

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

KINDHEARTS FOR CHARITABLE)
HUMANITARIAN DEVELOPMENT, INC.)
)
Plaintiff,)
)
v.)
)
TIMOTHY F. GEITHNER, in his official capacity as)
Secretary of the Treasury,)
ADAM J. SZUBIN, in his official capacity as)
Director of the Office of Foreign Assets Control, and)
ERIC H. HOLDER, in his official capacity as Attorney)
General of the United States,)
)
Defendants.)

Civil No. 3:08-cv-2400
Chief Judge James G. Carr

BRIEF OF AMICI CURIAE
GRANTMAKERS WITHOUT BORDERS; OMB WATCH; KAY
GUINANE; THE AMERICAN- ARAB ANTI-DISCRIMINATION
COMMITTEE; APPLETON FOUNDATION; BILL OF RIGHTS
DEFENSE COMMITTEE; DEFENDING DISSENT
FOUNDATION; FUND FOR NONVIOLENCE; GRASSROOTS
INTERNATIONAL; KINDER USA; MUSLIM ADVOCATES;
AND MUSLIM PUBLIC AFFAIRS COUNCIL.

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INTEREST OF THE AMICI

Grantmakers Without Borders (“GWB”), a philanthropic network, is dedicated to increasing funding for international social justice and environmental sustainability and to improving the practice of international grantmaking. Its members include 325 individuals from roughly 150 grantmaking entities, including private foundations, grantmaking public charities, individual donors with a significant commitment to philanthropy, and philanthropic support organizations. GWB provides capacity-building support to international grantmakers, offers a space for education, community, and collaboration among international grantmakers, communicates with policymakers on behalf of grantmakers, and works to leverage the philanthropic sector to increase funding to the global South.

OMB Watch is the operating name of a nonprofit corporation called Focus Project, Inc.. Its goal is to promote government accountability and citizen participation in public issues. It is guided by the belief that improving access to governmental decision-makers and energizing citizen participation will lead to a more just, equitable and accountable government, and a stronger society. Along with GWB, OMB Watch published a report on the impact of the government’s counter-terrorism efforts on the non-profit sector in 2008. OMB Watch also coordinates the Charity and Security Network, a network of charities, grantmakers, and advocacy groups to eliminate counterproductive barriers created by counterterrorism measures for legitimate charitable, human rights, development and charitable work.

Kay Guinane is a public interest attorney who specializes in the rights of nonprofit corporations, particularly in the areas of free speech and the strength and independence of civil society. Currently she is Program Manager of the Charity and Security Network, an education

and advocacy project of OMB Watch. In her work she has researched the impacts of counterterrorism policy on nonprofits, consulted with NPOs and grantmakers in the U.S. and abroad, and written and co-authored several reports on related subjects. These reports include *Collateral Damage: How the War on Terror Hurts Charities, Foundations and the People they Serve* (co-authored with Grantmakers Without Borders in July 2008), *Counterterrorism Developments Impacting Charities*, published by the International Center for Not for Profit Law (2007), *Muslim Charities and the War on Terror: Top Ten Concerns and Status Update* (March 2006), *The USA Patriot Act and its Impact on Nonprofit Organizations* (2003), and *Anti-Terrorism Bill Could Impact Nonprofits* (2001, abridged version published in the *Nonprofit Quarterly* Spring 2002).

The American-Arab Anti-Discrimination Committee (“ADC”) is the largest Arab-American grassroots civil rights organization and is committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. With nearly 40 chapters nationwide and members in every state, ADC represents the interests of the Arab American community through litigation and broader policy discussions. ADC is a proud and active Executive Committee member of the Leadership Conference on Civil Rights (LCCR), the Detention Watch Network (DWN), and a founding member and steering committee member of the Rights Working Group (RWG).

The Appleton Foundation is dedicated to supporting and promoting education and community awareness in the arts, humanities and public health. The Appleton Foundation seeks to address root causes of problems and to effectively further systemic change by promoting social and economic justice and an ecologically sustainable planet. One of Appleton’s programs involves extensive grantmaking in Latin America.

Bill of Rights Defense Committee (“BORDC”) is a nonprofit organization helping hundreds of communities across the country participate in an ongoing national debate about civil liberties and anti-terrorism legislation. BORDC’s mission is to promote, organize, and support a diverse, effective, national grassroots movement to restore and protect civil rights and liberties guaranteed by the Bill of Rights. BORDC engages in public education and debate about antiterrorism legislation and policies.

Defending Dissent Foundation is a nonprofit organization that collaboratively works with other civil liberties groups, and reaches out to include peace, environmental, civil rights and other activist groups to stop threats to our right to dissent. This work translates grassroots civil liberties concerns into national policy debate and action through regular publications and communications with policymakers.

Fund for Nonviolence is a private foundation whose mission is to cultivate and support community-based efforts to bring about social change that moves humanity towards a more just and compassionate coexistence. Its Latin America program addresses the root causes of violence by supporting social movements and networks whose work represents community voices challenging concentrated economic and political power, and creating alternatives.

