IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	CR No. 3:04-CR-240-G
	§	
HOLY LAND FOUNDATION	§	
FOR RELIEF AND DEVELOPMENT	§	
also known as the "HLF"(1)	§	**ECF**
SHUKRI ABU BAKER (2)	§	
MOHAMED EL-MEZAIN (3)	§	
GHASSAN ELASHI (4)	§	
MUFID ABDULQADAR (7)	§	
ABUDULRAHAM ODEH (8)	§	

PETITIONERS' REPLY TO THE GOVERNMENT'S OPPOSITION TO PETITIONERS' MOTION FOR EQUITABLE RELIEF FROM THE GOVERNMENT'S PUBLIC NAMING OF THEM AS UNINDICTED CO-CONSPIRATORS

Hina Shamsi (admitted *pro hac vice*)
L. Danielle Tully (admitted *pro hac vice*)
Jameel Jaffer (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
HShamsi@aclu.org
Tel: (212) 549-2500
Fax: (212)-549-2583

Lisa Graybill
Legal Director
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS
P.O. Box 12905
Austin, TX 78711
LGraybill@aclutx.org
Tel: (512) 478-7300 x 116
Fax: (512) 478-7303

David Broiles, Local Counsel
CAGLE AND BROILES
100 N. Forest Park, Suite 220
Ft. Worth, TX 76102
Tel. (817) 335-3311
Fax: (817) 335-7733

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INTRODUCTION

The government's opposition brief confirms that it has no legally cognizable justification for publicly naming petitioners ISNA and NAIT as unindicted co-conspirators in the HLF terrorism prosecution. Nowhere in the brief does the government actually address the merits of petitioners' claims that the government's public naming violated petitioners' Fifth Amendment rights and is contrary to binding Fifth Circuit precedent. The government does not argue that it had a substantial interest in naming petitioners, as the case law requires, or show why it had no means of achieving its goals that were less injurious to petitioners than a public designation. In fact, the government does not even discuss the Fifth Circuit case law. Nor does it argue that petitioners suffered no injury as a result of government conduct. Instead, the government raises only procedural challenges that are foreclosed by the directly applicable case law, and which petitioners address below.

In cases legally and factually similar to petitioners', the courts have made clear they have a critical role to play in safeguarding the rights of private citizens and entities, as well as the

integrity of the criminal justice system, from the kind of inflammatory and irresponsible action in which the government engaged here. Petitioners respectfully request this Court grant their motion for equitable relief.

ARGUMENT

I. THE GOVERNMENT OFFERS NO LEGITIMATE INTEREST TO JUSTIFY ITS PUBLIC NAMING OF PETITIONERS AS UNINDICTED CO-CONSPIRATORS

In its opposition brief, the government makes no effort to grapple with Fifth Circuit precedent that "the liberty and property concepts of the Fifth Amendment protect an individual from being publicly and officially accused of having committed a serious crime, particularly where the accusations gain wide notoriety." *In re Edward S. Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981); *see also United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975); *see generally*, Government's Amended Memorandum in Opposition to Petitioners, filed July 11, 2008 ("Gov't Opp."). Indeed, the brief offers only a glancing citation to *Briggs* and makes no mention whatsoever of *Smith*. The government also fails to explain why it chose to deviate from Department of Justice policy that expressly implements these two cases. United States Attorney Manual ("USAM") 9-27.760, *Limitation on Identifying Uncharged Third-Parties Publicly*.

There are a few exceptions to the Fifth Circuit's prohibition, but to meet them, the government must show (i) that it had a "substantial interest" in its public naming of an unindicted co-conspirator, and (ii) that it could not achieve that interest through less injurious means. *Briggs*, 514 F.2d at 804-05; *Smith*, 656 F.2d at 1106-07. The government's opposition brief contains no reference to the Fifth Circuit's test, let alone any justification that might meet it. Instead, the government's only explanations for why it publicly named petitioners in the appendix to its pre-trial brief are repetitions of reasons it offered in response to an *amicus* brief, Gov't Opp. at 2-5, which are unsupported by the case law and which petitioners already

addressed in detail in their motion. *See* Petitioners' Motion for Equitable Relief, filed on June 18, 2008 ("Pet. Mot.") at 17-19. The government provides no basis for any finding other than that it deviated from binding precedent and violated petitioners' Fifth Amendment rights.

