

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

BENEVOLENCE INTERNATIONAL )  
FOUNDATION, INC. )  
 )  
Plaintiff, )  
 )  
 )  
JOHN ASHCROFT, in his official capacity as )  
Mason )  
Attorney General of the United States of )  
America; PAUL H. O'NEILL, in his official )  
capacity as Secretary of the Treasury of the )  
United States of America; COLIN L. POWELL, )  
in his official capacity as Secretary of State of )  
the United States of America; ROBERT S. )  
MUELLER, III, in his official capacity as )  
Director, Federal Bureau of Investigation; and )  
R. RICHARD NEWCOMB, in his official )  
capacity as Director, United States Department )  
of the Treasury, Office of Foreign Assets Control,) )  
 )  
Defendants. )

No. 02-C-0763  
Judge Alesia  
Magistrate Judge

**CORRECTED MEMORANDUM IN SUPPORT OF PLAINTIFF BENEVOLENCE  
INTERNATIONAL FOUNDATION'S MOTION FOR PRELIMINARY INJUNCTION**

Matthew J. Piers  
Frederick S. Rhine  
Mary M. Rowland  
Shilpa S. Satoskar  
Juliet V. Berger-White  
**Gessler Hughes Socol Piers Resnick & Dym, Ltd.**  
Three First National Plaza, Suite 2200  
Chicago, Illinois 60602  
(312) 580-0100  
*Attorneys for Plaintiff Benevolence International Foundation*

Dated: April 5, 2002

## TABLE OF CONTENTS

### Page

TABLE OF AUTHORITIES i

INTRODUCTION 1

ARGUMENT 4

I. FACTUAL AND LEGAL BACKGROUND 4

A. Benevolence International Foundation 4

B. Defendants' Actions 7

II. BIF CLEARLY MEETS THE STANDARD FOR GRANTING A PRELIMINARY  
INJUNCTION 12

A. BIF Has No Adequate Remedy at Law and Will Suffer Irreparable Harm if  
Preliminary Relief is Not Granted. 13

1. Defendants' Actions Soon Will Lead to BIF's Demise. 13

2. Defendants' Actions Threaten to Destroy BIF's Humanitarian Projects. . .16

3. Defendants' Actions Are Destroying BIF's Reputation. 19

4. Defendants' Actions Are Causing a Drastic Drop in Donations to BIF. . . 19

5. Defendants' Actions Violate BIF's First Amendment Rights. 19

B. BIF Has A Substantial Likelihood of Success on the Merits 20

1. Defendants Failed to Afford BIF the Most Basic Due Process  
Protections. 20

a. BIF Has Been Deprived of Property and Liberty Interests. 21

b. Defendants' Failure to Provide Notice or Hearing Violates the Most  
Basic Due Process Rights. 22

2. Defendants' Actions Violated the Religious Freedom Restoration Act 27

3. The Blocking of BIF's Funds Infringes its First Amendment Rights of Free  
Speech and Association 31

4.	The Requirement that BIF Obtain Permission to Pay its Counsel Violates Basic Constitutional Rights.	38
5.	Defendants Searched and Seized BIF's and the Arnaout Family's Property Without Following the Dictates of the Fourth Amendment.	39
a.	The Searches and Seizures in Illinois	40
b.	The Search and Seizure in New Jersey	43
c.	The Blocking of BIF's Property	43
6.	Defendants Effected an Unconstitutional Taking of BIF's Property.	45
C.	The Balance of Harms Strongly Favors Preliminary Relief.	47
D.	The Public Interest Strongly Favors Preliminary Relief.	48
	CONCLUSION	49

## TABLE OF AUTHORITIES

### CASES

#### Page

<i>767 Third Avenue Associates v. United States</i> , 48 F.3d 1575 (Fed. Cir. 1995)	46
<i>Abbott Labs. v. Mead Johnson &amp; Co.</i> , 971 F.2d 6 (7 <sup>th</sup> Cir. 1992)	12, 19
<i>Ahmed v. United States</i> , 47 F. Supp.2d 389 (W.D.N.Y. 1999)	14
<i>American Diabetes Ass'n, Inc. v. National Diabetes Ass'n</i> , 533 F. Supp. 16 (E.D. Pa. 1981)	19
<i>American Airways Charters, Inc. v. Regan</i> , 746 F.2d 865 (D.C. Cir. 1984)	38, 39
<i>Andresen v. Maryland</i> , 427 U.S. 463 (1976)	41
<i>United States v. Basinski</i> , 226 F.3d 829 (7 <sup>th</sup> Cir. 2000)	41, 44
<i>Bill Johnson's Restaurants, Inc. v. NLRB</i> , 461 U.S. 731 (1983)	38
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	22
<i>Brotherhood of Railroad Trainmen v. Virginia</i> , 377 U.S. 1 (1964)	38
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	33
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992)	30
<i>Caplin &amp; Drysdale v. United States</i> , 491 U.S. 617 (1989)	27-28
<i>United States v. Chadwick</i> , 433 U.S. 1, 9 (1977), <i>overruled in part on other grounds</i> , <i>California v. Acevedo</i> , 500 U.S. 565 (1991)	45
<i>Citizens for a Better Environment v. City of Park Ridge</i> , 567 F.2d 689 (7 <sup>th</sup> Cir. 1975)	20
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	27
<i>City of Lakewood v. Plain Dealer Publishing Co.</i> , 486 U.S. 750 (1988)	34, 35
<i>Cleveland Hair Clinic, Inc. v. Puig</i> , 968 F. Supp. 1227 (N.D. Ill. 1996)	14, 19
<i>Connecticut v. Doehr</i> , 501 U.S. 1 (1991)	21, 26
<i>Creek v. Village of Westhaven</i> , 80 F.3d 186 (7 <sup>th</sup> Cir. 1996)	38

*DeBoer v. Village of Oak Park*, 267 F.3d 558 (7<sup>th</sup> Cir. 2001) 34

*Doe v. Small*, 964 F.2d 611 (7<sup>th</sup> Cir. 1992) 33

*Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) 13-14

*E-Systems, Inc. v. United States*, 2 Cl. Ct. 271 (Ct. Cl. 1983) 46

*Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) 45

*Elrod v. Burns*, 427 U.S. 347 (1976) 19, 20

*Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495 (4<sup>th</sup> Cir. 1981) 14

*Florida Businessmen for Free Enterprise v. City of Hollywood*,  
648 F.2d 956 (5<sup>th</sup> Cir. 1981) 19

*Florida Prepaid Postsecondary Edu. Exp. Bd. v. College Sav. Bank*, 527 U.S. 627  
(1999) 27

*Forest County Potawatomi Community of Wisc. v. Doyle*, 803 F. Supp.  
1526 (W.D. Wisc. 1992) 17

*Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) 32, 35, 36

*Fuentes v. Shevin*, 407 U.S. 67 (1972) 21, 22, 24, 26

*FWI/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) 34

*Gateway Eastern Ry. Co. v. Terminal R.R. Ass'n of St. Louis*,  
35 F.3d 1134 (7<sup>th</sup> Cir. 1994) 19

*Glatt v. Chicago Park Dist.* 87 F.3d 190 (7<sup>th</sup> Cir. 1996) 38

*Hawaii v. Gannett Pacific Corp.*, 99 F. Supp.2d 1241 (D. Hawaii 1999) 14

*Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9<sup>th</sup> Cir. 2000) 36, 37

*United States v. Husband*, 226 F.3d 626 (7<sup>th</sup> Cir. 2000) 40

*In re Young*, 82 F.3d 1407 (8<sup>th</sup> Cir. 1996), *vacated on other grounds sub nom. Christians v. Evangelical Free Church*, 521 U.S. 1114 (1997),  
*reinstated on remand*, 141 F.3d 854 (8<sup>th</sup> Cir. 1998) 27, 28-29

*In re Young*, 141 F.3d 854 (8<sup>th</sup> Cir. 1998) 27

*United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) 22, 24, 26

*Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951) 22, 24

*Jolly v. Coughlin*, 76 F.3d 468 (9<sup>th</sup> Cir. 1996) 29-30

*United States v. Jones*, 208 F.3d 603 (7<sup>th</sup> Cir. 2000) 40

*Kikamura v. Hurley*, 242 F.3d 950 (10<sup>th</sup> Cir. 2001) 27

*United States v. Kow*, 58 F.3d 423 (9<sup>th</sup> Cir. 1995) 42

*Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) 39

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) 45

*Mack v. O’Leary*, 80 F.3d 1175 (7<sup>th</sup> Cir. 1996),  
*vacated on other grounds*, 522 U.S. 801 (1997) 28, 29

*Maryland v. Macon*, 472 U.S. 463 (1985) 43

*Maryland v. Garrison*, 480 U.S. 79 (1987) 41

*Mathews v. Eldridge*, 424 U.S. 319 (1976) 23

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 21, 22

*NAACP v. Alabama*, 357 U.S. 449 (1958) 33

*NAACP Legal Defense and Educ. Fund v. Horner*, 636 F. Supp. 762 (D.D.C.),  
*vacated on other grounds*, 795 F.2d 215 (D.C. Cir. 1986) 17-18

*National Counsel of Resistance of Iran v. Department of State*,  
251 F.3d 192 (D.C. Cir. 2001) 23, 25, 26

*National People’s Action v. Village of Wilmette*, 914 F.2d 1008 (7<sup>th</sup> Cir. 1990) 20

*New Jersey State Nurses Ass’n v. Treacy*. No. 85-4912, 1985 U.S. Dist.  
LEXIS 23766 (D.N.J. Dec. 4, 1985) 14

*Nielsen v. Secretary of the Treasury*, 424 F.2d 833 (D.C. Cir. 1970) 46

*Niemotko v. Maryland*, 340 U.S. 268 (1951) 32

*Optimist Club of North Raleigh v. Riley*, 563 F. Supp. 847 (E.D.N.C. 1982) 18

*Paul v. Davis*, 424 U.S. 693 (1976) 22

*Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) 45

*United States v. Place*, 462 U.S. 696 (1983) 44

*Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8<sup>th</sup> Cir. 1977) 17

*Planned Parenthood v. Horner*, 691 F. Supp. 449 (D.D.C. 1988) 18

*Platteville Area Apartment Association v. City of Platteville*, 179 F.3d 574 (7<sup>th</sup> Cir. 1999) 41

*Powell v. Alabama*, 287 U.S. 45 (1932) 38

*Powers v. Ohio*, 499 U.S. 400 (1991) 27-28

*Preston v. Thompson*, 589 F.2d 300 (7<sup>th</sup> Cir. 1978) 48

*United States v. Richardson*, 208 F.3d 626 (7<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 910 (2000) 41, 44

*United States v. Robel*, 389 U.S. 258 (1967) 3-4

*Roland Machinery Co. v. Dresser Indus.*, 749 F.2d 380 (7<sup>th</sup> Cir. 1984). 13, 15, 20

*United States v. Roth*, 201 F.3d 888 (7<sup>th</sup> Cir. 2000) 40

*Sasnett v. Sullivan*, 91 F.3d 1018 (7<sup>th</sup> Cir. 1996),  
*vacated on other grounds*, 521 U.S. 1114 (1997) 29, 31

*Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) 33

*Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) 33

*Shimer v. Washington*, 100 F.3d 506 (7<sup>th</sup> Cir. 1996) 27

*Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) 32, 35

*Singleton v. Wulff*, 428 U.S. 106 (1976) 27-28

*Stanford v. Texas*, 379 U.S. 476 (1965) 41, 42

*United States v. Stefonek*, 179 F.3d 1030 (7<sup>th</sup> Cir. 1999). 40, 41-42

*Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9<sup>th</sup> Cir. 1999) 27

*Thomas v. Chicago Park Dist.*, 122 S. Ct. 775 (2002) 32, 35, 36

<i>Ty, Inc. v. The Jones Group, Inc.</i> , 237 F.3d 891 (7 <sup>th</sup> Cir. 2001)	12, 20, 48
<i>United Mine Workers v. Illinois State Bar Ass'n</i> , 389 U.S. 217 (1967)	38
<i>Vance v. Universal Amusement Co., Inc.</i> , 445 U.S. 308 (1980)	37
<i>Washington Legal Foundation v. Texas Equal Access to Justice Foundation</i> , 270 F.3d 180 (5 <sup>th</sup> Cir. 2001)	45
<i>Western Presbyterian Church v. Bd. of Zoning Adjustment of the Dist. of Columbia</i> , 849 F. Supp. 77 (D.D.C. 1994)	17
<i>Western Presbyterian Church v. Bd. of Zoning Adjustment of the Dist. of Columbia</i> , 862 F. Supp. 538 (D.D.C. 1994)	28, 29
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971)	22
<i>Wisconsin Vendors v. Lake County</i> , 152 F. Supp.2d 1087 (N.D. Ill. 2001)	20
<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	13