Grassroots International (“GRI”) is a 25 year-old human rights and international development organization and public foundation that promotes global justice through partnership with social change organizations. GRI works around the world to advance political, economic, and social rights and supports development alternatives through grantmaking, education, and advocacy. GRI’s international grantmaking – which is primarily focused on resource rights, including the rights to land, water, seeds, food, and other resources – covers sustainable livelihoods and community development, leadership development and capacity building, and

human rights monitoring and defending.

Kinder USA is a nonprofit organization that addresses the humanitarian needs of children in areas of war and occupation, particularly in Palestine. Founded in 2002 by a group of physicians and humanitarians, the goals of Kinder USA are to alleviate the suffering of children and their families – regardless of ethnicity or religious beliefs – by providing greatly needed projects that focus on self-empowerment through the initiation of educational, rehabilitation and health programs thereby reversing the suffering of these innocent beings due to the horrors of conflict, war and occupation.

Muslim Advocates (“MA”) is a national legal advocacy and educational organization dedicated to protecting freedom, justice, and equality for all, regardless of faith. MA’s mission is to promote the full participation of Muslims in American civic life. MA initiated the Muslim Charities Accreditation Program to strengthen the Muslim nonprofit sector by helping Muslim nonprofit organizations incorporate best practices, and by hosting legal and financial educational seminars across the United States for charities.

Muslim Public Affairs Council (“MPAC”) is a public service nonprofit organization promoting the civil rights of American Muslims, encouraging the integration of Islam into American pluralism, and promoting a positive, constructive relationship between American Muslims and their representatives. Since 1988, MPAC has worked diligently to promote a vibrant American Muslim community and enrich American society by exemplifying the Islamic values of Mercy, Justice, Peace, Human Dignity, Freedom, and Equality for all. MPAC is committed to developing leaders, and enhancing the political and civic participation of Muslim Americans.

INTRODUCTION

Nonprofit organizations (“NPOs”) provide vital, critical humanitarian aid across the globe, through an array of programs in a variety of social service areas. These programs create and support the infrastructure necessary for a healthy, educated, and productive society, thereby addressing the root causes of terrorism. NPOs promote and preserve human rights, provide health care and education services, foster sustainable community development, and encourage the growth of democratic institutions. Moreover, some NPO programs more directly prevent the growth and spread of terrorist organizations and activities by promoting nonviolent conflict resolution and fostering opportunities for democratic participation. NPOs also conduct vigorous due diligence and cultivate strong relationships with donor and recipient communities in order to ensure that their programs are implemented consistently with their humanitarian missions and are not co-opted to advance illicit activities. Through good governance practices, NPOs develop favorable reputations, which help them vigilantly guard against the abuse or misuse of their funds and services for illegal purposes. Because NPOs effectively implement missions crucial to promoting the welfare of millions of people, including those in regions devastated by armed conflict, natural disasters, and severe poverty, they are crucial allies in the global effort to counter terrorism.

Amici are U.S.-based NPOs that operate a variety of social service programs and provide humanitarian aid, and an individual expert who studies the impact of U.S. counterterrorism laws on NPOs. Amici are concerned about the U.S. government’s actions in the KindHearts case and in similar cases relating to the investigation, designation, or closing of U.S.-based NPOs. Amici recognize the government’s legitimate interest in stopping the financing of terrorist activity and

share this important goal. They are, however, deeply troubled by the government's unconstitutional actions and policies, including the freezing of assets pending investigation, the use of vague and overbroad legal standards, the failure to provide adequate notice and a meaningful opportunity for a hearing to targeted NPOs, and the lack of robust judicial review. These actions and policies have created a climate of fear and intimidation among NPOs, discouraging them from doing their critical humanitarian work—particularly in conflict-torn regions that are most in need—for fear of being arbitrarily subjected to these actions and policies themselves. In addition, the government's actions and policies have tarnished the individual reputations of NPOs and the nonprofit sector in general, by unfairly casting a cloud of suspicion over the sector without any factual basis. Damage to NPO reputations has severely undermined the ability of NPOs to provide humanitarian aid and to conduct the due diligence necessary to ensure that their programs are implemented consistently with their humanitarian missions and are not co-opted to advance illicit activities. In effect, the government's actions and policies are counterproductive to its efforts to counter terrorism because they discourage and undermine the vital work of NPOs.

Amici respectfully submit this brief to the Court to explain this larger, counterproductive impact of the government's policies upon the nonprofit sector as a whole because this information will aid the Court in determining the critical Constitutional questions raised by the Plaintiff's challenge to the government's actions in this case.

ARGUMENT

I. NPOs DILIGENTLY IMPLEMENT MISSIONS THAT PROVIDE VITAL HUMANITARIAN AID AND CONTRIBUTE TO THE GLOBAL EFFORT TO COUNTER TERRORISM.

U.S.-based NPOs deliver vital humanitarian aid through an array of programs. Millions of people depend on this aid to meet their immediate needs and to establish the infrastructure necessary to a strong and vibrant civil society. Moreover, the humanitarian work of NPOs is crucial to eliminating conditions conducive to the spread of violent extremism. NPOs conduct vigorous due diligence to ensure that their programs are implemented consistently with their humanitarian missions. By cultivating relationships of trust and a good reputation with donor and recipient communities, NPOs ensure that their missions are successful and guard against co-option of charitable funds and services for illicit purposes.