II. PETITIONERS HAVE STANDING TO CHALLENGE THE GOVERNMENT'S PUBLIC NAMING OF THEM AS UNINDICTED CO-CONSPIRATORS

Fifth Circuit precedent and the facts of this case make clear that petitioners have standing to bring this motion. According to the Fifth Circuit in *Briggs*, when the government causes injury by naming an unindicted co-conspirator publicly, and the named person or entity seeks judicial relief, there is "an actual case or controversy. It is narrow, sharply drawn, and concrete. On one side are the persons who complain of injury to them by a single document and on the other side is the sovereign, defending the power . . . to do what was done." *Briggs*, 514 F.2d at 799; *see also Smith*, 656 F.2d at 1106. The government does not discuss, let alone attempt to distinguish, the standing requirements of *Briggs*, *Smith* and their progeny. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (stating that the question of standing is best answered by comparing like cases).[1]

Petitioners' case fits squarely into the *Briggs* and *Smith* fact pattern. There is no dispute that the government publicly named petitioners as unindicted co-conspirators in its pre-trial brief appendix. Gov't Trial Brief (Docket Item 656). Petitioners have shown that the source of their harm is the government's public designation – it's official labelling of petitioners as participants

[1] The cases the government cites for its standing argument are inapposite because they concern plaintiffs who either failed to allege a direct, concrete injury, or who conceded they had no claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (petitioners lacked standing because they alleged a future hypothetical injury stemming from government action against another entity); *Allen*, 468 U.S. at 751-52 (parents of African American children lacked standing because they could not show direct injury caused by the IRS' grant of tax exempt status to racially discriminatory private schools); *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387-88 (5th Cir. 2003) (petitioner did not have standing to pursue claims on behalf of a proposed class because he had conceded his claims were moot).

in a criminal conspiracy – a designation that continues to harm petitioners today. Mattson Decl. at ¶¶ 19-26, App. 0007-0011 (public designation has injured ISNA's name, reputation and all areas of its work);[2] Siddiqi Decl. at ¶¶ 15-18, App. 0087-0088 (same, with respect to NAIT). The government does not deny that it caused petitioners *any* injury, nor could it, given that the lead HLF prosecutor apologized to petitioners' counsel for the harm the government's naming caused to petitioners' reputations. Pet. Mot. at 6-7; Reinberg Decl. at ¶ 8-9, App. 0112, and Reinberg Decl. Exh. A, App. 0115-0117. Petitioners' standing to challenge the government's conduct is patent.

Faced with a clear cut case, the government attempts to muddy the waters. According to the government, petitioners lack standing to challenge its conduct because (i) petitioners cannot trace their injury solely to the government's pre-trial brief, as opposed to media reports and evidence introduced at trial and, therefore, (ii) this Court cannot redress their injury.[3] Gov't Opp. 10-18. These arguments are both inconsistent with the applicable law and deeply disturbing because, as petitioners discuss in greater detail below, the government fails to recognize the unique nature of the harm caused by an official accusation of criminality.

The government's suggestion that petitioners' harm stems not from the pre-trial naming but from other sources is belied by the record petitioners have put before this Court, which the government does not contest. Petitioners make clear that the government's accusation of criminality has, on its own, harmed their names, reputations, standing in the community and ability to carry out their mandates. Mattson Decl. ¶¶ 19, 22-25, App. 0007, 0008-0011 (ISNA's work on behalf of the Muslim community with interfaith partners and with government agencies

[2] Short-form citations in this Reply follow the format used in Petitioners' Motion for Equitable Relief.
[3] The government makes these arguments to support both its claim that petitioners lack standing and its claim that petitioners' motion is moot. Gov't Opp. at 11, 17. Petitioners' arguments in response are made in the context of their standing discussion, but apply equally to mootness.

