “At bottom, the due process evaluation ‘is flexible and calls for such procedural protections as the particular situation demands.’” *Buckingham v. Secretary of U.S. Dept. of Agr.*, 603 F.3d 1073, 1083 (9th Cir. 2010) (citing *Mathews*, 424 U.S. at 334). In the unique context of terrorist financing, due process does “not require an agency to provide procedures which approximate a judicial trial.” *Holy Land Found.*, 333 F.3d at 164. Nevertheless, the district court found that the notice

provided to AHIF-Oregon during its designation and redesignation process was constitutionally insufficient. ER 0071-0077. This conclusion was erroneous; the record demonstrates that AHIF-Oregon was aware of the key allegations against it, and repeatedly, though unsuccessfully, attempted to negate them.

(U) Prior to the redesignation, OFAC provided AHIF-Oregon with sufficient notice of the allegations against it – in particular, OFAC’s concern about Al-Aqil’s and Al-Buthe’s control over the group, as well as AHIF-Oregon’s relationship to the larger Al Haramain organization – and numerous opportunities to address those concerns. In April 2004, OFAC informed AHIF-Oregon that it was considering designating the group, and provided all of the unclassified evidence that it relied upon in blocking AHIF-Oregon’s assets pending investigation. USER 19; ER 2119. Over the next several months, OFAC continued to provide AHIF-Oregon with unclassified material it was considering, and AHIF-Oregon in turn made submissions to OFAC on May 14, May 27, May 28, June 7, August 4, August 31, and September 4, 2004. USER 19-20 (¶¶55, 57-58 & n.4).

(U) In September 2004, OFAC designated AHIF-Oregon under E.O. 13224 §§ 1(c)-(d), which apply to individuals determined “to be owned or controlled by, or to act for or on behalf of” designated persons, as well as to those determined “to assist in, sponsor, or provide financial, material, or technological support for, or financial

or other services to or in support of” or “to be otherwise associated with” designated persons. USER 36; ER 2157. The agency statement accompanying the designation further noted that Al-Buthe was “nam[ed] as the * * * attorney” for AHIF-Oregon by Al-Aqil, who was designated, and that “individuals associated with the [U.S.] branch tried to conceal the movement of funds intended for Chechnya by omitting them from tax returns and mischaracterizing their use * * *.” ER 2020.

(U) AHIF-Oregon clearly understood the principal bases for this initial designation. Its February 2005 reconsideration request argued that the donation for purportedly humanitarian uses in Chechnya was proper, and that AHIF-Oregon should not be designated because of its affiliation with the Saudi office of Al Haramain. ER 0928-1130. AHIF-Oregon renewed those same arguments in September 2005, when it asked OFAC to supplement the record with its delisting petition (as well as with other materials already in the record). USER 22.

(U) In November 2007, OFAC notified AHIF-Oregon that it was considering redesignation based upon the updated administrative record, including all of the material AHIF-Oregon submitted. USER 22; ER 2300. OFAC also provided AHIF-Oregon with additional material it was considering. USER 23. In response, AHIF-Oregon again supplemented the administrative record with nearly 800 pages of materials. *Ibid.*; *see also* ER 1248-2018. Finally, in February 2008, OFAC

redesignated AHIF-Oregon “for being (1) owned or controlled by SDGTs al-Aqil and al-Buthe, (2) acting for or on behalf of SDGTs al-Aqil and al-Buthe, and (3) providing financial, material, and other support to SDGTs through its role as a branch office and integral part of the worldwide organization [Al Haramain].” USER 25.

(U) As the foregoing demonstrates, OFAC provided AHIF-Oregon with the unclassified information that it was considering as part of the designation process, and afforded the group numerous opportunities to dispute its SDGT status and to supplement the record. AHIF-Oregon was manifestly aware of the key allegations against it, and submitted voluminous materials attempting to explain away its \$150,000 contribution, and to separate itself from the larger Al Haramain network. As the district court noted, nothing more was required by IEEPA or OFAC regulations, and the agency’s process comported with the standard set by the D.C. Circuit in *NCRI*, 251 F.3d at 209 (defining process required in AEDPA designation context). ER 0075-0076.