A. NPOs Provide Critical Humanitarian Aid That Addresses And Prevents The Conditions Conducive To The Spread Of Terrorism.

The U.S.-based nonprofit sector is comprised of organizations that are independent of federal, state, and local governments and provide a wide array of services and programs to benefit the public. NPOs include charities, foundations, social welfare organizations, as well as professional and trade organizations.¹ NPOs promote human rights and development through an array of social and economic programs addressing, among other things, community development, education, environmental degradation, health care, housing, hunger and poverty, non-violent conflict resolution, HIV/AIDS, religious instruction, and water resources. As of 2007, more than 1.6 million NPOs were operating in the United States, employing 8.7 million workers, or approximately six percent of the U.S. labor force.²

Many NPOs engage in international humanitarian work, and some focus primarily on

¹ See Elizabeth J. Reid and Janelle A. Kerlin, *The International Charitable Nonprofit Subsector in the United States: International Understanding, International Development and Assistance, and International Affairs* (“Urban Institute Report”) at 7 (The Urban Institute, 2006), available at <http://www.urban.org/url.cfm?ID=411276> (last visited February 26, 2009).

² Bureau of Labor Statistics, *Wages in the Nonprofit Sector: Management, Professional, and Administrative Support Occupations* (Oct. 28, 2008), available at <http://www.bls.gov/opub/cwc/cm20081022ar01p1.htm> (last visited February 26, 2009).

such work. While NPOs that engage primarily in international programs constitute only two percent of the U.S. nonprofit sector, and though the majority of them have annual revenues of less than \$500,000, their work exerts considerable influence in areas of international affairs, development and relief assistance, and international understanding.³

Many NPOs provide humanitarian aid in regions that have been torn apart by violent conflict or ravaged by generations of severe poverty—regions where vital services are not provided by the government or the for-profit sector.⁴ Millions of people in these regions rely on the work of U.S.-based NPOs to provide both immediate aid for survival and the tools and vision necessary for building a brighter future.

In providing vital humanitarian assistance, NPOs also aid global efforts to prevent and counter terrorism. By promoting human rights and development, and by assisting underserved populations to lay the infrastructure necessary for a healthy, educated, and productive society, NPOs work to address the root causes of terrorism. Indeed, reports commissioned by both the U.S. government and international sources conclude that preventing the growth and spread of terrorism requires a strategy that promotes economic, social, and political development. The 9/11 Commission reported that, “when people lose hope, when societies break down, when countries fragment, the breeding grounds for terrorism are created.”⁵ The Commission recommended that “a comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children’s future.”⁶

³ Urban Institute Report at 2, 13.

⁴ Urban Institute Report at 18.

⁵ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* at 378 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (last visited February 26, 2009).

⁶ *Id.* at 379.

Likewise, the United Nations General Assembly unanimously adopted a Global Counter-Terrorism Strategy proposing, as the first of four pillars, proactive measures to bolster civil society in order to eradicate conditions conducive to the spread of terrorism.⁷

In particular, NPOs that deliver critical humanitarian aid in zones of conflict are laying the foundations for productive civil societies that are inhospitable to the seeds of extremism. In conflict regions, NPOs not only provide vital responses to immediate community needs, but they also advance the long-term goal of enabling local partners and communities to build the institutional capacity to address future community needs. By ensuring community access to health care, education, and economic opportunities, NPOs are providing the means by which communities can participate and co-exist peacefully in the global society.

Independent NPO-evaluation organizations such as Charity Navigator,⁸ American Institute of Philanthropy,⁹ and Better Business Bureau Wise Giving Alliance,¹⁰ recognize the need for critical humanitarian aid in conflict regions and have awarded highest ratings to many NPOs operating in these regions. U.S.-based NPOs such as American Near East Refugee Aid (“ANERA”), CARE, and Mercy Corps actively pursue humanitarian missions in Afghanistan, Gaza/West Bank, Iraq, and other conflict-torn regions. Not only do these programs deliver critical aid, but they exemplify the frontline efforts of NPOs in the global effort to secure society against the threat of terrorist attacks. In Afghanistan, CARE has built libraries, provided primary education to more than 44,000 children, and made more than 5,000 micro-enterprise loans to

⁷ G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 8, 2006), *available at* <http://www.un.org/terrorism/strategy-counter-terrorism.shtml> (last visited February 26, 2009).

⁸ Charity Navigator, <http://www.charitynavigator.org/> (last visited February 26, 2009)

⁹ American Institute of Philanthropy, <http://www.charitywatch.org/> (last visited February 26, 2009).

¹⁰ Better Business Bureau, <http://www.us.bbb.org> (last visited February 26, 2009).

Afghani women.¹¹ In Gaza and the West Bank, ANERA has delivered medicine and health supplies to clinics and implemented water access projects that created 200,000 days of work.¹² In Iraq, Mercy Corps has constructed clinics and marketplaces, sponsored theater productions, art lessons, and other creative endeavors, and supported local women leaders.¹³

In addition, some NPO programs explicitly contribute to anti-terrorism efforts by facilitating and promoting nonviolent conflict resolution and democratic participation. These programs encourage and enable political participation without resort to violence. The Carter Center, for example, promotes peace in the communities affected by the Israeli-Palestinian conflict by, among other things, promoting and assisting in free and open Palestinian elections and bringing together local political leaders to negotiate plans for a sustainable peace.¹⁴ Another NPO, Ashoka, sponsors fellows who work to bolster democratic participation and institute nonviolent conflict resolution programs in areas such as Lebanon and the West Bank.¹⁵ These and other NPOs are working to counter terrorist activities by building democratic institutions and promoting peace at a grassroots level.