"severely injured" because of naming); Siddiqi Decl. ¶ 17, App. 0087-0088 (government's naming "has jeopardized NAIT's reputation, its standing in the American Muslim community, and its ability to fulfill its mission"). The government's actions also resulted in widespread publicity that propagated the government's official charge and suggested petitioners engaged in criminal activity. Mattson Decl. ¶¶ 20-21, App. 0007-0008; Siddiqi Decl. ¶¶ 15-16, App. 0087. The government may not attribute the harm caused by its own conduct to media reports. *Cf. Briggs*, 514 F.2d at 799 ("We reject as frivolous the contention that if appellants have suffered injury it is at the hands of only the news media").[4]

Relatedly, the government cannot justify its decision to name petitioners as unindicted co-conspirators *before* trial by pointing to evidence it introduced *at* trial. Government identification of an unindicted co-conspirator before trial imputes criminality, while identification at trial does not. *Briggs*, 514 F.2d at 805 (distinguishing between alleged co-conspirator's testimony at trial where there is "no formal adjudication regarding criminality" and identification before trial, when due process concerns are heightened); *see also* USAM 9-11.130 (identifying an individual as a co-conspirator for hearsay purposes does not subject person to the burden of formal accusation); Pet. Mot. at 15-17.

It is in the government's discussion of trial evidence that the government most egregiously demonstrates its ignorance of – or willful blindness to – the harmful consequences of an official, government-imposed stigma. The government spends pages of its opposition brief re-alleging that ISNA and NAIT were part of a criminal conspiracy to support Hamas; according to the government, trial evidence establishes petitioners' alleged co-conspirator status as "fact" and "a matter of public record." Gov't Opp. at 11-14. The evidence does no such thing. Of the

[4] That the government equates the importance of its own statements to reports in media outlets and blogs, Gov't Opp. 11 and n.7, only demonstrates how misguided its arguments are.

exhibits the government cites that contain any mention of ISNA or NAIT (many do not),[5] all pre-date by years the earliest conspiracy charge in the HLF Superseding Indictment (1995) and the 1995 designation of Hamas as a terrorist organization.[6] Even if the "evidence" provided some basis for alleging criminality against petitioners, the government's discussion of it shows the government utterly fails to grasp the singular weight and consequence that an official accusation of criminal conduct carries in our criminal justice system and in our society.

The government's opposition brief illustrates perfectly the bind that publicly-named third parties are in when the government accuses them of criminal conduct. If the government had not publicly identified petitioners as unindicted co-conspirators before trial, the "trial evidence" referred to in its opposition brief would remain speculative and would not impute criminality to petitioners (especially given that it all pre-dates any conspiracy charge in the HLF case). With the imprimatur of government accusation, which is now exacerbated by the government's citations to the "evidence" in its opposition brief, the purported evidence takes on a dimension of apparent credibility. Yet petitioners may not challenge the "evidence" with the full panoply of rights that a criminal defendant has. *Briggs*, 514 F.2d at 804 ("The unindicted conspirator is not a party to the criminal trial where names and facts come to light, and he has no right under the Federal Rules of Criminal Procedure to intervene"). In the face of the government's allegation of criminality, petitioners have no forum to dispute the purported evidence on the grounds of authenticity, relevance or hearsay. Nor do petitioners have any forum in which to defend

[5] For example, none of the exhibits the government cites in support of a paragraph in its brief that begins "ISNA and NAIT. . . were intimately connected with the HLF and its assigned task of providing financial support to HAMAS," Gov't Opp. at 13, contains any mention of ISNA or NAIT.