B. (U) Any Due Process Violation Was Harmless In Light of the Overwhelming Evidence in the Administrative Record

(U) Even if OFAC did violate AHIF-Oregon’s due process rights, that violation is subject to harmless error review, as the district court correctly held. ER 0077. The Supreme Court “has applied harmless-error analysis to a wide range of errors and has

recognized that most constitutional errors can be harmless.” *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (Rehnquist, J., concurring for a majority of the Court). That standard applies, for example, in capital cases where a trial court erroneously admits a coerced confession, *id.* at 295, or psychiatric testimony obtained in violation of Sixth Amendment, *Satterwhite v. Texas*, 486 U.S. 249 (1988); where the Fifth Amendment is violated by improper prosecutorial comments about a defendant’s failure to testify at trial, *see Chapman v. California*, 386 U.S. 18, 22 (1967), or rebut the governments’s case, *United States v. Hasting*, 461 U.S. 499, 512 (1983); where a judge has improper *ex parte* communications with a juror, *Rushen v. Spain*, 464 U.S. 114 (1983); and where there are procedural due process errors in a state administrative proceeding, *Tennessee Secondary School Athletic Ass’n v. Brentwood Academy*, 551 U.S. 291, 303 (2007). This Court has similarly recognized that “all harmless errors including constitutional errors must be disregarded on appeal.” *United States v. Navarro*, 608 F.3d 529, 538 (9th Cir. 2010).

(U) Under that harmless error standard, this Court must affirm the district court’s order here upholding OFAC’s redesignation decision. There is no dispute that AHIF-Oregon channeled money to the Saudi headquarters of Al Haramain and its branch in Albania at a time when they were funding both separatist fighters and humanitarian efforts in Chechnya. ER 0068. As we have pointed out, that support

is sufficient, as a matter of law, to support the designation of AHIF-Oregon. *See Humanitarian Law Project*, 130 S.Ct. at 2725; *IARA*, 477 F.3d at 735. Similarly, AHIF-Oregon's own materials demonstrate that this entity was a branch office of Al Haramain's worldwide network, ER 0151, 0938; that fact too is sufficient by law to support its designation. *See IARA*, 477 F.3d at 733-34.

(U) Even in this Court, AHIF-Oregon has not pointed to any materials it was prevented from submitting to OFAC to counter the grounds relied upon by OFAC in making its redesignation. The entity's arguments concerning Al-Buthe are unavailing. It contends that, had it known earlier that Al-Buthe's role in AHIF-Oregon was a basis for the organization's designation, he would have resigned, or, alternatively, AHIF-Oregon would have challenged his global terrorist designation by OFAC on the merits. Neither action would negate the basis for the designation, however, as it would not change the fact that Al-Buthe had used AHIF-Oregon's funds to provide financial assistance to Al Haramain in Saudi Arabia, and exercised operational control over AHIF-Oregon. Moreover, as the district court notes, AHIF-Oregon's arguments ring hollow; Al-Buthe still has not resigned even though it has long been clear that his involvement with AHIF-Oregon was a basis for the designation. ER 0024-0025, ER 2331. And, finally, AHIF-Oregon would not, in any event, have had standing to challenge Al-Buthe's designation by OFAC – Al-Buthe

could have filed such a challenge, but has never done so.

(U) Similarly, AHIF-Oregon's arguments concerning its relationship with Al Haramain's Saudi headquarters are unavailing. AHIF-Oregon does not deny the transfer of a large sum to the Saudi office when it was supporting terrorists in Chechnya. On the contrary, the documents in the record from the Saudi headquarters *prove* the fact of this donation, and that AHIF-Oregon was a branch of the Al Haramain global organization. *See* ER 0151; 0938 (affidavit confirming receipt of money from "Al-Haramain U.S. office").

C. (U) Structural Error Analysis Is Inappropriate In This Case

(U) Plaintiffs nevertheless urge that any due process error in this case cannot be harmless because it is "structural." That special analysis applies only in a "very limited class of cases," such as where a criminal defendant is completely denied counsel or the right to self-representation or a public trial, where the judge is biased, or where the grand jury was selected in a racially-discriminatory manner. *Neder v. United States*, 527 U.S. 1, 8 (1999) (citations omitted); *see also United States v. Marcus*, 130 S.Ct. 2159, 2164-65 (2010) (collecting authorities).

(U) This Court has *never* applied structural error analysis in a civil case. *M.L. v. Federal Way School Dist.*, 394 F.3d 634, 654 (9th Cir. 2005) (Gould, J., concurring). It should not do so for the first time here, where plaintiffs were in fact

on notice of the key allegations against them and responded to the evidence in the unclassified record. Whatever fault this Court might find in OFAC's numerous communications concerning AHIF-Oregon's proposed redesignation, those faults are surely no more egregious than the use of a coerced confession in a murder trial, *Fulminante*, 499 U.S. at 306, a Confrontation Clause violation, *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010), a faulty jury instruction, *United States v. Smith*, 561 F.3d 934, 938 (9th Cir. 2009) (*en banc*), a due process violation at a parole revocation hearing, *United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008), or a violation of the privilege against self-incrimination, *United States v. Lopez*, 500 F.3d 840, 844 (9th Cir. 2007) – all of which are subject to harmless error analysis.