NPOs that work to protect human rights and promote economic development are also performing the work of peace. Through their efforts in development and human rights, NPOs are working to dry up the wells of extremism from which terrorism springs.

¹¹ CARE, Project Information: Secondary Schools for Girls, http://www.care.org/careswork/projects/AFG023.asp?s_subsrc=170960090000&s_src=default (last visited February 26, 2009)

¹² ANERA, *Annual Report* at 5 (2008), available at <http://www.anera.org/aboutUs/documents/ANERAAnnualReport08.pdf> (last visited February 26, 2009).

¹³ Mercy Corps, Program Details: Iraq, <http://www.mercycorps.org/countries/iraq> (last visited February 26, 2009)

¹⁴ The Carter Center, Democracy Program: Palestine, <http://cartercenter.org/peace/democracy/palestine.html> (last visited February 26, 2009)

¹⁵ Ashoka Fellows Database, <http://www.ashoka.org/fellows> (last visited February 26, 2009)

B. NPOs Conduct Vigorous Due Diligence To Ensure That Their Programs Do Not Finance Terrorist Activity.

NPOs are unequivocal in condemning all forms of terrorism, and by vigorously implementing both statutorily required and self-imposed due diligence practices, NPOs are working to ensure that their funds are used for their intended humanitarian purposes, rather than siphoned off to finance terrorist organizations and activities. For example, NPOs diligently comply with tax, accounting, disclosure, and other laws and regulations that promote NPO transparency and accountability. U.S. federal income tax law generally prohibits use of charitable funds for non-charitable purposes, and it requires NPOs to submit detailed statements of their activities, revenues, expenditures, and organizational governance and policies to the IRS.¹⁶

Moreover, many NPOs adopt policies that impose additional disclosure, monitoring, and reporting requirements in order to bolster donor, recipient, and public confidence in the legitimacy and trustworthiness of the NPOs and their activities.¹⁷ NPOs have embraced this self-governing approach in recognition of the fact that “[t]he best bulwark against misconduct will always be a well-informed vigilance by members of the nonprofit community themselves.”¹⁸

¹⁶ 26 U.S.C. § 501(c)(3) (2007) (providing exemption only if no substantial part of NPO activities are non-charitable); 26 C.F.R. § 1.501(c)(3)-1 (defining categories of exempt organizations; limiting definition to organization with only insubstantial part of activities going to non-exempt purposes); 26 C.F.R. § 1-501(a)-1(b)(1, 2) (requiring additional proof of exempt status for § 501(c)(3) organizations); 26 C.F.R. § 1-501(h)-2 (establishing the expenditure test for reporting non-charitable activities); I.R.S. Form 5768 (rev. December 2004) (certification of insubstantial non-charitable activity); I.R.S. Form 990 (2008) (exempt-organization return form; requiring detailed disclosure of expenditures and organizational governance policies, among others).

¹⁷ Independent Sector, Panel on the Nonprofit Sector, *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations* (“Principles for Good Governance and Ethical Practice”) at 2 (October 2007), available at http://www.nonprofitpanel.org/report/principles/Principles_Guide.pdf (last visited February 26, 2009).

¹⁸ *Id.* at 5.

These self-governing practices have informed the compilation of several best-practices guides to guard against, among other things, the unintended diversion of donations to terrorist organizations. These include *Principles of International Charity*,¹⁹ *Principles of Accountability for International Philanthropy*,²⁰ *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*,²¹ and the *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*.²² In addition, innovative initiatives to certify NPOs based on widely-accepted governance and funding standards have been developed.²³ These guides and initiatives demonstrate that the nonprofit sector is continually working to strengthen organizational practices to prevent NPO funds, programs, and services from being used for unintended or illegal purposes.

In specific recognition of the government's claim that NPO programs and funds may unwittingly be co-opted to support illegal activity, NPOs have adopted specific measures to ensure, to the extent possible, that both revenue streams and expenditures are devoid of nefarious intentions or ends. These measures include, for example: entering into agreements with donors

¹⁹ Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, *Principles of International Charity* (March 2005), available at http://www.cof.org/files/Documents/International_Programs/Principles_Final.pdf (last visited February 26, 2009).

²⁰ Council on Foundations and European Foundation Centre, *Principles of Accountability for International Philanthropy* (April 2007), available at http://www.greengrants.org/pdf/principles_of_accountability07.pdf (last visited February 26, 2009).

²¹ *Principles of Good Governance and Ethical Practice*, *supra*.

²² *Joint efforts of Independent Sector, InterAction, Council on Foundations, and Day, Berry & Howard Foundation, Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know* (March 2004), available at <http://www.independentsector.org/PDFs/counterterrorism.pdf> (last visited February 26, 2009).