### **CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. I.	19, 31-39
U.S. Const. Amend. IV.	40-45
U.S. Const. Amend. V.	20-26, 38, 45
U.S. Const. Amend. XIV, § 5	27

## FEDERAL STATUTES

107 P.L. 56 (Oct. 26, 2001)	<i>passim</i>
3 U.S.C. § 301	7
5 U.S.C. §§ 701-706	25
8 U.S.C. § 1189	23, 36
8 U.S.C. § 1189(a)(1)(A)-(C)	24
8 U.S.C. § 1189(a)(4)(A)	36
8 U.S.C. § 1189(b)(1)	25
42 U.S.C. § 2000bb et seq.	27
42 U.S.C § 2000bb-1	27, 29
42 U.S.C. § 2000bb-2	27
50 U.S.C. § 1631	44
50 U.S.C. §§ 1701-07	<i>passim</i>
50 U.S.C. § 1702(a)(1)(B)	<i>passim</i>
50 U.S.C. §§ 1821-1829	10
50 U.S.C. § 1824(e)	40, 43

## LEGISLATIVE HISTORY

S. Rep. No. 103-111 (1993)	30
H.R. Rep. No. 103-88 (1993)	30

## FEDERAL ORDERS AND REGULATIONS

Executive Order 13224, 66 Fed. Reg. 49,079 (2001) 7, 34

31 C.F.R. § 500.3069, 24

31 C.F.R. § 501.80111, 20, 35

31 C.F.R. § 501.80235

31 C.F.R. § 595.3119, 24

31 C.F.R. § 597.3099, 24

## OTHER AUTHORITIES

Cyril Glasse, *The Concise Encyclopedia of Islam* (Harper Collins 1991) 5

Thomas W. Lippman, *Understanding Islam, An Introduction to the Muslim World*  
(Penguin Books 1995) 5

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

BENEVOLENCE INTERNATIONAL )  
FOUNDATION, INC. )

Plaintiff, )  
)  
)

JOHN ASHCROFT, in his official capacity as )  
Mason )

Attorney General of the United States of )  
America; PAUL H. O'NEILL, in his official )  
capacity as Secretary of the Treasury of the )  
United States of America; COLIN L. POWELL, )  
in his official capacity as Secretary of State of )  
the United States of America; ROBERT S. )  
MUELLER, III, in his official capacity as )  
Director, Federal Bureau of Investigation; and )  
R. RICHARD NEWCOMB, in his official )  
capacity as Director, United States Department )  
of the Treasury, Office of Foreign Assets Control, )

Defendants. )  
)

No. 02-C-0763  
Judge Alesia  
Magistrate Judge

**CORRECTED MEMORANDUM IN SUPPORT OF PLAINTIFF BENEVOLENCE  
INTERNATIONAL FOUNDATION'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Benevolence International Foundation, Inc. ("BIF"), by counsel, hereby submits this corrected memorandum in support of its Motion for Preliminary Injunction in the above-captioned matter.

**INTRODUCTION**

This case concerns the limits on the government's power to destroy a domestic, faith-based charity, and violate the most fundamental constitutional rights, in order to conduct an undefined and limitless "investigation" into the charity's activities.

BIF is a nonprofit, religious, humanitarian, charitable organization incorporated in Illinois. BIF is dedicated to assisting individuals afflicted by war, natural disaster, and extreme

poverty. Since 1992, BIF has administered essential humanitarian aid to the poor in many of the neediest areas of the world, by distributing food, clothing, medical services, and other critical assistance, and by operating hospitals, medical and dental clinics, and orphanages. BIF also has performed charitable work in the United States, including raising funds for relief efforts in New York City following the tragic and inhumane terrorist attacks of September 11.

BIF has never engaged in terrorist activities; it does not fund and never has funded or otherwise supported terrorist activities. Nor has the government, at any time, even asserted, let alone found, to the contrary.

On December 14, 2001, federal officials, acting on behalf of the defendants, seized all of BIF's financial records and other documents and substantially all of its office equipment from its offices in Chicago, Illinois and Newark, New Jersey, as well as personal property from the home of its Chief Executive Officer, Mr. Enaam Arnaout, and blocked all of BIF's property and funds, preventing it from spending any of its money without prior approval by the government – all for an indefinite and potentially unlimited period of time and purely for allegedly “investigative” purposes.

Defendants' draconian actions, which were taken with no prior notice to BIF and without any opportunity for BIF to defend itself either before or since December 14, 2001, were accompanied by no justification other than the vague assertion that “[t]he United States government has reason to believe that [BIF] may be engaged in activities that violate the International Emergency Economic Powers Act.” On that thin reed of suspicion, without any determination – or even allegation – of any probable cause to believe that BIF violated any law, defendants have essentially shut down BIF, taken from BIF all independent control over its property, prevented BIF and its donors from exercising their religious beliefs and their rights to free speech and association, and denied BIF other basic constitutional rights. Tragically and inexcusably, defendants' actions will cause countless innocent children, women, and men to suffer hunger, exposure to severe

cold, serious illness, and perhaps even death – all due to their inability to continue to receive humanitarian relief from BIF.

Defendants maintain that their authority to impose restrictions on BIF's fundamental rights is primarily based on a recent statutory amendment that allows the blocking of an organization's assets *pending investigation* of the organization's activities. The statute has no provision for the organization to contest or appeal the government's actions. Nor does it impose on the government, or require it to establish, a single standard to guide its decision as to when or how to take such actions. There are no limits on the duration of the investigation or the corresponding restrictions.

As a result of defendants' actions, BIF, as well as its donors and the recipients of its charity, are suffering severe and irreparable injuries, including the impending demise of the organization and its charitable projects around the world, many of which provide the beneficiaries their only source of food, shelter, and medical care. In short, without preliminary injunctive relief, BIF will be destroyed and many innocent people will suffer greatly and, indeed, many will lose their lives. BIF's injuries cannot be remedied by damages, nor can BIF wait for relief until the end of trial, as the harm will be devastating and irreversible by then.

It is beyond question that we live in times that demand heightened concern for the safety of the nation and its residents, and that our government must have the power to protect and defend the nation from terrorist threats. But in our constitutional democracy, that power is not and should not be boundless. "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . that make[] the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

Although this case presents many legal issues, at bottom it presents the question of how far the government may intrude on the fundamental rights that form the bedrock of this nation, in an effort to investigate potential threats to the nation. The answer,

especially at this stage, is clear. The government's actions here are so manifestly unconstitutional as to be far on the unlawful side of the line. Therefore, BIF is entitled to preliminary injunctive relief to prevent irreparable injury.

## **ARGUMENT**

### **I. FACTUAL AND LEGAL BACKGROUND**

#### **A. Benevolence International Foundation**

Since its founding in 1992, BIF has provided tens of millions of dollars worth of humanitarian aid in many of the neediest areas of the world, including Afghanistan, Azerbaijan, Bosnia, China, Daghestan, Ingushetia, Pakistan, and Tajikistan. BIF is funded by donations from individuals, businesses, and other Islamic organizations. After deducting less than fifteen percent for administrative purposes, BIF uses the remainder of the donations to support charitable work around the world. It performs much of this charitable work in conjunction with other organizations, such as the World Food Programme, the United Nations High Commissioner for Refugees, and the World Health Organization. See Ex. A ¶ 1 (Enaam Arnaout Decl.).

BIF has never provided aid or support to people or organizations known to be engaged in violence, terrorist activities, or military operations of any nature. See Ex. A ¶ 7. BIF abhors terrorism and all forms of violence against human beings. *Id.* With the help of its field staff, BIF ensures that the donations it receives are spent solely for charitable, humanitarian purposes. *Id.* ¶ 6.

The vast majority of individual donations to BIF are made as part of the Muslim religious obligation of *zakat*. See Ex. A ¶ 5. As one of the Five Pillars of Islam, *zakat* – a mandatory donation to charity in support of widows, wayfarers, orphans, and the poor, see, e.g., Thomas W. Lippman, *Understanding Islam, An Introduction to the Muslim World* at 18-19 (Penguin Books 1995) – is a central tenet of the Muslim faith, *id.* at 6

(Five Pillars are the fundamental duties, practices, and beliefs of Islam).<sup>1</sup> *Zakat* requires Muslims to donate 2.5% of their saved assets to assist the poor and needy. See, e.g., Cyril Glasse, *The Concise Encyclopedia of Islam* at 430-31 (Harper Collins 1991). Pursuant to Islamic law, BIF is required to maintain *zakat* donations in a non-interest bearing account and to use the money solely to aid the poor and needy. See Ex. A ¶ 5. The other thirty percent of BIF's donations consists of *sadaqah*, or voluntary charitable giving. Glasse, *supra*, at 341; Ex. A ¶ 5.

BIF performs the charitable, humanitarian, and religious activities of raising funds for and distributing goods and services to persons in need. For the past four years, BIF has run a tuberculosis hospital in Tajikistan which currently treats approximately forty-five children under the age of fourteen and employs over fifty individuals, including medical staff. See Ex. A ¶ 20; Ex. I ¶ 4-6 (Dr. Akram Rakhimov First Decl.). Since BIF assumed responsibility for running the TB hospital, the hospital's mortality rate has dropped to its lowest point in ten years, and over three hundred children have fully recuperated in the hospital. See Ex. A ¶ 20; Ex. I ¶ 4. In addition to the hospital, BIF supplies food to approximately one hundred and eighty-five children who live in three orphanages in Tajikistan. See Ex. A ¶ 20. BIF also runs an orphanage in Azerbaijan that houses over sixty-three children and serves as a school for over six hundred children. See *id.*; Ex. J ¶ 2 (Mohamed Abdalla Mohamed Ali Decl.). BIF supplies daily meals for the children, provides clothing and education, and supports the staff of one hundred employees and teachers. See Ex. A ¶ 20; Ex. J ¶ 4. BIF also has distributed blankets, bed sheets, shoes, jackets, and toys to orphans over the last four years. *Id.*

---

<sup>1</sup> Zakat has parallels in the other Abrahamic religions in the forms of tithing for Christians, and tzedakah for Jews.

In the town of Mahachkala in Daghestan, pursuant to an agreement with the government of Daghestan, BIF runs the Charity Women's Hospital, which offers greatly needed inpatient and outpatient gynecological and obstetric treatment and testing. See Ex. A ¶ 20; Ex. K ¶ 3-4 (Aishat Magomedoya Decl.). The hospital provides courses in general and land mine first aid, an essential service in light of the high fatality rates among victims of frequent earthquakes and the widespread use of land mines and explosives in Daghestan.

In Ingushetia, BIF provides assistance to the thousands of refugees from Chechnya who have been forced to flee their homes because of the devastation of war. See Ex. A ¶ 20; Ex. N ¶ 2 (Belkhoroev Yahya Decl.). BIF provides essential medical assistance to the Chechen refugees, works to improve the conditions of the refugee camps, and funds an orphanage and school for children living in Ingushetia. See Ex. A ¶ 20; Ex. N ¶ 3.

BIF also administers essential financial assistance to orphans in several countries through its orphan sponsorship program, which matches donors to orphans in eight countries and allows donors to sponsor a child to help pay for the child's basic needs, such as food and clothing. See Ex. A ¶ 21-22; Ex. L ¶ 7 (Dr. Akram Rakhimov Second Decl.); Ex. M ¶ 6-7 (Husein Evloev Decl.). Currently, BIF sponsors approximately 2,100 orphans, whose nominal monthly stipend is often the only source of income for the orphan and his or her guardian. *Id.*

## **B. Defendants' Actions**

Shortly after the devastating tragedy of September 11, 2001, President George W. Bush signed into law Executive Order 13224, pursuant to his authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-07 (“IEEPA”). See Ex. B (Exec. Order 13224, §§ 1, 5, 66 Fed. Reg. 49,079 (2001)) (“Executive Order”). Executive Order 13224 declared a national emergency, blocked the property and interests in property of twenty-seven specified persons or entities (but not BIF), and authorized the Secretary of State and Secretary of Treasury to freeze the assets of additional persons who, after investigation, were determined to be associated with the designated terrorists.<sup>2</sup>

Approximately one month later, on October 26, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”), 107 P.L. 56 (October 26, 2001), which amended IEEPA to allow the President to “*block during the pendency of an investigation . . . any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.*” 50 U.S.C. § 1702(a)(1)(B) (emphasis added). Generally speaking, the President may delegate any of his functions to the head of any executive department or agency. See 3 U.S.C. § 301. Following the PATRIOT Act’s amendment to IEEPA, President Bush has neither delegated his authority to block entities pending investigation, nor directed such activity himself.