V. (U) OFAC Did Not Violate The Fourth Amendment

A. (U) OFAC Blocking Orders Are Not Susceptible to Fourth Amendment Challenges

(U) “The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *United States v. Knights*, 534 U.S. 112, 118-119 (2001) (quotation marks and citation omitted). An

action will be deemed reasonable under this test “as long as the circumstances, viewed objectively, justify the action.” *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (quotation marks, citation, and alteration omitted).

(U) In the criminal context, Fourth Amendment reasonableness generally requires a warrant. The Supreme Court has made clear, however, that “neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.” *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *see also United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (warrantless, suspicionless vehicle searches reasonable in light of the Government’s “paramount interest in protecting the border”); *Knights* 534 U.S. at 119 (warrantless, suspicionless probationer search reasonable in light of Government’s interest in “rehabilitation and protecting society”).

(U) IEEPA blocking orders easily survive scrutiny under the “reasonableness” balancing test. It is difficult to conceive of a governmental interest more weighty than preventing the flow of funds and support to international terrorist groups. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.” (quotation marks and citation omitted)). In the context of IEEPA blocking orders, that

compelling interest is narrowly-tailored to the precise action taken by the Government: the President must expressly declare an international emergency, and the agency must assemble a specific basis for designating an individual in connection with that emergency (as reflected in the administrative record that may ultimately be reviewed by a court). No privacy right identified by plaintiffs is sufficient to overcome this compelling interest.

(U) If plaintiffs' Fourth Amendment argument were accepted, it would presumably apply not just to OFAC, but also to the President himself. Thus, prior to issuing E.O. 13224, plaintiffs would have required the President to ask a magistrate judge for permission to block the property and interests of the 27 individuals he determined to be responsible for an international emergency. Similarly, plaintiffs would have the President consult a magistrate prior to complying with Congressionally-imposed deadlines for imposing IEEPA sanctions, like those required by Section 105 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act, Pub. L. 111-195 (July 1, 2010) (requiring sanctions against individuals who committed "serious human rights abuses" following the June 2009 Iranian elections).

(U) Plaintiffs' proposed rule would make little sense in light of the President's extraordinary powers in the foreign affairs arena. *See Regan v. Wald*, 468 U.S. 222,

242 (1984). It makes even less sense where, as here, the President acts pursuant to an express delegation of authority from Congress. In such circumstances, an Executive action is “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quotation mark and citation omitted).

(U) Unsurprisingly, then, every court to consider the question prior to the district court in this case concluded, properly, that an IEEPA blocking order “does not create a cognizable claim under the Fourth Amendment.” *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 48 (D.D.C. 2005); *see also Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 78-79 (D.D.C. 2002) (citing *Tran Qui Than v. Regan*, 658 F.2d 1296, 1301 (9th Cir. 1981)).¹³ Those cases are consistent with the President’s long-recognized power to use blocking orders to respond to international emergencies, and the Supreme Court’s decisions upholding such actions (under both IEEPA and its predecessor, the Trading With the Enemy Act) without suggesting that they give rise to Fourth Amendment concerns.

¹³ (U) Subsequently, another district court erroneously relied on the opinion in this case to conclude that a blocking constitutes a seizure. *See KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F.Supp.2d 857, 872 (N.D. Ohio 2009).

See, e.g., Wald, 468 U.S. at 232-33; *Dames & Moore*, 453 U.S. at 674; *Orvis v. Brownell*, 345 U.S. 183, 187-88 (1953); *Propper v. Clark*, 337 U.S. 472, 481-82 (1949).

B. (U) In Any Event, the Blocking Order Here Did Not Violate the Fourth Amendment

(U) Even if the Fourth Amendment’s warrant requirement did apply in this context, OFAC’s warrantless blocking order was justified by the “special needs” exception, as the district court correctly held. ER 0030-0036. This exception applies where (1) the primary purpose of the search or seizure is beyond ordinary criminal law enforcement; and (2) where the circumstances of the case make the warrant and probable cause requirements of the Fourth Amendment impracticable. *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *Chandler v. Miller*, 520 U.S. 305, 313 (1997); *see also Cassidy v. Chertoff*, 471 F.3d 67, 82 (2d Cir. 2006) (“special needs” exception justifies warrantless trunk searches on public ferries, in order to “[p]revent[] or deter[] large-scale terrorist attacks”); *MacWade v. Kelly*, 460 F.3d 260, 271-72 (2d Cir. 2006) (special needs exception authorizes warrantless bag searches on subway for anti-terrorism purposes).