²³ See e.g., InterAction Private Voluntary Organization Standards certification process, <http://www.interaction.org/pvostandards/index.html> (last visited February 26, 2009); Muslim Advocates Charities Accreditation Program, http://www.muslimadvocates.org/press_room/muslim_advocates_announces_new.html (last visited February 26, 2009).

regarding the specific programs for which a donation is intended; promulgating policies to assess whether a specific donation would compromise an organization's ethics, financial status, or program focus; assessing the ability of grant-recipients to accomplish the charitable purposes of the grant; implementing continuous monitoring of grant-recipient progress; instituting financial controls to trace delivery of goods and services; requiring grant recipients to comply with specific accounting procedures; and covering the grantees' auditing expenses.²⁴

In addition, NPOs take great care to establish relationships of trust with both donors and recipients, and to develop deep knowledge of the donor and recipient communities. Such relationships and knowledge help NPOs ensure that their programs and services meet local needs without risk of abuse or misuse.²⁵ NPOs also work to ensure the legitimacy of their programs by clearly communicating their mission, goals, and expectations to both donors and recipients.²⁶ NPOs also screen recipients of their programs and services to ensure that there is actual need, and they refuse to accept donations that are conditioned on illegal or non-charitable use.²⁷ Further, NPOs monitor the effectiveness of their programs and services by evaluating their outcomes.²⁸

Such due diligence efforts have numerous benefits for NPOs and for society as a whole. First, these efforts ensure that an NPO's mission is successfully and sustainably implemented. Second, these efforts enable an NPO to stay accountable to donors and maintain donor confidence. Third, due diligence efforts promote and protect the good reputation of an NPO,

²⁴ Principles of Accountability for International Philanthropy at 17-19; Principles for Good Governance and Ethical Practice at 25; Principles of International Charity at 10.

²⁵ Principles of International Charity at 10-11.

²⁶ Principles of Accountability for International Philanthropy at 13.

²⁷ Principles for Good Governance and Ethical Practice, nos. 28 and 30.

²⁸ Principles for Good Governance and Ethical Practice, nos. 22, 24, 30.

which is its most valuable asset.²⁹ Finally, an NPO's reputation for fiscal accountability fosters relationships of trust between the NPO and its donor and beneficiary communities. These relationships then further reinforce the due diligence efforts to guard against co-option of NPO funds and services for non-charitable purposes.

II. THE U.S. GOVERNMENT'S ACTIONS AND POLICIES VIS-A-VIS NPOs ARE UNCONSTITUTIONAL AND COUNTERPRODUCTIVE TO ITS EFFORTS TO COUNTER TERRORISM.

After 9/11, the U.S. government repeatedly alleged that NPOs have played a significant role in financing terrorism.³⁰ Pursuant to these allegations, and as part of its efforts to counter terrorism, the government has implemented harsh policies targeting NPOs. These policies have violated the Constitutional rights of targeted NPOs by, among other things, allowing the government unfettered discretion to freeze the assets of NPOs or to designate NPOs as terrorist organizations without providing them adequate notice or meaningful opportunities to challenge the government's actions, and without providing for robust judicial review of those actions. In short, as shown by the KindHearts case, the government is acting arbitrarily to enforce vague standards, while failing to provide critical due process protections.³¹ NPOs recognize the government's legitimate interest in stopping the financing of terrorist activity. But the

²⁹ See Ken Miller, Building on Strength: Ten Tips for Preserving Your Reputation, available at <http://www.boardsource.org/Knowledge.asp?ID=1.642> (last visited February 26, 2009); Don Kramer, Charitable Reputation: An Asset Worth Protecting (2004), available at <http://www.nonprofitissues.com/public/features/risk/2004apr-IS.html> (last visited February 26, 2009).

³⁰ Grantmakers Without Borders and OMB Watch, *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve* ("Collateral Damage") at 31 (July 2008), available at <http://www.ombwatch.org/npadv/PDF/collateraldamage.pdf> (last visited February 26, 2009).

³¹ See generally Plaintiff's Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment ("Plfs. S.J. Br."); Plaintiff's Reply Memorandum in Support of Its Motion for Partial Summary Judgment and Its Memorandum in Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment on All Counts ("Plfs. Reply Br.").

government's methods have created a climate of fear and intimidation among NPOs, who worry that the government might shut them down at any moment though they are doing nothing illegal—or, under the government's vague standards and arbitrary enforcement, for doing something they had no way of knowing was illegal.³²

This fear and intimidation, in turn, has had a significant negative impact on the NPO community and its beneficiaries across the globe. First, NPOs are discouraged from providing critical humanitarian aid in needy areas of the world when they see fellow organizations like KindHearts being effectively shut down without any notice, seemingly without any evidence of wrongdoing, and without due process protections, because they fear that they will suffer the same arbitrary fate. Second, even if an NPO continues its work despite the risk of arbitrary and unfair government targeting, that work is undermined by the significant damage done to that NPO's most valuable asset, its reputation. Through its actions and policies, the government has cast unfair and inaccurate aspersions upon individual NPOs, such as those working in conflict regions, as well as the entire nonprofit sector, which has been accused baselessly of poor fiscal self-governance and co-option by terrorist organizations.