In October 2001, BIF retained its current counsel because of its concern with a story published in the New York Times on October 1, 2001, which indicated that unknown persons in the employ of the United States government were recommending that BIF be investigated as a

---

<sup>2</sup> As noted above, no such determination has ever been made with regard to BIF.

potential source of funding for terrorism. See Ex. C (Matthew J. Piers Decl. ¶ 4). At that time, BIF wished to clear its name from the improper taint of suspicion that the newspaper story had created, and to assist to whatever extent it could in the investigations following the tragedy of September 11, 2001, including by providing the government with open access to its files and records and the opportunity to talk to its employees. See *id.* ¶¶ 4-5. For approximately one month beginning on November 1, 2001, BIF's counsel repeatedly offered the government BIF's full cooperation as well as access to all information regarding its activities. See *id.* ¶¶ 5-10.

On December 14, 2001, the Office of Foreign Assets Control (“OFAC”), a division of the Department of Treasury, served BIF’s Illinois and New Jersey offices with a document entitled “Blocking Notice and Requirement to Furnish Information,” stating that “[t]he United States government has reason to believe that [BIF] may be engaged in activities that violate the International Emergency Economic Powers Act” and that the Department of Treasury “is blocking all funds and accounts and business records in which BIF has any interest, pending further investigation and resolution of this matter.” See Ex. D (“IL Blocking Order” and “NJ Blocking Order”). The Blocking Orders also demanded the immediate physical surrender of all of BIF’s records, including personal computers, pursuant to IEEPA. *Id.* at 2, 4.

The same day, OFAC issued the following bulletin: “All financial assets and all records of BENEVOLENCE INTERNATIONAL FOUNDATION, INC. . . . wherever located are blocked pending investigation pursuant to Section 106 of the U.S.A. PATRIOT Act. . . . Although these entities are not now SDNs [“specially designated nationals”], their names have been integrated into OFAC’s SDN list with the descriptor “[BPI-PA]” to indicate that their financial assets and all records are currently blocked.” See Ex. B at 27.<sup>3</sup> BIF has not been charged with any violation of the law, nor has it been designated a “Specially Designated Terrorist,” see 31 C.F.R. § 595.311, a “Foreign Terrorist Organization,” see 31 C.F.R. § 597.309, a “Specially Designated National,” see 31 C.F.R. § 500.306, or a “Specially Designated Global Terrorist,” see 31 C.F.R. § 597.309.<sup>4</sup>

Also on December 14, 2001, the FBI seized from BIF’s office in Palos Hills, Illinois all of BIF’s financial and business records and other documents and property, including computers, cellular telephones, and photographs of and files on BIF-sponsored orphans. See Ex. E at 1-7 (Evidence Recovery Log dated 12/14/01); Ex. E at 8 (U.S.

---

<sup>3</sup> “BPI-PA” stands for Blocked Pending Investigation-PATRIOT Act.

<sup>4</sup> Section 597.309 deals with “Foreign Terrorist Organizations” (“FTOs”). OFAC’s website reflects that FTOs have recently been renamed “Specially Designated Global Terrorists.”

Department of Justice Federal Bureau of Investigation Receipt for Property Received/Returned/Released, Seized, dated 12/14/01). On the same day, the FBI seized from the home of Enaam Arnaout, a United States citizen who is BIF's Chief Executive Officer, certain of his and his family's personal effects, which have nothing to do with BIF, including family photographs, Mr. Arnaout's citizenship papers, and a microphone from Mr. Arnaout's son's Nintendo<sup>®</sup> game. See Ex. E at 9 (U.S.

Department of Justice Federal Bureau of Investigation Receipt for Property Received/Returned/Released, Seized, dated 12/14/01)<sup>5</sup>. Also on the same day, the United States Customs Service, apparently acting on behalf of OFAC, seized from BIF's office in Newark, New Jersey BIF's documents and other property, including the personal wallet of one of BIF's employees,<sup>6</sup> computers, and fax and copier machines. See Ex. E at 10 (Office of Foreign Assets Control Support Blocked Property Inventory, dated 12/14/01).

According to a form FBI agents presented to BIF on December 14, 2001, the FBI conducted the searches and seizures of BIF's Palos Hills office and Mr. Arnaout's home (but not the Newark office) pursuant to an Attorney General Emergency Physical Search Authorization ("AGEPSA"), purportedly authorized by the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1821- 1829 ("FISA"). See Ex. F ¶ 5 (Mary M. Rowland Decl.). The AGEPSA purported to authorize the physical search of a person identified as "Samir Abdul Motaleb" at three separate locations: (a) the BIF office in Palos Hills, Illinois; (b) a storage facility rented by BIF in Illinois; and (c) the address of the apartment where BIF's CEO Enaam Arnaout resides. *Id.* The warrant, subsequently issued on December 15, 2001, the day *after* the search was conducted, purportedly authorized FBI officials to conduct a physical search of BIF's premises and

---

<sup>5</sup> The name listed on the Receipt is Fatin Almakri, who is Mr. Arnaout's wife. The Receipt is not a complete list of the items seized by the FBI.

<sup>6</sup> The wallet was presumably seized because it was laying on a desk in the office at the time of the search.

the home of Mr. Arnaut (whose home was falsely represented to be the residence of someone named “Samir Abdul Motaleb”) and to seize information, material, or property in order to obtain foreign intelligence.<sup>7</sup> *Id.* Mr. Arnaut is not and never has been known as Samir Abdul Motaleb. He has no idea (other than from information received from BIF’s legal counsel) who Samir Abdul Motaleb may be, if such a person actually exists. See Ex. A ¶ 10. It thus appears that defendants have not only committed numerous constitutional violations, but that they have done so based on a case of mistaken identity – an error which easily could have been avoided if BIF’s offer of voluntary cooperation had been accepted.

From December 18, 2001 to the present, BIF, through its attorneys, has written OFAC approximately fifteen letters requesting OFAC to issue licenses, pursuant to 31 C.F.R. § 501.801, permitting use of blocked funds in BIF’s bank accounts to pay (1) legal fees and expenses; (2) BIF’s outstanding obligations, including payment of the salaries of BIF’s employees and past due bills; (3) reimbursement of Mr. Arnaut for his payment of certain of BIF’s past due bills; (4) BIF’s monthly operating expenses; and (5) BIF’s monthly charitable donations. See Ex. A ¶ 17. BIF has also requested a license permitting it to obtain copies of the records and documents belonging to BIF and Enaam Arnaut that were seized by federal officials, a copy of the Evidence Recovery Log for property seized from BIF’s Newark office, and return of the personal property taken from the Arnaut family home in Justice, Illinois, and from BIF’s New Jersey office. *Id.* Despite the government’s actions on and since December 14, BIF has continued to offer to cooperate with the government investigation, proposing repeatedly to make BIF employees available for interviews, to help the government understand the records

---

<sup>7</sup> The stated language is not an exact quote of the language used in the warrant. Defendants have refused to allow BIF’s attorneys to have or make a photocopy of the AGEPSA or the subsequent warrant issued by Judge Lamberth. See Ex. F ¶ 3. On January 25, 2002, after numerous requests, defendants finally permitted BIF’s counsel to read (but not photocopy) the AGEPSA and the warrant. *Id.* ¶ 4. None of those documents contains any secret information. *Id.*

seized from BIF, and to accompany government agents to any and all locations of BIF's overseas charitable work in order to obtain any and all available information about BIF's activities. See Ex. C ¶ 10. Because the government did not respond either to BIF's continuing offers to cooperate or to BIF's license requests (with the sole exception of the request for a license to pay limited attorneys' fees, see Ex. H at 1-2), BIF was left with no alternative but to file, on January 30, 2002, this suit for declaratory and injunctive relief.<sup>8</sup> On March 22, 2002, OFAC denied "BIF's request for a license authorizing the release of blocked funds, during the pendency of the investigation, to fund any operations or ventures (including charitable endeavors) outside the United States." See Ex. H at 12.

## **II. BIF CLEARLY MEETS THE STANDARD FOR GRANTING A PRELIMINARY INJUNCTION.**

A party seeking a preliminary injunction must show that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm if preliminary relief is not granted; and (3) there is some likelihood of prevailing on the merits. *Ty, Inc. v. The Jones Group, Inc.*, 237 F.3d 891, 895 (7<sup>th</sup> Cir. 2001); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7<sup>th</sup> Cir.1992). Once the moving party makes such a showing, the court further considers whether the nonmoving party will suffer any irreparable harm if preliminary relief is granted, balancing any such harm against the harm the moving party will suffer if relief is denied. *Ty*, 237 F.3d at 895. Finally, the court considers the effect of granting or denying the injunction on the public interest, or non-parties. *Id.* The court then weighs all of these factors under a "sliding scale" approach: the more likely it is that the

---

<sup>8</sup> Since the filing of this lawsuit, OFAC has issued five licenses, including a license for (1) specific expenses that BIF incurred prior to December 14, 2001; (2) reimbursement of Mr. Enaam Arnaout for certain bills he paid on behalf of BIF; (3) payment of outstanding salaries to BIF's domestic employees from December 1, 2001 to February 15, 2002, and payment of four additional bills that pre-dated December 14; (4) payment of five additional bills incurred prior to December 14, 2001, federal payroll taxes and additional monies to a BIF employee; and most recently, (5) payment of certain ongoing domestic operating expenses, in an amount not to exceed \$16,669.17 per month. See Ex. H at 3-15.

movant will succeed on the merits, the less the balance of irreparable harms need weigh toward its side; the less likely it is that the movant will succeed, the more the balance of harm need weigh towards its side. *Abbott Labs*, 971 F.2d at 12. BIF clearly meets the standards for granting a preliminary injunction.

**A. BIF Has No Adequate Remedy at Law and Will Suffer Irreparable Harm if**

**F**

Without preliminary relief allowing it to access its funds, records, and other seized property, and to continue its humanitarian aid, BIF will suffer irreparable injuries that cannot be remedied through a damages award. The injuries flowing from defendants' blocking and seizures include the destruction of BIF, the potential death of many of the recipients of its charity, and the violation of the constitutional freedoms of BIF and its donors. These injuries cannot be adequately redressed by damages (assuming that the United States' sovereign immunity would not limit such an award), and any post-trial relief would come too late to avert the harms that will be the inevitable result of defendants' actions.

**1. Defendants' Actions Soon Will Lead to BIF's Demise.**

Because BIF simply cannot function without access to its funds, business records and other property, continued lack of access to these essentials will force it out of business. The Seventh Circuit has recognized that the right to continue a business is not measurable in monetary terms, and that loss of this right therefore cannot be remedied adequately by damages. *Roland Machinery Co. v. Dresser Indus.*, 749 F.2d 380, 386 (7<sup>th</sup> Cir. 1984) (citing *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (Friendly, J.)). *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (government seizure and operation of business "bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement").

BIF will suffer irreparable harm in the absence of preliminary relief protecting its ability to function because post-trial injunctive relief will "come too late to save [BIF's] business." *Roland Machinery*, 749 F.2d at 386 (post-trial relief inadequate to remedy harm where plaintiff is forced to shut down business in the interim). *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (finding irreparable injury where parties alleged that absent preliminary relief "they would suffer a substantial loss of business

and perhaps even bankruptcy”); *Federal Leasing, Inc. v. Underwriters at Lloyd’s*, 650 F.2d 495, 500 (4<sup>th</sup> Cir. 1981)(finding irreparable harm where plaintiff sought “to preserve its existence”); *Cleveland Hair Clinic, Inc. v. Puig*, 968 F. Supp. 1227, 1246-47 (N.D. Ill. 1996 ) (Shadur, J.) (finding irreparable injury where company’s “very ability to survive [was] threatened” and post-trial relief “almost certainly [would] come too late to save [the] business”).<sup>9</sup>

Without preliminary relief, BIF simply cannot “continue operating at a level remotely approaching the levels that existed prior to [December 14, 2001].” *Cleveland Hair Clinic*, 968 F. Supp. at 1247 (finding irreparable harm on this basis). For the past three and a half months, BIF has been unable to pay basic operating expenses and, until recently, was unable to pay past due salaries to its employees, resulting in almost 60% of its domestic staff being forced to seek other employment. See Ex. A ¶ 8. BIF’s ability to operate thus already has been drastically curtailed, and is continuing to diminish. BIF currently has outstanding obligations of approximately \$90,000. See Ex. A ¶ 18. This amount includes BIF’s past due bills for its offices in Illinois and New Jersey as well as several bills paid by its CEO, Enaam Arnaout, from his own limited funds and on behalf of BIF. This amount does not include BIF’s considerable and mounting legal fees, or the money required to continue the operation of its overseas programs. At a minimum, BIF’s monthly expenses are almost \$120,000, including payment of BIF’s domestic and overseas staff, administrative costs, the costs of running its overseas programs, see Ex.