(U) Plaintiffs do not argue that the primary purpose of blocking orders under IEEPA and E.O. 13224 is criminal. Rather, they argue that obtaining a warrant in

these circumstances is not impractical, because Congress *could* pass a new statute that would give a district court powers to issue nationwide asset freezes, and that courts, under that hypothetical statute, *could* find that OFAC has met the statute's particularity requirement. *See* Br. 44.

(U) Whatever the merits of this hypothetical approach, the record here demonstrates that obtaining a warrant in the international terrorist financing context would be impracticable under current law – if not impossible, as the district court found. ER 0032-0033. To obtain a warrant, OFAC would need to “describe the items to be seized with sufficient particularity.” *United States v. Spilotro*, 800 F.2d 959, 964 (9th Cir. 1986). Very often OFAC does not and cannot know the identity or location of all of the assets that it seeks to block, which include a wide range of bank accounts, real property, goods, contracts, and a host of other financial instruments, scattered throughout the United States and some of which are held in other people's names. *See* USER 50-51 (¶¶ 6-8). Indeed, OFAC often must rely on the holders of the blocked property (such as banks) to identify the full range of assets held by a blocked country, entity, or person. USER 52-53 (¶¶ 11-12).

(U) Blocking notices also cover *future* transactions with designated individuals, which are reported to OFAC by banks and other property holders. USER 52 (¶¶ 10-11). Because these property holders need only submit annual reports

to OFAC, 31 C.F.R. § 501.603, the Government would not have the timely notice required to return to a court to update its warrant application each time a new blocked asset is discovered or a new transaction attempted. Nor would it be realistic to assume the Government could do so, given the large number of sanctions programs that it administers, and the wide range of property interests that it must block, in order to effectively stem the flow of terrorist financing. USER 49-51 (¶¶3-8). Indeed, it is not clear that a court would even have the jurisdiction necessary to issue warrants for the broad range of assets in question, which may be located anywhere in the world.

(U) As OFAC's Director notes, the timing of designation decisions is often based on foreign policy and national security considerations. USER 54 (¶15). In the present case, for example, the United States coordinated closely with the Government of Saudi Arabia and the United Nations on its designations of numerous individuals and branches tied to the Al Haramain network. Requiring the President to obtain a warrant related to those multi-national actions could significantly delay and complicate such diplomatic efforts.

(U) Taken together, "the broad scope of property potentially subject to a blocking order," "the fact that such property may be located anywhere in the world," the "fact that OFAC often does not have the ability to identify and locate all property subject to a blocking order," and "the fact that effective blocking of assets requires

quick action to prevent their dissipation,” mean that it surely “would be impractical for OFAC to obtain a warrant for every account, transaction or other property that might be affected as a result of a blocking action.” USER 53-54 (¶14).

Unquestionably, a warrant requirement “would interfere to an appreciable degree with the [] system” for imposing economic sanctions during a national emergency pursuant to Congressional authorization and “the delay inherent in obtaining a warrant would make it more difficult * * * to respond quickly to evidence of misconduct.” *Griffin*, 483 U.S. at 876.

(U) Plaintiffs’ suggestion that the “special needs” doctrine should not even apply given the degree of intrusion into their privacy interests (Br. 46-48) fundamentally misunderstands Fourth Amendment law. Like the general “reasonableness” test, the “special needs” doctrine requires courts to balance the governmental interest against a private interest to determine if a warrantless search was valid. *See, e.g., Henderson v. City of Simi Valley*, 305 F.3d 1052, 1059 (9th Cir. 2002). As the district court correctly found, and as explained above, the Government’s surpassing interest in “stopping the financing of terrorism outweighs AHIF-Oregon’s privacy interests,” ER 0035 – however substantial they may be.

(U) Plaintiffs’ observation about a court’s power to issue nationwide injunctions is also beside the point. Br. 44-45. Nothing in the Fourth Amendment

requires the Government to satisfy the demanding test that would be required to obtain that sort of mandatory equitable relief. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). Nor is it clear that a court *would* have the power to prevent every person in the country from disposing of any property in which AHIF-Oregon has an interest anywhere in the world, or from engaging in any transactions with AHIF-Oregon, simply because it has jurisdiction over AHIF-Oregon itself. Moreover, merely informing AHIF-Oregon that it is seeking such an injunction would undoubtedly result in asset flight during the pendency of that litigation.