Regrettably, the government's policies are not making Americans any safer, and indeed

³² The government has provided a set of best-practices Guidelines and a "Risk Matrix," both intended to help instruct NPOs on what is and is not permissible activity. U.S. Treasury Department, *Anti-Terrorist Financing Guidelines* (2006), available at <http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf> (last visited February 26, 2009); *Risk Matrix for the Charitable Sector* (2007), available at http://www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf (last visited February 26, 2009). Both the Guidelines and the Risk Matrix, however, have been roundly criticized by NPOs as unworkable, inefficient, burdensome, and ill-suited to meet the common goals of the government and of the non-profit sector in ensuring that funds and programs are not inadvertently used for illegal purposes. See *Collateral Damage* at 39-49. Moreover, even if an NPO complies with the Guidelines, there is no guarantee that it is safe from FPI or designation as an SDGT. *Id.* In effect, an NPO can be shut down by the government, even when the NPO is doing everything the government has asked it to do—i.e., for doing something it had no way of knowing was wrong. See *Collateral Damage* at 19.

have proven counterproductive.³³ The government’s policies discourage and undermine the vital work done by U.S.-based NPOs in the world’s most troubled regions, where a positive U.S. presence would send a message of tolerance and compassion and contribute to drying up the wells of desperation and extremism from which terrorism springs. By carrying out these policies, the U.S. government—and the world in general—loses out on the beneficial impact NPOs otherwise have in the global effort to counter terrorism.

A. The Government’s Actions And Policies Violate The Constitutional Rights Of NPOs.

The Treasury Department’s Office of Foreign Assets Control (“OFAC”) claims the authority to freeze the assets of an organization or individual under the International Emergency Economic Powers Act (“IEEPA”) and Executive Order 13,224 (“EO 13224”), 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 a “specially designated global terrorist” (“SDGT”).³⁴ A provision of the USA PATRIOT Act grants even more authority to the executive branch, authorizing 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.”³⁵ Neither of the statutes nor EO 13224 articulates any substantive criteria guiding or restricting OFAC’s decision to impose a Freeze Pending Investigation (“FPI”), nor requires any procedural safeguards, nor imposes any time limit on such freezes.³⁶ Moreover, since 2001, OFAC and the Justice Department have expanded their interpretation of what is prohibited under

³³ Collateral Damage at 36-37.

³⁴ Collateral Damage at 11-15; Plfs. S.J. Br. at 2.

³⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at various sections of 8, 15, 18, 22, 32, 42, 49, and 50 U.S.C. (2006)) at Section 106 (adding the words “block during the pendency of an investigation” after the word “investigate” in IEEPA, 50 U.S.C. 1702(a)(1)(B)(2000)).

³⁶ Collateral Damage at 11-15; Plfs. S.J. Br. at 2.

IEEPA, making it increasingly difficult for NPOs to predict what constitutes illegal behavior.³⁷ The statute prohibits “material support” of designated terrorist organizations, which the government has come to interpret as including even lawful charitable aid that might “otherwise cultivate support” for a designated organization.³⁸

The government of course has a legitimate interest in stopping the financing of terrorist activity, and this is an interest that NPOs share. Since 2001, however, in its investigations of NPOs on terrorism financing allegations, the government has used methods that severely limit the ability of NPOs to defend themselves against allegations that may be completely untrue. When the government refuses to give an NPO notice of the actual reasons for its assets being frozen or for its designation, when it uses secret evidence that is never made available to the NPO, and when that evidence is never subjected to scrutiny by a federal court, an NPO cannot possibly defend itself, even if it is completely innocent. The government’s methods therefore raise significant constitutional concerns and compromise the ability of NPOs to demonstrate their innocence.³⁹

Although each case is different, the KindHearts case exemplifies the problems that underlie the government’s “Freeze Pending Investigation” policy and that raise grave concerns within the NPO community. First, the FPI authority itself is vague, imposing no limits on government discretion and affording no guidance to NPOs about what is proscribed.⁴⁰ Second, the targeted NPO—in this case KindHearts—is provided with no adequate notice or opportunity to defend itself.⁴¹ Third, the government seizes the NPO’s assets without a warrant, without

³⁷ Collateral Damage at 19.

³⁸ *Id.*

³⁹ See Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime* (“Constitutional Challenges”), 43 Wake Forest L. Rev. 643, 663 et seq (2008).

⁴⁰ See Collateral Damage at 19-22; Constitutional Challenges at 677-683..

⁴¹ See Collateral Damage at 11-15; Constitutional Challenges at 666-670.

probable cause, and without any structural substitute that would render such an indefinite seizure reasonable.⁴² The KindHearts case also demonstrates that the government’s designation authority and process are likewise problematic—and likewise of grave concern to other U.S.-based NPOs—for similar reasons. EO 13224 contains vague criteria for designation.⁴³ There is no adequate notice.⁴⁴ (Rather, the government usually publishes the news of the designation after the fact, in a press release.) And the government routinely relies on classified evidence that it refuses to disclose, while placing arbitrary restrictions on the NPO’s ability to defend itself by restricting the use of its own documents and resources.⁴⁵

Not only do the government’s FPI and designation schemes violate the Constitutional rights of the NPOs targeted by those schemes, but they also threaten the rights of other U.S.-based NPOs, all of which are potential future targets. NPOs worry that the relevant laws, and the government’s interpretation and use of those laws, subject all NPOs to potentially arbitrary and unpredictable enforcement, without giving them a fair opportunity to prove their innocence. NPOs are deeply troubled by the prospect of having their vital humanitarian work suddenly and permanently ended, for poor reasons or no reason at all.