---

<sup>9</sup> See also *Hawaii v. Gannett Pacific Corp.*, 99 F. Supp. 2d 1241, 1253 (D. Hawaii 1999) (finding irreparable injury where in absence of preliminary injunction, newspaper would no longer be viable); *Ahmed v. United States*, 47 F. Supp. 2d 389, 400-01 (W.D.N.Y. 1999) (finding irreparable harm where plaintiff showed that significant portion of revenue would be lost and averred that it would be forced out of business without preliminary relief); *New Jersey State Nurses Ass’n v. Treacy*, No. 85-4912, 1985 U.S. Dist. LEXIS 23766, at \*5 (D.N.J. Dec. 4, 1985) (granting preliminary injunction where “it appear[ed] likely that the organization would collapse within a short period of time” unless it was “permitted to maintain its traditional . . . activities without interference, and to receive the funding that it has traditionally received to carry out such functions”) (Ex. P at 1-3.)

A ¶ 19, as well as sending a monthly stipend to approximately 2,100 orphans through its orphan sponsorship program, see Ex. A ¶ 21.<sup>10</sup>

Preliminary relief is essential to BIF's survival. Every day, BIF is incurring liabilities that it cannot pay. At the same time, as a result of the adverse publicity attendant to defendants' actions, as well as the fact that BIF has not been licensed to resume charitable activities, donations to the organization, which are the only source of BIF's revenue, have dramatically decreased since December 14, 2001. From July 2001 until November 2001, BIF received an average of \$170,568 each month. See Ex. A ¶ 14. In contrast, following the seizures and blocking on December 14, 2001, BIF received only \$49,587 total in January and February 2002. *Id.* In these stark circumstances, BIF's current assets (approximately \$825,000), will be depleted in fewer than six months, and BIF's projects will likely cease to exist by the end of April if BIF is unable to send additional support. See Ex. A ¶¶ 15, 23. It is questionable whether any organization would be able to stay afloat where, as here, it cannot use its own money, cannot even see its own records, and cannot even use its basic office equipment, such as computers. Return of the blocked funds and seized goods at the end of trial – or even later on in the course of pretrial proceedings – will “come too late to save” BIF. *Roland Mach.*, 749 F.2d at 386.

## **2. \_\_\_\_\_ Defendants' Actions Threaten to Destroy BIF's Humanitarian Projects.**

The blocking of funds that BIF uses to maintain its ongoing humanitarian activities also will cause immense human suffering to innocent victims, and will have devastating and irreparable consequences for BIF's projects around the world. BIF operates desperately needed humanitarian facilities, including a hospital in Tajikistan for children

---

<sup>10</sup> On March 22, 2002, OFAC granted BIF a license to pay certain monthly expenses for its United States operations not to exceed \$16,669.17 per month. See Ex. H at 12-15.

with tuberculosis, the Charity Women's Hospital in Daghestan, an orphanage in Azerbaijan, medical and dental clinics and an orphanage for Chechen refugees in Ingushetia, and a dental clinic for children in Bosnia. See Ex. A ¶ 20.

Without preliminary relief allowing BIF to expend the funds and access the records required to continue operating these facilities, many or all of them will cease to exist, thus irreparably destroying BIF's core activities and mission, and causing irreversible and potentially fatal harm to the impoverished individuals that rely on BIF's facilities, relief programs, and sponsorship. These facilities are unique and critically necessary in the parts of the world where they operate. There are no alternatives for the sick and needy who utilize these services. For example, without BIF's support, the tuberculosis hospital in Tajikistan will close, and at least forty-three children infected with this highly contagious disease will be discharged into the community before they have recovered. See Ex. I ¶¶ 6, 12; Ex. A ¶ 20. The women that use the Charity Women's Hospital in Daghestan will be left without adequate medical care if BIF is unable to continue its support of that institution. See Ex. K ¶¶ 7-13; Ex. A ¶ 20. Likewise, if BIF cannot resume normal operations in the near future, it will no longer be able to provide food, medicine, hygienic and kitchen supplies, bedding, or any of the other forms of relief it offers to the over 26,000 displaced persons living in Ingushetia who rely upon BIF aid. See Ex. N ¶¶ 2-5, 7-8; Ex. A ¶ 20. In addition, BIF's orphanages in Azerbaijan and Ingushetia will not survive without BIF's financial support. See Ex. J ¶¶ 5-8; Ex. N ¶ 4; Ex. A ¶ 20. Without BIF's funding, over eighty-five orphans will be left homeless, and countless individuals, including many children and refugees, will be left without adequate medical care. See Exs. I-O.

Moreover, BIF's inability to continue sending sponsorship money to the orphans through its orphan sponsorship programs will destroy those programs, which in many cases provide orphaned children the only means they have to obtain basic necessities, such as food and clothing. See Exs. L-O.

BIF's inability to continue providing these types of necessary social and medical services – which are the cornerstone of its existence as a nonprofit Islamic charitable organization – constitutes irreparable injury. See, e.g., *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 863, 866 (8<sup>th</sup> Cir. 1977) (irreparable injury where nonprofit organization could not create and operate clinic to serve patients); *Western Presbyterian Church v. Bd. of Zoning Adjustment of the Dist. of Columbia*, 849 F. Supp. 77, 79 (D.D.C. 1994) (irreparable harm where zoning regulation required church to discontinue social welfare and religious program); *NAACP Legal Defense and Educ. Fund v. Horner*, 636 F. Supp. 762, 765 (D.D.C.) (irreparable harm where loss of funds from charity drive “would force [organizations] to curtail immediately the health and welfare services they provide to their clients”), *vacated on other grounds*, 795 F.2d 215 (D.C. Cir. 1986); *Forest County Potawatomi Community of Wisc. v. Doyle*, 803 F. Supp. 1526, 1536 (W.D. Wisc. 1992) (irreparable harm where loss of revenue from prohibited gaming activities would “prevent plaintiffs from providing critical government services . . . such as safe housing . . . that cannot be compensated for by damages paid at a later date”).

Preliminary relief is especially appropriate where, as here, the irreparable harm also extends to participants in a nonprofit organization's activities, or beneficiaries of its services. Thus, in granting a preliminary injunction, the court in *NAACP* emphasized that the irreparable harm resulting from the plaintiff organizations' inability to solicit contributions would “be visited not only on the plaintiffs themselves, but more importantly on their clients – persons unable to obtain legal assistance elsewhere.” *NAACP*, 636 F. Supp. at 765. See also *Planned Parenthood v. Horner*, 691 F. Supp. 449, 457 (D.D.C. 1988) (irreparable harm where curtailment of organization's medical and educational services would harm not only organization, but the individuals it served); *Optimist Club of North Raleigh v. Riley*, 563 F. Supp. 847, 850 (E.D.N.C. 1982)

(irreparable harm where charity's inability to conduct effective solicitation campaign would injure both charity and its beneficiaries).

The need for preliminary relief is even more urgent here. It is a matter of life and death. The harm visited upon BIF extends to the many persons who participate in BIF's programs and depend upon its services – persons who are unable to obtain adequate food, clothing, medical care, or education elsewhere. Without preliminary relief allowing BIF to continue its operations, countless individuals around the world – including persons in urgent need of medical care, and over 2,300 orphans and 26,000 refugees – will be in grave danger. These individuals will not be able to get adequate food, clothing, medical care, and other necessities, and many will likely die, as a result of defendants' investigative blocking actions preventing BIF from engaging in its charitable work. BIF and its beneficiaries simply cannot wait to obtain relief. Nor could any amount of money adequately redress such disastrous consequences, which cannot be quantified in monetary terms.

### **3. Defendants' Actions Are Destroying BIF's Reputation.**

Since the seizure and blocking on December 14, 2001, BIF's reputation and goodwill in the community, see Ex. A ¶ 3, have been and continue to be significantly damaged. The actions taken against BIF, surrounded by rumor and innuendo, have been widely publicized in the media. Because injury to reputation and goodwill is impossible or very difficult to quantify in monetary terms, it is irreparable and cannot be adequately redressed at law. *Gateway Eastern Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7<sup>th</sup> Cir. 1994); *Abbott Labs*, 971 F.2d at 16; *Cleveland Hair Clinic*, 968 F. Supp. at 1247.

### **4. Defendants' Actions Are Causing a Drastic Drop in Donations to BIF.**

As a result of its inability to continue its normal charitable work and its impaired reputation, BIF is suffering further irreparable injury in the form of lost donations. As BIF's only source of revenue, donations are necessary to sustain BIF's services around the world and to maintain the viability of the organization itself. See Ex. A ¶¶ 3, 13-16. Even if this aspect of BIF's injuries is potentially capable of monetary relief, BIF will not survive without preliminary injunctive relief and therefore, BIF has no adequate remedy at law. *American Diabetes Ass'n, Inc. v. National Diabetes Ass'n*, 533 F. Supp. 16, 21 (E.D. Pa. 1981) (irreparable harm and inadequate legal remedy where charity could lose donations). *Cf. Cleveland Hair Clinic*, 968 F. Supp. at 1247 (loss of future customers is irreparable harm); *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 958 n.3 (5<sup>th</sup> Cir. 1981)(same).

### **5. Defendants' Actions Violate BIF's First Amendment Rights.**

Finally, BIF and its donors are suffering the irreparable injury of deprivation of their First Amendment rights of free speech and association. See *infra* Sections B.3, B.4. Even a temporary loss of First Amendment rights constitutes irreparable injury, see, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689, 691 (7<sup>th</sup> Cir. 1975), and damages cannot

adequately remedy the loss. *National People's Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7<sup>th</sup> Cir. 1990).<sup>11</sup>

In sum, preliminary relief is essential to averting numerous irreparable injuries to BIF for which there is no adequate remedy at law.<sup>12</sup>

## **B. BIF Has A Substantial Likelihood of Success on the Merits.**

At the preliminary injunction stage, BIF must show only that its likelihood of success on the merits of its claims is “better than negligible.” *Ty*, 237 F.3d at 897. BIF easily meets this minor burden. BIF’s likelihood of prevailing on at least one of the claims asserted in its Complaint is substantial, and in any event, much “better than negligible.”<sup>13</sup>

### **1. Defendants Failed to Afford BIF the Most Basic Due Process Protections.**

In blocking BIF’s assets *during the pendency of an investigation*, 50 U.S.C. § 1702(a)(1)(B), defendants trampled on the essential protections of the Due Process Clause of the Fifth Amendment, which forbids the deprivation of “life, liberty, or property, without due process of law . . . .” U.S. Const. amend. V. “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). “The purpose of this requirement is . . . to protect [the individual’s] use and possession

---

<sup>11</sup> BIF’s likelihood of success on its First Amendment claims is certainly “‘better than negligible,’” *Roland Mach.*, 749 F.2d at 387, *see infra* Sections B.3, B.4; however, even the allegation that BIF was deprived of its First Amendment rights is sufficient to meet the irreparable injury requirement. *National People’s Action*, 914 F.2d at 1013; *Wisconsin Vendors v. Lake County*, 152 F. Supp. 2d 1087, 1093 (N.D. Ill. 2001).

<sup>12</sup> The fact that OFAC “has licensing authority to help ameliorate the effects of the blocking of BIF funds and accounts,” *see* Ex. D at 1, 3, citing 31 C.F.R. § 501.801, does not change this result. OFAC’s ad hoc, standardless and completely discretionary licensing procedure is wholly inadequate to alleviate the irreparable harm threatened by defendants’ actions, and is itself constitutionally infirm. *See infra* Section B.3.

<sup>13</sup> By asserting certain claims for preliminary relief here, BIF has not waived its right to seek relief in the future on the other claims pled in its Complaint.

of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property.” *Fuentes v. Shevin*, 407 U.S. 67, 80- 81 (1972).