(U) Even if OFAC's action was improper under the Fourth Amendment, that would not alter the outcome of this case. AHIF-Oregon has been properly designated, and the merits of that designation have nothing to do with the manner in which its assets were frozen since the time of its initial blocking. For that reason, if this Court resolves the merits of the designation against plaintiffs, principles of constitutional avoidance counsel against reaching the merits of this Fourth Amendment question.

VI. (U) Executive Order 13224 and OFAC Regulations Do Not Ban “Pure Speech”

(U) Plaintiff MCASO, which has not been designated under E.O. 13224, joined AHIF-Oregon's suit in order to allege that the Executive Order's prohibition on providing services to designated entities “criminalize[s] pure speech on the basis of

its content” and thus violates MCASO’s First Amendment rights. Br. 60. This claim lacks merit, as shown by recent precedent from the Supreme Court and this Court.

(U) The Executive Order prohibits providing “any * * * services to or for the benefit of those persons” designated under the Order. E.O. 13224 § 2(a). OFAC regulations clarify this provision by explaining that it prohibits “services performed in the United States or by U.S. persons * * * [o]n behalf or for the benefit of a [designated] person * * *.” 31 C.F.R. § 594.406(a). The regulation provides examples of such prohibited services, including: “legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services.” *Id.* § 594.406(b).

(U) As the Supreme Court recently recognized, the “ordinary meaning” of the word “service” involves “concerted activity, not independent advocacy.” *Humanitarian Law Project*, 130 S.Ct. at 2722. Here, as in *HLP*, that ordinary meaning is reinforced by the context in which it is used; E.O. 13224 prohibits services “to or for the benefit of” designated persons, and the regulation prohibits providing a service “on behalf of or for” a designated person. Thus, “a person of ordinary intelligence would understand that independently advocating for a cause is different from providing a service to a group that is advocating for that cause.” *Humanitarian Law Project*, 130 S.Ct. at 2722. This Court earlier reached that precise

conclusion in *Humanitarian Law Project v. U.S. Treasury Dept.*, 578 F.3d 1133, 1146 (9th Cir. 2009), where it rejected a vagueness challenge to E.O. 13224's ban on providing services to designated entities.

(U) To the extent that E.O. 13224 prohibits more than independent advocacy, it does not violate MCASO's First Amendment rights. In *Humanitarian Law Project v. Dep't of Treasury*, this Court rejected First Amendment challenges to E.O. 13224's ban on providing services to a designated entity – the very provision plaintiff now challenges. See *HLP*, 578 F.3d at 1150-51. As this Court recognized, “[p]roviding legal, financial, accounting, educational, business, and like services to designated terrorist groups saves them money, which in turn increases the means at their disposal for terrorist acts.” *HLP*, 578 F.3d at 1148. “Inhibiting this provision of services is for this reason a legitimate government regulation of constitutionally unprotected conduct.” *Ibid.*

(U) Without expressly acknowledging this Court's holding concerning E.O. 13224, plaintiff argues that *Humanitarian Law Project* is distinguishable, because AHIF-Oregon is not a “foreign” terrorist organization. Br. 63 n.18. MCASO similarly attempts to distinguish the Supreme Court's holding in *Humanitarian Law Project* on this same ground, even though plaintiff concedes that the Supreme Court too rejected a First Amendment challenge to a “similar prohibition” on providing

material support to designated terrorist organizations. Br. 62; *see also Humanitarian Law Project*, 130 S.Ct. at 2724-30. This distinction is not controlling. The plaintiffs in *Humanitarian Law Project* – the ones whose First Amendment rights were at issue – were United States citizens and organizations, just like MCASO. Moreover, plaintiff’s contention ignores that AHIF-Oregon has been designated because it was a part of a foreign organization designated as an SDGT, supported SDGTs, and was controlled by them. Because such IEEPA designations are authorized by Congress in an attempt to stop *international* emergencies and *international* terrorist financing, it would make little sense to find that the concerns that motivated the Court in *Humanitarian Law Project*, 130 S.Ct. at 2724-30, are somehow lacking here.

(U) CONCLUSION

(U) For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully Submitted,

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s/Michael P. Abate _____

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(U) STATEMENT OF RELATED CASES

(U) Counsel for appellee are not aware of any related cases, as defined in Ninth Circuit Rule 28-2.6.

s/Michael P. Abate

Michael P. Abate

**(U) CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(a)(7)(B)**

(U) I hereby certify that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman 14-point font and contains 13,240 words.

s/Michael P. Abate

Michael P. Abate

(U) CERTIFICATE OF SERVICE

(U) I hereby certify that I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on September 29, 2010. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/Michael P. Abate _____
Michael P. Abate