B. The Government’s Actions And Policies Discourage The Vital Humanitarian Work Of NPOs.

The vagueness of standards, the arbitrariness and unpredictability of the government’s actions, and the lack of meaningful opportunities for NPOs to defend themselves all combine to generate a great deal of fear and intimidation throughout the NPO community.⁴⁶ This climate of fear and intimidation, in turn, has had a “chilling effect” on NPO activity, discouraging NPOs

⁴² See Constitutional Challenges at 663.

⁴³ See Collateral Damage at 19-22; Constitutional Challenges at 677-683.

⁴⁴ See Collateral Damage at 11-15; Constitutional Challenges at 666-670.

⁴⁵ See Collateral Damage at 24, 26-28; Constitutional Challenges at 670-672.

⁴⁶ Collateral Damage at 19.

from implementing particular types of aid programs or, more typically, from working in conflict regions where humanitarian aid is critical.

International NPO activity in general has suffered as a result of the government's policies. The percentage of international grants targeting overseas recipients dropped from 40 percent in 1998 to 31 percent in 2001, and dropped again between 2002 and 2004.⁴⁷ A study published by *Alliance*, the world's leading magazine on philanthropy and social investment, noted organizational anxiety over the draconian nature of the government's freeze and designation regime; many organizations interviewed for the study feared the long-term consequences of international grantmaking because of the unpredictability of government action.⁴⁸ Professor Nancy Billica, in her paper *Philanthropy at Risk*, has also noted that vague government policies create uncertainty and fear among NPOs, and may cause them to turn away from starting international programs.⁴⁹

The chilling effect of the government's actions and policies has been most pronounced in areas where humanitarian aid is desperately needed, often in conflict zones where designated terrorist organizations operate. For example, it is practically impossible to set up camps and hospitals for displaced persons in a region such as eastern Sri Lanka, where the Liberation Tigers of Tamil Eelam—a designated terrorist organization—controls the region. An NPO cannot provide humanitarian aid in such a region without dealing with the designated organization, since the organization controls the local government and infrastructure. An NPO might decide not to deliver aid in such regions because the risk of being shut down by the government is simply too

⁴⁷ Collateral Damage at 52.

⁴⁸ Rachel Humphrey, *Alliance Extra – June 2003* (June 2003) (cited in Collateral Damage at 52).

⁴⁹ Nancy Billica, *Philanthropy at Risk: U.S. Administrative and Legislative Proposals for Change* at 3-4 (2005) available at <http://www.urgentactionfund.org/index.php?id=155> (last visited February 26, 2009)

great.⁵⁰ Numerous regions in the world, such as Sri Lanka, the Palestinian Territories, Burma, Nepal, Afghanistan, Colombia, Indonesia, Jammu and Kashmir, Pakistan, and the Philippines may be construed as “too risky” for NPO activity under the government’s current policies, despite desperate levels of need in these regions.⁵¹

When NPOs pull out of certain regions of the world because of fear of being shut down by the government, the public image of the U.S. also suffers.⁵² Small-scale grantmaking and outreach to communities in conflict regions are more important than ever, in order to prevent the spread and growth of terrorism. NPO activity aids in communicating peaceful aims at the grassroots level, thereby diminishing animosity toward the U.S. and improving the U.S. image across the globe. NPOs have extensive field experience in zones of conflict, and they have important knowledge on the specific local conditions that fuel extremism.⁵³ When NPOs cease to work in conflict zones, aid that was promised does not get delivered, and the result is increased, rather than diminished, animosity toward the U.S.⁵⁴

Data suggests that international assistance “makes the world feel good about America, thereby counteracting anti-American sentiment.”⁵⁵ For example, Terror Free Tomorrow conducted surveys within Indonesia to gauge public opinion about the U.S. after the 2004 Indian Ocean tsunami, when more than \$13.4 billion in U.S. humanitarian aid, both public and private,

⁵⁰ See Collateral Damage at 54.

⁵¹ See Urgent Action Fund and OMB Watch, *Counterterrorism Policies Discourage Charities from Attacking the Root Causes of Terrorism* (“Factsheet 5”), available at http://www.urgentactionfund.org/assets/files/uaf-pubs/GINN/gnin_091508-5.pdf (last visited February 26, 2009).

⁵² See Collateral Damage at 53.

⁵³ David Cortright, *Friend not Foe: Civil Society and the Struggle Against Violent Extremism* at 5, 17 (October 2008), available at http://www.fourthfreedom.org/pdf/08_10_Friend_Not_Foe.pdf (last visited February 26, 2009).

⁵⁴ See *id.*

⁵⁵ Collateral Damage at 53.

went to help victims.⁵⁶ Due to that relief, forty-four percent of respondents in January 2006 reported a favorable view of the U.S., compared to just fifteen percent in May 2003, before the tsunami.⁵⁷ Furthermore, Indonesia reported its lowest level of support for Osama bin Laden and terrorism since 9/11.⁵⁸ This same phenomenon was recorded by Terror Free Tomorrow in Pakistan, after the 2005 earthquake; seventy-five percent of Pakistanis had a more favorable opinion of America, and most cited earthquake relief as the reason.⁵⁹ This is precisely the kind of work that the 9/11 Commission recommended, and the kind of results that it anticipated.⁶⁰ Rather than promoting such crucial work, the government's policies are discouraging it.