With complete disregard of the most rudimentary requirements of the Due Process Clause, defendants blocked BIF’s assets and seized all of BIF’s property without notifying BIF of their intent to shut it down, without (to this very day) informing BIF of the basis for their actions, and without providing either a pre-deprivation or a post-deprivation hearing at which BIF would have the opportunity to meet and rebut the government’s allegations. Defendants’ actions are more appropriate in a police state than in a constitutional democracy, as they make a mockery of the strictures of due process, one of the bedrock principles of our Constitution.

**a. BIF Has Been Deprived of Property and Liberty Interests.**

There is no question that the physical seizure of property from BIF’s two offices and from the home of its CEO, and the blocking of BIF’s accounts, which prevents BIF from using or transferring its funds and destroys virtually all the rights incident to ownership for an indefinite period of time, deprived BIF of constitutionally protected property interests. Even “[a] temporary, nonfinal deprivation of property is nonetheless a ‘deprivation’” for purposes of due process. *Fuentes*, 407 U.S. at 85; see, e.g., *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (“even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection”).

Defendants also have deprived BIF of protected liberty interests. First, defendants have destroyed BIF’s ability to fulfill its mission of providing humanitarian relief to those in need. “Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right . . . to engage in any of the common occupations of life.” *Board of Regents v. Roth*, 408 U.S. 564, 572-73 (1972). Second, BIF has been robbed of its reputational interests. Underlying defendants’ actions is an undefined and unstated suspicion that BIF is somehow funding or associated with terrorists, which has grave

implications for its reputation and honor and future viability of the organization.<sup>14</sup>

“Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (“The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”).<sup>15</sup>

**b. Defendants’ Failure to Provide Notice or a Hearing Violates the Most Basic Due Process Rights.**

Defendants have deprived BIF of property and liberty interests without *any* notice or *any* hearing, in flagrant violation of the Due Process Clause, which at bottom requires both notice and an opportunity to be heard. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *Fuentes*, 407 U.S. at 80; *Mullane*, 339 U.S. at 314. The well-known formula applicable to due process claims generally requires consideration of three factors: (1) the private interests affected by the official action; (2) the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards; and (3) the government’s interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Application of these factors makes clear that defendants violated the Fifth Amendment by failing to give BIF notice and a pre-deprivation hearing, *or*, at the very least, a post-deprivation hearing during the three months that have passed since defendants blocked BIF’s assets and property.

---

<sup>14</sup> The reputational injury is aggravated by BIF’s inability to respond effectively and defend its reputation as a result of defendants’ failure to specify even which provision of IEEPA they believe BIF may have violated or the factual basis – if any – for their belief.

<sup>15</sup> In addition to the harm to its reputation, the government has deprived BIF of a previously held right – the right to contract for banking services and access its money. *Paul v. Davis*, 424 U.S. 693, 708 (1976); *Roth*, 408 U.S. at 572-73 (liberty includes “right of the individual to contract”).

The D.C. Circuit, in *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 195 (D.C. Cir. 2001), addressed a due process challenge in a related context, brought by two organizations following their designation as “foreign terrorist organizations” pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 8 U.S.C. § 1189. Weighing the *Mathews v. Eldridge* factors, the court concluded that “the Secretary must afford the limited due process available to the putative foreign terrorist organization prior to the deprivation worked by designating that entity as such with its attendant consequences, unless he can make a showing of a particularized need.” *Id.* at 208. The court remanded the case to allow the plaintiffs the opportunity to be meaningfully heard by the Secretary, including to file responses to the nonclassified evidence against them, and to file evidence in support of their contention that they were not terrorist organizations. *NCRI*, 251 F.3d at 209.<sup>16</sup>

BIF’s status as a domestic organization that is *not* designated as a terrorist organization makes the government’s actions here even more outrageous than the actions held to violate due process in *NCRI*. To begin with, the effect of defendants’ actions on BIF’s interests is devastating. By freezing BIF’s assets and seizing its property, defendants have deprived BIF of the ability to continue functioning as a humanitarian aid organization. The significance of BIF’s interest in its own viability cannot be overstated. Furthermore, there is an extraordinarily high risk that the government will erroneously deprive innocent entities of protected interests under the scheme set forth in IEEPA, as amended by the PATRIOT Act, which purportedly allows defendants to shut down organizations *during the pendency of an investigation*. The PATRIOT Act’s amendment

---

<sup>16</sup> The D.C. Circuit stopped short of vacating the government’s two-year designation of the plaintiffs as foreign terrorist organizations because the designation was set to expire four months after the opinion was issued. 251 F.3d at 209. A similar remedial approach would be wholly inappropriate here. First, the government has not designated BIF a terrorist organization. Second, the investigatory blocking of BIF has no expiration whatsoever, let alone an impending expiration date. Finally, unlike the foreign plaintiff-organizations in *NCRI*, BIF is a domestic charity, and its treatment implicates much stronger constitutional protections than were implicated in *NCRI*. *See id.* at 208.

of IEEPA eliminated all essential procedural safeguards under the Due Process Clause. It has long been recognized that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.” *Fuentes*, 407 U.S. at 81 (quoting *McGrath*, 341 U.S. at 170-72); *James Daniel Good Real Estate*, 510 U.S. at 55 (“The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making.”).

IEEPA’s statutory framework, in contrast, (1) does not set forth *any* standards to guide defendants in their decision whether, or how long, to block an organization pending investigation;<sup>17</sup> (2) does not require defendants to provide notice of any kind to the organization before instituting a blocking; (3) does not specify the scope and nature of the legal basis or factual information upon which the government may rely in deciding whether to block an organization pending investigation; (4) does not provide an opportunity for the targeted organization to comment on even the unclassified materials upon which the government relied or to present contrary evidence; and (5) does not allow the targeted organization to participate at any stage of the process.

The risk of an erroneous deprivation under IEEPA’s statutory framework is heightened by the lack of meaningful judicial review. Unlike AEDPA, 8 U.S.C. § 1189(b)(1), IEEPA contains no provision for judicial review. Moreover, to the extent that the Administrative Procedure Act, 5 U.S.C. §§ 701-706, provides a mechanism for judicial review of defendants’ decisions to block and seize pending an undefined, open-ended investigation, such review would be meaningless. *Cf. NCRI*, 251 F.3d at 209 (judicial review “is not sufficient to supply otherwise absent due process protection. The

---

<sup>17</sup> Compare 8 U.S.C. § 1189(a)(1)(A)-(C) (setting forth general guidelines as to when the Secretary is authorized to designate an organization as a foreign terrorist organization); 31 C.F.R. § 595.311 (specially designated terrorist); 31 C.F.R. § 500.306 (specially designated nationals); 31 C.F.R. § 597.309 (foreign terrorist organization). No such guidelines or regulations exist in the case of a blocking order pending investigation.

statutory judicial review is limited to the adequacy of the record before the court to support the Secretary's executive decision. That record is currently compiled by the Secretary without notice or opportunity for any meaningful hearing."). The statutory scheme thus creates an unconscionably high risk of erroneous deprivation of protected property and liberty interests.

The government's interest similarly weighs in favor of affording BIF additional procedural protections. Specifically, the government's interest in ensuring the safety of our nation would actually be furthered by the provision of procedural protections for BIF. If the government's true aim is to determine whether BIF has links to or information about illegal activities, the process will be greatly facilitated if BIF is granted an opportunity to be heard.<sup>18</sup> The fact that defendants had insufficient evidence to accuse BIF of misconduct or to designate BIF as a terrorist organization militates against the strength of the government's interest under the *Mathews* balancing test. *Cf. NCRI*, 251 F.3d at 207-208 ("It is simply not the case . . . that the Secretary has shown how affording the organization[] whatever due process [it is] due before [its blocking] and the resulting deprivation of rights would interfere with the Secretary's duty to carry out foreign policy.")

Even if exceptional circumstances warranted denying BIF a pre-deprivation hearing, the government's failure to provide a hearing during the course of the past three months *after* the blocking is unjustified, unprecedented, and unconstitutional. The Supreme Court has made clear that even where an emergency requires immediate government action without prior notice or hearing, that merely justifies *postponing* the hearing. See *James Daniel Good Real Estate*, 510 U.S. at 53; *Doehr*, 501 U.S. at 16; *Fuentes*, 407 U.S. at 82. Here, the unconstitutionality of defendants' failure to provide any post-

---

<sup>18</sup> In this regard, it is important to note that defendants' actions were taken in large part on the mistaken belief that BIF's Chief Executive Officer is "Samir Abdul Motaleb." See Ex. F ¶ 5. If there is such a person and he does pose a threat to our national security interests, it would obviously be critically important to the government to know both who and where he is, and who and where he is not.

deprivation hearing *whatsoever* is compounded by the fact that IEEPA sets no deadline by which the government must either designate the organization or unblock its assets. The Constitution simply does not permit defendants to deprive a domestic religious charity of its liberty and property without *ever* providing a hearing. That is precisely what defendants have done.

## 2. Defendants' Actions Violated the Religious Freedom Restoration Act.

Defendants' conduct violates the rights of BIF and its donors under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ("RFRA").<sup>19</sup> RFRA prohibits the government, including federal officials, *id.* § 2000bb-2, from substantially burdening a person's exercise of religion, unless the government demonstrates that application of the burden to the person is (1) "in furtherance of a compelling government interest," and (2) "the least restrictive means of furthering that compelling government interest." *Id.* § 2000bb-1.

Defendants' actions have substantially burdened the exercise of religion by BIF and its employees and donors.<sup>20</sup> A "substantial burden" within the meaning of RFRA is "one

---

<sup>19</sup> In *City of Boerne v. Flores*, the Supreme Court invalidated RFRA as it applied to the states, holding that Congress overreached its remedial power under Section 5 of the Fourteenth Amendment when it applied RFRA to the actions of state and local governments and officials. 521 U.S. 507, 520-36 (1997). See *Florida Prepaid Postsecondary Edu. Exp. Bd v. College Sav. Bank*, 527 U.S. 627, 637-638 (1999) (characterizing *Boerne's* holding as such). The *Boerne* Court did not address RFRA's application to any entities other than state and local governments.

Because Congress' authority to legislate with respect to the federal government does not depend on its power under Section 5 of the Fourteenth Amendment, which applies only to the states, the application of RFRA to the federal government was unaffected by the Court's decision in *City of Boerne*. *Kikamura v. Hurley*, 242 F.3d 950, 958-60 (10<sup>th</sup> Cir. 2001); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 831-33 (9<sup>th</sup> Cir. 1999); *In re Young*, 141 F.3d 854, 858-59 (8<sup>th</sup> Cir. 1998). The federal portion of RFRA is severable and remains independently applicable to federal defendants. *Kikamura*, 242 F.3d at 959-60; *Young*, 141 F.3d at 859.

<sup>20</sup> BIF has third-party standing to assert the religious rights of its donors. *In re Young*, 82 F.3d 1407, 1416 (8<sup>th</sup> Cir. 1996) (holding that church could assert RFRA rights of its donors), *vacated on other grounds sub nom. Christians v. Evangelical Free Church*, 521 U.S. 1114 (1997), *reinstated on remand*, 141 F.3d 854 (8<sup>th</sup> Cir. 1998). See *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989) (third-party standing depends upon (1) "the relationship of the litigant to the [third party] whose rights are being asserted;" (2) "the ability of the [third party] to advance his own rights"; and (3) "the impact of the litigation on third-party interests"); *Powers v. Ohio*, 499 U.S. 400, 410-15 (1991); *Singleton v. Wulff*, 428 U.S. 106, 114-18 (1976); *Shimer v. Washington*, 100 F.3d 506, 508 (7<sup>th</sup> Cir. 1996).

BIF and its donors have a close relationship ensuring that "the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S. at 115. Donors entrust BIF with their charitable donations and BIF protects the donors' anonymity and serves as the means by which donors fulfill their religious obligations. See Ex. A ¶ 5. In turn, BIF depends on the donors' support to maintain its religiously-motivated charitable work and to

that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7<sup>th</sup> Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997).