Finally, the government's actions and policies have discouraged not only NPOs but also their donors. Donors from various communities, and specifically donors of particular faiths and donors with ties to particular regions of the world, have been discouraged from giving because of the threat of being associated with an NPO that could be shut down by the government at any time, for little or no reason.⁶¹ The government's seemingly disproportionate targeting of Muslim American charities, for example, has caused many Muslim Americans to fear that their donations might land them on a list of suspected terrorist sympathizers, even if they are completely unaware and unsupportive of any wrongdoing.⁶² In this climate of fear and intimidation, donations to Muslim charities have declined significantly.⁶³

Unfortunately, the ultimate losers, as a result of the government's actions and policies,

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See The 9/11 Commission Report at 378-79.

⁶¹ See, e.g., OMB Watch, *Muslim Charities and the War on Terror: Top Ten Concerns and Status Update* ("Muslim Charities") at 5 (February 2006), available at http://www.ombwatch.org/pdfs/muslim_charities.pdf (last visited February 26, 2009).

⁶² *Id.*

⁶³ *Id.*

are the millions of people worldwide who depend on the work of U.S.-based NPOs. These people—often in desperate need throughout conflict-torn regions—suffer because the government’s actions and policies under the current “freeze and designation” regime create a climate of fear that effectively discourages the work of NPOs.⁶⁴

C. The Government’s Actions And Policies Undermine The Vital Humanitarian Work of NPOs By Unfairly Damaging Their Reputations.

The government’s actions and policies have damaged the reputations of individual NPOs and of the nonprofit sector as a whole, casting a cloud of suspicion through baseless claims that the sector is a “significant” source of terrorism financing.⁶⁵ NPOs suffer, and their work is severely undermined, when their reputations are called into question. An NPO’s most valuable asset is its reputation.⁶⁶ A favorable reputation is crucial to the development of relationships of trust between an NPO and its donor and recipient communities, and those relationships of trust are, in turn, crucial to ensuring the success of the NPO’s mission.

Harm to an NPO’s reputation undermines that NPO’s work in various ways. Donors will not contribute to a "suspect" organization out of fear that they themselves may be targeted for investigation.⁶⁷ Recipients of an NPO’s funding or services likewise become concerned about being linked to a “suspect” organization, and might refuse even critically needed funds or humanitarian services from that NPO. Similarly, foreign governments or groups who control

⁶⁴ Collateral Damage at 11.

⁶⁵ See Collateral Damage at 34-35. Notably, the government’s actions and policies have had a disparate impact on Muslim charities, which have suffered particular suspicion and harm to their collective reputation. See generally Muslim Charities; Mohammed Kroessin, *Islamic Charities and the 'War on Terror': Dispelling the Myths* at 27, in 38 Humanitarian Exchange (June 2007), available at <http://preview.tinyurl.com/abzdttr> (last visited February 26, 2009).

⁶⁶ See Ken Miller, Building on Strength: Ten Tips for Preserving Your Reputation, available at <http://www.boardsource.org/Knowledge.asp?ID=1.642> (last visited February 26, 2009); Don Kramer, Charitable Reputation: An Asset Worth Protecting (2004), available at <http://www.nonprofitissues.com/public/features/risk/2004apr-IS.html> (last visited February 26, 2009).

⁶⁷ See, e.g., Muslim Charities at 5.

access to particular areas or regions become wary of granting such access to an NPO operating under the cloud of suspicion. Based on suspicion alone, the ripple effect of government action can be crippling to an NPO and the communities it serves.

What is at stake here are an NPO's relationships of trust with its donor and recipient communities. U.S.-based NPOs have developed their favorable reputations for implementing effective humanitarian programs through the cultivation of relationships with donor and recipient communities and through substantial due diligence practices. These reputations are critical to their programmatic successes and to ensuring that their programs are not affiliated with terrorist activity in any way. The government's FPI and designation practices threaten to degrade the reputations of not only those NPOs targeted for investigation or designation, but all NPOs doing work in conflict zones, and indeed doing work across the globe. This reputational harm significantly undermines the work that these NPOs provide.

CONCLUSION

NPOs are in fact the government's allies in the global effort to prevent the growth and spread of terrorist organizations and activities. By providing humanitarian aid, by encouraging economic development, and by enhancing the prospects for the future for those in need, NPOs work to prevent people from losing hope. They work to prevent societies from breaking down, countries from fragmenting. This work helps to prevent the emergence of violent extremism. Unfortunately, at a time when the U.S. has so much to gain by supporting international philanthropy, such work is instead becoming increasingly difficult. NPOs should be treated as allies in the global effort to counter terrorism, but instead they have become targets and casualties. Not only are the government's actions and policies unconstitutional, but they also discourage and undermine the critical humanitarian aid provided by NPOs, and thus they are

counterproductive to the government's own counter-terrorism goals.

For the foregoing reasons, amici respectfully request that the Court grant the relief sought by Plaintiff.

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Respectfully submitted,

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