Defendants' actions in blocking BIF's funds have inhibited the religious practice of *zakat* as well as other religiously-motivated charitable work by BIF and its employees and donors. As one of the Five Pillars of Islam, *zakat* is a central tenet of the Muslim faith. Last year, 70% percent of donations to BIF were specifically earmarked as *zakat* donations, see Ex. A ¶ 5, the use of which is subject to certain requirements and limitations. *Id.* Even non-*zakat* donations collected by BIF are religiously motivated, as they consist of *sadaqah*, or voluntary religious charitable giving. BIF serves as the bridge between the donors and the ultimate recipients of the donations, thus facilitating the donors' fulfillment of their religious obligation to donate a percentage of their savings to the poor. Furthermore, BIF's charitable work, which aids poor Muslims around the world, is an independent expression of religious beliefs. *Cf. Western Presbyterian Church v. Bd. of Zoning Adjustment of the Dist. of Columbia*, 862 F. Supp. 538, 544 (D.D.C. 1994) (holding that church's program to feed homeless was religiously motivated and noting that such charitable work is also required in other religions, including Islam).

---

provide funds to run the organization. *Id.* This common interest ensures effective representation of the donors' interests. *Young*, 82 F.3d at 1416.

Furthermore, the individual donors' assertion of their rights faces several formidable obstacles, including fear of public association with an organization targeted in connection with the war on terrorism, *cf. Singleton*, 428 U.S. at 117, and the "considerable practical barriers to suit . . . because of the small financial stake involved and the economic burdens of litigation." *Powers*, 499 U.S. at 415. Finally, because the challenged actions have substantially burdened the donors' religiously motivated conduct, this litigation directly affects their interests. *Caplin & Drysdale*, 491 U.S. at 624.

By blocking all of BIF's funds, including *zakat* and *sadaqah* donations, by prohibiting the use of those donations, and by substantially impairing BIF's ability to continue its religiously-motivated charitable work, defendants have imposed a substantial burden on the exercise of religion by BIF, its employees, and donors. See *In re Young*, 82 F.3d 1407, 1417-18 (8<sup>th</sup> Cir. 1996) (holding that permitting creditors to recover debtors' religiously motivated contributions to church would place substantial burden, within meaning of RFRA, on debtors' exercise of religion), *vacated on other grounds sub nom. Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997), *reinstated on remand*, 141 F.3d 854 (8<sup>th</sup> Cir. 1998); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7<sup>th</sup> Cir. 1996) (prison's prohibition on wearing jewelry placed substantial burden on religiously motivated conduct of wearing a Christian cross), *vacated on other grounds*, 521 U.S. 1114 (1997); *Western Presbyterian Church*, 862 F. Supp. at 545-47 (holding that zoning regulation that prevented church from continuing its charitable program to feed homeless persons imposed a substantial burden on church's exercise of religion within meaning of RFRA).

Although national security is no doubt a compelling interest, it is inconceivable that defendants can show that this substantial burden on religious exercise was the least restrictive means of furthering a compelling interest. See *Mack*, 80 F.3d at 1180. Defendants cannot satisfy their heavy burden under RFRA simply by offering conclusory statements about the national security or other governmental interests. Rather, defendants must show that the *particular actions taken against BIF* further the interest. See 42 U.S.C. § 2000bb-1(b) (requiring government to demonstrate that "*application of the burden to the person is in furtherance of a compelling governmental interest*") (emphasis added); *Jolly v. Coughlin*, 76 F.3d 468, 479 (9<sup>th</sup> Cir. 1996) ("the connection between the application of a policy to an individual and the furtherance of the government's goals must be clear"). RFRA's legislative history underscores that government actions "grounded on mere speculation, exaggerated fears, or post-hoc

rationalizations will not suffice to meet the act's requirements." S. Rep. No. 103-111, at 10 (1993); see also H. R. Rep. No. 103-88, at 8 (1993).

BIF is not, and has never been, designated as a terrorist organization or an organization with any links to terrorism. None of its officers or employees has been charged with any crime. Rather, BIF has merely been subjected to an "investigation." And though defendants have been investigating BIF and examining its documents for over three months, they have not charged, suggested, or even questioned BIF regarding a single violation of the law. In these circumstances, it is unlikely that defendants can show that their actions were based on anything more than "mere speculation, exaggerated fears, or post-hoc rationalizations."

It is even more unlikely that defendants can show that their broad-based seizure and blocking of all of BIF's property, records, and funds were the least restrictive means available to further their purported objective. "To meet strict scrutiny . . . a State must do more than assert a compelling state interest – it must demonstrate that its [actions are] *necessary* to serve the asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (emphasis added).

Instead of taking focused and immediate measures to question BIF officers or employees, searching for particular items or records, monitoring or partially restricting BIF's use of funds, or even accepting BIF's offer of full voluntary cooperation, defendants cast a wide, indiscriminate, all-encompassing net, seizing all of BIF's business records, its computers, and computer files, and blocking all possible uses of its funds, thus indefinitely removing from BIF all independent control over its property and activities without any notice or hearing and with the obviously foreseeable result of destroying BIF's viability as an organization. This gross over-reaching simply cannot be the least restrictive means to protect any purported governmental interest. For example, defendants have refused even to let BIF obtain *copies* of its own paper and electronic business records. See Ex. A ¶ 17. Even more tragically, BIF cannot

purchase medicine and other supplies for, or pay the medical staff at, its hospitals, or provide the support necessary to sustain its orphanages. While the defendants pursue their leisurely fishing expedition, innocent children and women are needlessly suffering and may die, and BIF will perish along with them.

“These features of the [defendants’] practice blast the case for regarding [their actions] as a serious and measured response to [their] concern.” *Sasnett*, 91 F.3d at 1023. Even if some limited seizure and/or blocking of BIF’s funds and property were necessary to guard against a “genuine threat” to national security, *id.*, nothing can justify the imposition of such sweeping restrictions on BIF’s lawful – and, in some cases, even *legally required* – activities. *See id.* at 1022-23 (state failed to meet RFRA burden to justify substantial burden placed on wearing of Christian crosses by prison ban on jewelry where ban prohibited wearing of religious symbols even when they posed no genuine security threat).<sup>21</sup>

### **3. The Blocking of BIF’s Funds Infringes its First Amendment Rights of Free Speech and Association.**

The statutory and regulatory scheme pursuant to which defendants have blocked BIF’s assets pending investigation violates the First Amendment on its face, and as applied to BIF, because defendants have unfettered discretion to prohibit protected speech and association. It has long been established that “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). “Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its contents.” *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775, 780 (2002). *See also Forsyth County v.*

---

<sup>21</sup> Defendants’ actions also violated BIF’s rights under the Free Exercise Clause of the First Amendment; however, this Court need not reach that issue given that defendants’ actions clearly violate RFRA, and for that reason, BIF does not base the instant motion on its Free Exercise claim.

*Nationalist Movement*, 505 U.S. 123, 131 (1992) (scheme that allows government officials to restrict protected speech based upon “appraisal of facts, the exercise of judgment, and the formation of an opinion” presents a “danger of censorship and of abridgment of our precious First Amendment freedoms . . . too great to be permitted”); *Niemotko v. Maryland*, 340 U.S. 268, 269, 271 (1951) (permit-issuing practice for “meetings and celebrations of various kinds” unconstitutional because of lack of standards or limits to constrain official discretion).

IEEPA and related regulations purport to allow government officials to block an organization’s assets for an indefinite period of time “during the pendency of an investigation.” 50 U.S.C. § 1702(a)(1)(B). There are no standards governing the “investigation.” Subsequent to such blocking, the blocked organization cannot use any of the blocked funds for any purpose without a license issued by OFAC. See Ex. D. There are no standards governing when, how, or why a license may be granted or denied.

This statutory and regulatory system operates as a licensing scheme imposing an unconstitutional prior restraint on several forms of First Amendment protected speech or association. First, it prohibits organizations blocked pending investigation from making any expenditures whatsoever in support of any cause without prior government approval. For example, BIF cannot expend its funds to support charitable projects, to solicit donations, to pay litigation expenses, or to further its humanitarian or religious messages in any way, without getting prior approval from the government. Such “communicative” expenditures are protected under the First Amendment. See *Buckley v. Valeo*, 424 U.S. 1, 16, 39-57 (1976) (invalidating content-neutral limitations on expenditures by political candidates and stating that “this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment” ).

Second, organizations blocked pending investigation cannot spend money to express religious beliefs. “It is well established that private religious speech is protected under the Free Speech Clause of the First Amendment.” *Doe v. Small*, 964 F.2d 611, 617 (7<sup>th</sup> Cir. 1992). Third, such organizations cannot solicit charitable contributions or spend money on fundraising activities. It has long been recognized that “charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment.” *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959 (1984); *see also Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636 (1980).

Finally, the blocking of funds deters association between charitable organizations and their donors, by effectively excluding from “the right to join together for the advancement of beliefs and ideas . . . the right to pool money through contributions.” *Buckley*, 424 U.S. at 65. Monetary contributions to charitable organizations such as BIF are a protected form of association (as well as religious exercise). *Id.* at 16-17, 24-25; *see NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (“it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”). The actions taken against BIF have in fact deterred donors from so associating with BIF. *See Ex. A ¶ 13.*

“[A]ny system of prior restraint . . . bear[s] a heavy presumption against its constitutional validity.” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990). The statutory and regulatory system by which officials may prohibit speech pending investigation cannot overcome that heavy presumption because it operates as an unconstitutional “[licensing] scheme that places ‘unbridled discretion in the hands of a government official or agency.’” *Id.* at 225-26 (quoting *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988)).

Section 1702(a)(1)(B) of IEEPA contains no limits on the decisionmaker's discretion to block pending investigation because it fails to set forth any standards to guide the determination to block, or even to investigate. The remaining provisions of IEEPA similarly "provide no concrete standards or guideposts." *DeBoer v. Village of Oak Park*, 267 F.3d 558, 573 (7<sup>th</sup> Cir. 2001) (upholding facial invalidation of ordinance that allowed officials to deny permission to engage in First Amendment protected activity unless it would "benefit[] the public as a whole"). Nor does Executive Order 13224, pursuant to which the President delegated his IEEPA authority to defendants O'Neill and Powell, see Ex. B at § 7, provide any guidance. Indeed, the Executive Order does not even mention the possibility of blocking pending investigation, but rather, governs the blocking of persons who have been *determined* by the Secretary of State and/or the Secretary of Treasury to fall within certain delineated categories.<sup>22</sup> *Id.* at § 1. By definition, organizations that are merely under investigation are not subject to those provisions because *no determination has been made* with respect to them.

Likewise, the decision whether to grant a license permitting such an organization to engage in protected activity is left "to the whim of the administrator." *Forsyth County*, 505 U.S. at 133. OFAC's blocking order indicates that it has the authority to issue licenses pursuant to 31 C.F.R. § 501.801-802, but those regulations are bereft of any criteria by which such authority is exercised.

IEEPA and OFAC's licensing regulations further submit First Amendment freedoms to "the uncontrolled will of an official," *Shuttlesworth*, 394 U.S. at 151, because they lack any other constraints minimizing discretion. First, there is nothing that "render[s] [the official's decision] subject to effective judicial review." *Thomas*, 122

---

<sup>22</sup> That is not surprising, because the Executive Order was issued more than a month before IEEPA was amended to include the authority to block assets pending investigation and thus cannot have been a valid delegation of that subsequently-conferred authority. See *infra* Section B.5.c.

S. Ct. at 780. See *supra* Section B.1.b.<sup>23</sup> Second, the unduly broad official discretion is left unchecked by any requirement that the official explain any of his determinations, as the decision to block pending investigation is made without any notice or real explanation, and the regulations do not require OFAC to give any explanation for its denial of a license. Compare *Thomas*, 122 S. Ct. at 781 (upholding content-neutral licensing scheme that required officials to “clearly explain [their] reasons for any denial” of license). Third, the official discretion is unconstrained by time. In contrast to the scheme upheld in *Thomas*, which required officials to process applications within 28 days, see *id.*, IEEPA sets forth no limit on the length of time an organization can be investigated, or blocked pending investigation, and OFAC’s licensing regulations, contain no requirement that OFAC render a decision within a certain timeframe. See 31 C.F.R. § 501.801-802. This further expands the decisionmaker’s discretion. Cf. *City of Lakewood*, 486 U.S. at 792 (because licensing ordinance did not require officials “to act with reasonable dispatch,” license “application could languish indefinitely”).

The Supreme Court’s characterization of a similarly standardless licensing system is equally applicable here:

There are no articulated standards either in the [statute] or in the [agency’s] established practice. The [government official] is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others [by] arbitrary [means]. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

*Forsyth County*, 505 U.S. at 133 (invalidating ordinance on its face).

The Ninth Circuit’s decision in *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9<sup>th</sup> Cir. 2000), is not to the contrary. There, the court rejected an argument that AEDPA granted the Secretary of State unfettered discretion to designate foreign organizations

---

<sup>23</sup> In any event, judicial review alone cannot make up for the lack of concrete standards guiding the agency’s underlying decisions. *City of Lakewood*, 486 U.S. at 792 (citing *Saia v. New York*, 334 U.S. 558, 560 (1948)).

to which giving material support was prohibited. 205 F.3d at 1136-37. First, in marked contrast to the scheme at issue here, AEDPA set forth “sufficiently precise” standards that limited which organizations could be designated, *id.* at 1137; see 8 U.S.C. § 1189, and limited the period of designation of foreign terrorist organizations to two years, see 8 U.S.C. § 1189(a)(4)(A). Second, as the Supreme Court’s recent decision in *Thomas* makes clear, the Ninth Circuit applied the wrong legal standard. It analyzed the pertinent provision of AEDPA under the standard applicable to content-neutral regulations of conduct rather than following the line of cases prohibiting unfettered discretionary power to limit speech. See *Humanitarian Law Project*, 205 F.3d at 1136. The Supreme Court, in *Thomas*, confirmed the error of this approach when it reiterated that even a content-neutral licensing scheme that governs both expressive and non-expressive activity must incorporate specific, objective, and definite limitations on the discretion of officials. 122 S. Ct. at 780. The scheme at issue here certainly does not.

The lack of standards is especially significant here because organizations that are blocked *pending investigation* have never been determined to have engaged in unlawful activity.<sup>24</sup> As long as an organization such as BIF is under “investigation,” its assets may be blocked indefinitely. In *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), the Supreme Court held that a statutory scheme with a similar effect on motion picture exhibitors was unconstitutional as applied to the exhibitors. There, a state nuisance statute, coupled with state rules of civil procedure, “authorize[d] prior restraints of indefinite duration on the exhibition of motion pictures that [had] not been finally adjudicated to be obscene.” 445 U.S. at 316. The Court held that the suppression of the exhibitors’ speech during the period before a determination was made as to whether a film was obscene was unconstitutional. *Id.* at 317. The same

---

<sup>24</sup> In *Humanitarian Law Project*, in contrast, the statute at issue authorized designation of a foreign organization (and concomitant restrictions on speech and association) only where the Secretary of State *determined* that the organization engaged in terrorist activities. 205 F.3d at 1137.

result should follow here, where organizations like BIF can be deprived indefinitely of First Amendment rights before any determination as to whether they have violated any law.

Indeed, as applied to BIF, the scheme at issue here grants government officials much more discretion than the scheme in *Vance*. In *Vance*, a temporary injunction against the showing of films could be entered based upon a showing of probable success on the merits. *Vance*, 445 U.S. at 312 n.4. Here, in contrast, the government has essentially administratively enjoined BIF from engaging in protected speech based not on any judicial finding regarding the strength of its evidence, but merely on the vague assertion that BIF “may be engaged in activities that violate [IEEPA].” On its face and as applied to BIF, this scheme is a drastic and unconstitutional encroachment on First Amendment liberties.

#### 4. The Requirement that BIF Obtain Permission to Pay its Counsel Violates Basic Constitutional Rights.

The requirement that BIF seek a license to pay an attorney infringes its First Amendment right to petition for redress of grievances, as well as its free speech and due process rights. “The right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.” *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). This protection is especially strong where, as here, a lawsuit touches on public concerns, such as public officials committing constitutional violations. See *Glatt v. Chicago Park Dist.*, 87 F.3d 190, 193 (7<sup>th</sup> Cir. 1996); *Creek v. Village of Westhaven*, 80 F.3d 186, 192 (7<sup>th</sup> Cir. 1996). Moreover, the right to counsel in civil matters implicates the Petition Clause and the Free Speech Clause of the First Amendment, as well as the Due Process Clause of the Fifth Amendment. *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 221-22 (1967) (freedom of speech, assembly, and petition); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 6-7 (1964) (same); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (due process); *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 (D.C. Cir. 1984) (noting protection provided by First and Fifth Amendments).

Although OFAC has granted BIF a license to pay certain attorneys’ fees,<sup>25</sup> the very requirement of a license is unconstitutional, particularly as it has been applied to BIF. In *American Airways*, the D.C. Circuit avoided what it found to be serious constitutional concerns by refusing to construe the Trading with the Enemy Act to authorize an OFAC regulation requiring a license prior to retention of counsel.

*American Airways*, 746 F.2d at 872-74. “[I]n our complex, highly adversarial legal

---

<sup>25</sup> On January 24, 2002, more than five weeks after a license application was filed, OFAC granted BIF a license limited to payment for the legal services of attorneys at one particular law firm, for the limited purpose of challenging OFAC’s actions, and limited to a certain amount. See Ex. H at 1-2. In order to retain other attorneys, to retain the same attorneys to represent it in connection with other legal issues, or to pay for additional legal services, BIF would have to apply for another license.

system,” the court stated, “an individual or entity may in fact be denied the most fundamental elements of justice without prompt access to counsel.” *Id.* at 872-73. Given that payment is generally required for legal services, OFAC’s requirement of a license to pay attorneys’ fees amounts to a unconstitutional restriction on its First Amendment right to retain counsel and to access the courts.<sup>26</sup>

Moreover, in determining whether to grant BIF a license, OFAC improperly considered the nature of the legal representation that attorneys at Gessler Hughes Socol Piers Resnick & Dym, Ltd. sought to provide, and explicitly limited the amount that BIF may spend on legal services, thus encroaching further on BIF’s First Amendment rights (in addition to attorney-client privilege). See Ex. F ¶ 7; Ex. G (Letter from Mary M. Rowland to R. Richard Newcomb, dated 1/3/02). Finally, BIF’s ability to seek redress of its grievances is further constricted by the fact that defendants have seized and denied it any access to its own business records and documents, which are necessary to provide effective legal representation. *Cf. Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (“restricting . . . attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys”). The First Amendment prohibits such severe restrictions on BIF’s access to counsel and the courts.

**5. Defendants Searched and Seized BIF’s and the Arnaout Family’s Property Without Following the Dictates of the Fourth Amendment.**

The searches and seizures of BIF’s property in Illinois and New Jersey violated the most basic principles of the Fourth Amendment. The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

---

<sup>26</sup> As noted above, the licensing determination is within the unfettered discretion of OFAC. See *supra* Section B.3.

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; *United States v. Husband*, 226 F.3d 626, 634 (7<sup>th</sup> Cir. 2000).

**a. The Searches and Seizures in Illinois**

The searches of, and the seizures of property from, BIF's Illinois office and the family home of BIF's CEO, Enaam Arnaout, violated the Fourth Amendment for two fundamental reasons. First, FBI officials lacked probable cause to believe that the searches they conducted would produce contraband or evidence of a crime, as the Fourth Amendment requires before a search warrant may be issued. See *United States v. Jones*, 208 F.3d 603, 608 (7<sup>th</sup> Cir. 2000); *United States v. Roth*, 201 F.3d 888, 892 (7<sup>th</sup> Cir. 2000); *United States v. Stefonek*, 179 F.3d 1030, 1033 (7<sup>th</sup> Cir. 1999). That is because the searches were based on the patently false supposition that Enaam Arnaout is an individual named "Samir Abdul Motaleb." See Ex. F ¶ 5. The Attorney General Emergency Physical Search Authorization, or "AGEPSA,"<sup>27</sup> purported to authorize search of a person identified as Samir Abdul Motaleb at two of BIF premises and the apartment where Enaam Arnaout resides. See Ex. A ¶ 10; Ex. F ¶ 5. Mr. Arnaout has never been known by the name "Samir Abdul Motaleb;" in fact, *he had never even heard that name* before the events that gave rise to this lawsuit. See Ex. A ¶ 10.

Second, even if the searches and seizures had been supported by probable cause, they would be unconstitutional for the independent reason that the warrant purporting to authorize the search, which was issued the day *after* the searches were conducted,<sup>28</sup> violated the Fourth Amendment's particularity requirement. The Fourth

---

<sup>27</sup> Pursuant to FISA, "the Attorney General may authorize the execution of an emergency physical search if (i) a judge having jurisdiction . . . is informed by the Attorney General . . . that the decision has been made to execute an emergency search, and (ii) an application . . . is made to that judge as soon as practicable but not more than 72 hours after the Attorney General authorizes such search." 50 U.S.C. § 1824(e).

<sup>28</sup> "A warrantless search or seizure is *per se* unreasonable unless the police can show that it falls in one of a carefully defined set of exceptions based on the presence of exigent circumstances." *United States v. Richardson*, 208 F.3d 626, 629 (7<sup>th</sup> Cir.) (internal quotation marks omitted), *cert. denied*, 531 U.S. 910 (2000). The government bears the burden of

Amendment requires a search warrant to “particularly describ[e] the place to be searched, and the persons or things to be seized.” A valid search warrant particularizes the scope of the search by specifying its object. *Platteville Area Apartment Association v. City of Platteville*, 179 F.3d 574, 579 (7<sup>th</sup> Cir. 1999). The warrant here, in contrast, authorized the search of BIF’s premises, and its CEO’s home, in order to seize information, material, or property in order to obtain foreign intelligence. See Ex. F ¶ 5. No further detail was provided. Consistent with this blanket search warrant, FBI officials searched for and physically seized all of the documents and computers and substantially all of the remaining property in BIF’s possession. See Ex. A ¶ 9; Ex. F ¶ 6.

The blanket search warrant the government relied upon flies in the face of the long settled rule that a “general warrant” permitting the authorities to indiscriminately seize a person’s books, papers, and other effects, violates the Fourth Amendment. *Stanford v. Texas*, 379 U.S. 476, 486 (1965). *Accord Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *Andresen v. Maryland*, 427 U.S. 463, 480 (1976); *Stefonek*, 179 F.3d at 1032-33. Indeed, the Supreme Court invalidated a nearly identical warrant in *Stanford*. There, a judge issued a warrant authorizing officials to search “a place where books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas [and its operations] were unlawfully possessed,” and to seize the listed items, pursuant to which the executing officers searched for and seized numerous books and periodicals. 379 U.S. at 478-80. The Court unanimously held that the “indiscriminate sweep” of the search warrant was a “constitutionally intolerable” general warrant, noting that “[t]o hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history.” *Id.* at 486.

---

establishing the existence of exigent circumstances. *United States v. Basinski*, 226 F.3d 829, 833 (7<sup>th</sup> Cir. 2000).

Similarly, in *Stefonek*, the Seventh Circuit held that a search warrant authorizing federal agents to seize “evidence of crime” violated the Fourth Amendment. 179 F.3d at 1032-33. The court explained: “So open-ended is th[is] description that the warrant can only be described as a general warrant, and one of the purposes of the Fourth Amendment was to outlaw general warrants.” *Id.* at 1033. *See also United States v. Kow*, 58 F.3d 423, 426-29 (9<sup>th</sup> Cir. 1995) (warrant that “listed entire categories of documents to be seized, encompassing essentially all documents on the premises” was unconstitutional general warrant).

The warrant that purported (after the fact) to authorize the FBI’s search and seizure here is likewise patently unconstitutional. By authorizing FBI agents to “obtain foreign intelligence” without providing any further guidance as to what was to be seized, the warrant left the seizure entirely to the unchecked discretion of the officers executing the warrant. *See Stanford*, 379 U.S. at 486 (particularity requirement ensures that “[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant”) (citation and internal quotation marks omitted). As in *Stanford*, the FBI agents seized large quantities of documents and other property that the government plainly had no lawful basis for seizing, such as BIF’s Cook County property tax bill, personal effects of BIF’s employees, Mr. Arnaout’s family photographs, Mr. Arnaout’s citizenship papers, and a microphone from Mr. Arnaout’s son’s Nintendo® game. *See* Ex. A ¶ 9; Ex. E at 1-9. The warrant, and the searches and seizures the FBI conducted pursuant to it, thus violated the Fourth Amendment.

#### **b. The Search and Seizure in New Jersey**

Defendants’ search of BIF’s offices in New Jersey, and seizure of property therefrom, were unconstitutional because, to BIF’s knowledge, defendants *never* obtained a search warrant – not even after the fact, as with the Illinois searches and seizures. Nor, to BIF’s knowledge, did defendants even obtain an AGEPSA, as they did in Illinois. The Foreign Intelligence Surveillance Act requires that an AGEPSA be

obtained even where an emergency situation requires that a search be executed before a warrant may be obtained. See 50 U.S.C. § 1824(e). Furthermore, the NJ Blocking Order, on its face, is addressed only to the blocking of funds and assets and the surrender of certain business records. See Ex. D at 3-4. The United States Customs Service seized BIF's property on December 14 with absolutely no authority to do so and, as a result, defendants' actions in New Jersey are perhaps even more egregious than their actions in Illinois.

### **c. The Blocking of BIF's Property**

The blocking of BIF's property indisputably constitutes a "seizure" within the meaning of the Fourth Amendment. See *Maryland v. Macon*, 472 U.S. 463, 469 (1985) ("A seizure occurs when 'there is some meaningful interference with an individual's possessory interests' in the property seized."). Purportedly relying on IEEPA, as amended by the PATRIOT Act, defendants blocked BIF's assets pending investigation, thus forbidding BIF to spend its funds unless it seeks and obtains a special license from OFAC to do so. See Ex. D. The blocking order is of indefinite (and potentially unlimited) duration, since neither the PATRIOT Act nor any other provision of law places any limitation on the length of time that property may be blocked pending investigation, and defendants have not specified any deadline by which their investigation will be concluded.

To BIF's knowledge, defendants have never obtained a warrant authorizing the blocking. Like any other warrantless seizure, defendants' blocking of BIF's property is presumptively unreasonable, *United States v. Richardson*, 208 F.3d 626, 629 (7<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 910 (2000), and the government bears the burden of showing otherwise, *United States v. Basinski*, 226 F.3d 829, 833 (7<sup>th</sup> Cir. 2000). Furthermore, to the extent the blocking was based on the mistaken theory that Mr. Arnaout is Samir Abdul Motaleb, the government lacked probable cause to block BIF's funds. Any seizure of significant duration (here over three months, and counting) must be

supported by probable cause. See *United States v. Place*, 462 U.S. 696, 707-10 (1983) (90-minute detention of luggage, not supported by probable cause, violated Fourth Amendment).

Nor is there any statute or executive order authorizing defendants to block BIF's property pending investigation. The power to block pending investigation is authorized only by the PATRIOT Act, which President Bush signed into law on October 26, 2001. The PATRIOT Act amended IEEPA to authorize the President "under such regulations as he may prescribe, by means of instructions, licenses, or otherwise" to "block during the pendency of an investigation" "any property in which any foreign country or a national thereof has any interest . . . ." 50 U.S.C. § 1702(a)(1)(B). The powers granted to the President under IEEPA may be exercised only when the President declares a national emergency, *id.* at § 1701, and issues an Executive Order published in the Federal Register specifying the provisions under which he or other officers will act, 50 U.S.C. § 1631. At no time following the enactment of the PATRIOT Act has the President issued an Executive Order delegating his authority to block during the pendency of an investigation to any officer or agency of the United States.

The fundamental inquiry in evaluating a seizure under the Fourth Amendment is whether the seizure was reasonable under all the circumstances. *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *overruled in part on other grounds, California v. Acevedo*, 500 U.S. 565 (1991). In this case, the circumstances make clear that the blocking was and is unreasonable. The blocking order forbids BIF to make any use of its property, is of potentially unlimited duration, has never been approved by any judicial officer, and is not authorized by any statute or executive order.

**\_\_\_\_\_ 6. Defendants Effected an Unconstitutional Taking of BIF's Property.**

Defendants' blocking of BIF's funds effected an unconstitutional taking in violation of the Takings Clause of the Fifth Amendment. The Fifth Amendment's

prohibition on governmental taking of private property without just compensation extends to governmental restrictions that deprive the property owner of all economically beneficial use of the property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).<sup>29</sup> In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), the Supreme Court identified three factors for determining whether such restrictions constitute a taking: (1) “the economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action.” All three factors demonstrate that a taking occurred here.

Because defendants have blocked BIF’s funds pending investigation, those funds are no longer in BIF’s bank accounts, but are being held in a newly-opened account to which BIF does not have access. BIF has been unable to operate without its donations or property and without its ability to raise additional money. Defendants’ actions thus have had a crippling economic impact on BIF.

As a domestic nonprofit organization that for the last ten years has raised private donations and maintained the funds in a United States bank, BIF had eminently reasonable investment-backed expectations that it would have undiminished and uninterrupted access to its funds. Prior to the PATRIOT Act’s passage in October 2001, the government did not have the authority to freeze the assets of a corporation, domestic or otherwise, pending investigation, without first determining that it is a terrorist organization. BIF therefore could not have been “on notice that the government, pursuant to its statutory and constitutional authority, could close [its] offices and freeze its assets.” *767 Third Avenue Associates v. United States*, 48 F.3d 1575, 1581 (Fed. Cir. 1995).

---

<sup>29</sup> Because the statute and the challenged actions “require[d] a direct transfer of funds mandated by the Government,” BIF may seek injunctive relief in this Court to remedy the harm without seeking compensation pursuant to the Tucker Act. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520-22 (1998); *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 270 F.3d 180, 192-94 (5<sup>th</sup> Cir. 2001).

That BIF's property is in limbo because of BIF's "blocked pending investigation" status is irrelevant, because "even blocking involves a deprivation of property." *Nielsen v. Secretary of the Treasury*, 424 F.2d 833, 843 (D.C. Cir. 1970). "[M]en live in a shorter run than the government, and that what may be considered only a temporary freeze by a government may be a permanent denial to the individual whose life comes to an end while the government ponders its course." *Id.*; see also *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271, 276 (Ct. Cl. 1983)("[I]t is not a prerequisite to an appropriation that the government take physical possession of the property to the exclusion of the plaintiff."). Without any limit whatsoever on the duration of the investigation or the blocking, it can hardly be said that BIF's inability to access its funds is "temporary."

Nor can defendants' actions be justified under the same rationale used to justify previous blocking actions. In contrast to plaintiffs who have brought takings claims under IEEPA in the past, BIF is a United States entity that has not been designated as a terrorist organization. See *E- Systems*, 2 Cl. Ct. at 275 (distinguishing cases dealing with "the blocking or freezing of the assets of nationals of enemy or hostile governments"). The government's blocking of the assets of a domestic entity that has not been designated a terrorist organization is unprecedented and unconstitutional.

### **C. The Balance of Harms Strongly Favors Preliminary Relief.**

In contrast to the severe and irreparable harm that BIF faces in the absence of preliminary relief, defendants will suffer no such harm if this Court enters the injunction sought by BIF. BIF has not been convicted, or even *accused*, of any crime. Nor has BIF been designated any type of terrorist organization. That remains true even though defendants have now had over three months to review the documents they seized from BIF. Defendants' investigation of BIF would not be hindered by granting preliminary relief, because BIF does not object to allowing defendants to keep and to continue reviewing copies of the seized materials for a reasonable period of additional time. BIF

also has offered all along to answer any and all questions and otherwise cooperate with the investigation, Ex. C ¶¶ 5-10; notably, defendants have yet to take advantage of this opportunity. Defendants thus cannot show that they will be harmed if BIF is permitted simply to access and use its money and other property to run its business and engage in lawful humanitarian work, as it has been doing for nearly ten years.

Even if defendants would suffer harm from preliminary relief (and they will not), any such “harm” would be greatly outweighed by the numerous forms of irreparable injury that BIF and its projects and beneficiaries will suffer in the absence of such relief – including the imminent demise of a charity that is the sole or primary source of critically needed food, clothing, shelter, and/or medical care for thousands of needy individuals.

#### **D. The Public Interest Strongly Favors Preliminary Relief.**

The preliminary relief sought here will not harm any third parties, nor can defendants show that it will. See *Ty*, 237 F.3d at 895 (consideration of public interest entails determining effect that granting or denying injunctive relief will have on non-parties). Although the nation is currently faced with heightened security concerns, the injunction sought here would in no way harm the national security. Unlike all but one of the many organizations that have been blocked, BIF has not been determined to have engaged in any terrorist activities, or to have any links to terrorist organizations. Moreover, the vast majority of relief BIF seeks will have no effect on the national security, because it will merely allow BIF to pay the operating expenses of overseas charity projects (for example, purchasing medical supplies for a women's hospital and paying its doctors and nurses, see Ex. K ¶ 9, and sending food, medicine, shoes, hygienic supplies, and kitchen supplies to Chechen refugees, see Ex. N ¶¶ 2-3), and could be monitored by the government.<sup>30</sup>

In contrast, a denial of preliminary relief would be devastating to third parties. As explained above, thousands of persons around the world will be left without adequate food, shelter, clothing, and/or medical care if BIF closes or continues to lack the means to continue its charitable work. Many of those people may die. Furthermore, vindication of constitutional rights is manifestly in the public interest. See, e.g., *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7<sup>th</sup> Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.").

#### **CONCLUSION**

---

<sup>30</sup> In an effort to accommodate any concerns about how it is spending its money, BIF has offered not only to assist in the review of its documents and to answer all pertinent inquiries, but also to have its officials accompany government agents on site visits to the locations of its charitable activities overseas. Accordingly, although BIF respectfully submits that it is not a proper or legally mandated condition of the interim relief sought here, BIF is willing to allow the resumption of its charitable and humanitarian activities to be subject to reporting to and oversight by the government.

For the reasons stated herein, BIF respectfully requests the entry of a preliminary injunction requiring defendants to (1) grant a hearing in which BIF may respond to any allegations against it; (2) return the property seized from BIF's offices and the home of Enaam Arnaout; and (3) unblock BIF's funds. In the alternative, at the very least, BIF respectfully requests entry of a preliminary injunction requiring defendants to (a) provide BIF with copies of the seized documents; (b) return the property seized from BIF's offices and the home of Enaam Arnaout; and (c) unblock BIF's funds on a monthly basis to allow BIF to pay its operating and charitable expenses, with or without monitoring by the government.

Respectfully submitted,

---

One of the Attorneys for Plaintiff  
Benevolence International Foundation

Matthew J. Piers  
Frederick S. Rhine  
Mary M. Rowland  
Shilpa S. Satoskar  
Juliet V. Berger-White  
**Gessler Hughes Socol Piers Resnick & Dym, Ltd.**  
Three First National Plaza, Suite 2200  
Chicago, Illinois 60602  
(312) 580-0100

Dated: April 5, 2002

**APPENDIX  
TABLE OF CONTENTS**

- A: Declaration of Enaam Arnaout
1. Summary of License Applications
  2. Summary of BIF's Outstanding Obligations
  3. Summary of BIF's Monthly Operating Expenses
  4. Summary of BIF's Monthly Charitable Donations
- B: Executive Order 13224
- C: Declaration of Matthew J. Piers
- D: Blocking Notice and Requirement to Furnish Information for BIF's Palos Hills, Illinois office (1-2) and Newark, New Jersey office (3-5)
- E: Evidence Recovery Log dated 12/14/01 (Palos Hills, IL office) (1-7)
- U.S. Department of Justice Federal Bureau of Investigation Receipt for Property Received/Returned/Released, Seized, dated 12/14/01 (Palos Hills, IL office) (8)
- U.S. Department of Justice Federal Bureau of Investigation Receipt for Property Received/Returned/Released, Seized, dated 12/14/01 (Mr. Arnaout's home) (9)
- Office of Foreign Assets Control Support Blocked Property Inventory, dated 12/14/01 (Newark, NJ office) (10)
- F: Declaration of Mary M. Rowland
- G: Letter from Mary M. Rowland to R. Richard Newcomb, dated 1/3/02 (2)
- H: Licenses
- License No. SDGT-21, dated 1/24/02 (1-2)
- License No. SDGT-33, dated 2/20/02 (3-5)
- License No. SDGT-35, dated 2/21/02 (6-7)
- License No. SDGT-36, dated 2/20/02 (8-9)
- License No. SDGT-39 (10-11)
- FAC No. SDGT-199682 and License No. SDGT-41, dated 3/22/02 (12-15)
- I: First Declaration of Dr. Akram Rakhimov
- J: Declaration of Mohamed Abdalla Mohammed Ali
- K: Declaration of Aishat Magomedoya
- L: Second Declaration of Dr. Akram Rakhimov

M: Declaration of Husein Evloev

N: Declaration of Belkhoroev Yahya

O: Declaration of Rafael Hasanov

P: *New Jersey State Nurses Ass'n v. Treacy*, No. 85-4912, 1985 U.S. Dist. LEXIS 23766 (D.N.J. Dec. 4, 1985) (1-3)