[6] Assuming the authenticity of documents' dates, the most recent documents to mention either ISNA or NAIT are dated 1991, Gov. Exhs. 3-3 and 3-85, but the majority of the documents are older. Almost all of the numerous exhibits that purport to show financial transactions and that contain any mention of ISNA or NAIT are dated 1988 and 1989 (there are two dated 1990), almost a decade before the majority of the overt acts the government alleges in support of its conspiracy charges against the HLF defendants.

themselves on the merits or to raise constitutional objections such as, for example, the freedoms of speech and association.[7]

The government's redressability argument, that this Court cannot remedy petitioners' injury because they were also harmed by media reports and the trial evidence, misses the mark as widely as its causation and injury arguments do. Petitioners' injury stems from the government's public designation of them as unindicted co-conspirators. With the remedies petitioners seek and that this Court has the authority to grant, Pet. Mot. at 19-21, petitioners "could forevermore proclaim their vindication to anyone expressing concern about the government's allegations." *United States v. Anderson*, 55 F. Supp. 2d 1163, 1168 (D. Kan. 1999).

Even if the Court were to find that petitioners' injury stemmed from sources in *addition* to the government (the government does not argue that its actions caused petitioners *no* injury), the Court may still grant petitioners relief. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (to meet redressability requirement, plaintiff need only show that "a favorable decision will relieve a discrete injury" and not that it would relieve "*every* injury") (emphasis in original); *Church of Scientology of Ca. v. United States*, 506 U.S. 9 (1992) (same, in mootness context).

III. THE DISPUTE BETWEEN PETITIONERS AND THE GOVERNMENT IS LIVE AND ON-GOING AND PETITIONERS' MOTION IS NOT MOOT

While petitioners' names remain on the government's public list of unindicted co-conspirators, and therefore on the official records of this Court, the controversy between the government and petitioners is not moot but is "real, direct and continuing." *Briggs*, 514 F.2d at

[7] Unsurprisingly, the government's additional and recent imputation of criminality to petitioners in its opposition brief has generated media attention, and the government has exacerbated the injury petitioners have already suffered. Associated Press, *Government Opposes Move to Clear 2 Groups*, Houston Chronicle, July 10, 2008 ("The exhibits also show [petitioners'] ties to the Muslim Brotherhood and the Palestine Committee, organizations linked to the Palestinian militant group Hamas, according to the filing"); Josh Gerstein, *U.S.: Facts Tie Muslim Groups to Hamas Front Case*, New York Sun, July 11, 2008.

800.[8] Petitioners have already demonstrated in their discussion on standing why the government's justifications for its mootness argument fail. It bears repeating in the mootness context, though, that in its recently-filed opposition brief, the government misuses trial evidence to impute criminality to petitioners once again. *See supra* at 6-7. Petitioners do not ask this Court, as the government suggests, Gov't Opp. at 15, to alter the record of the public trial in this case. Rather, the targeted remedies petitioners request will ensure that, "such references may not be used as a public record to impugn the reputation of petitioner[s]." *Smith*, 656 F.2d at 1106.

IV. PETITIONERS' MOTION FOR EQUITABLE RELIEF IS TIMELY

The government's claim that petitioners' motion is untimely ignores the binding case law and is undercut by the government's own conduct in petitioners' case. Both the law and the equities support the timeliness of petitioners' motion for equitable relief.

Courts have granted publicly named unindicted co-conspirators equitable relief in challenges brought at all stages of the proceedings. *See, e.g.*, *Briggs*, 514 F.2d at 797 (petitioner's pre-trial challenge denied by district court; Fifth Circuit granted appeal even though trial had concluded); *Delpit v. Beckner*, 481 F.Supp. 42, 46 (M.D. La. 1979) (granting relief in challenge brought more than a year after public naming because injury to petitioner's reputation

[8] The cases the government cites to argue that petitioners' claims are moot are, like its standing cases, factually inapposite; the mootness cases involve plaintiffs for whom the source of the case or controversy was eliminated. *See, e.g.*, *Honig v. Doe*, 484 U.S. 305 (1988) (plaintiff's appeal mooted because, by the time of appeal, his age no longer qualified him for education benefits provided by the act under which he sued); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472 (1990) (plaintiff's federal law challenge to a state statute regulating banks mooted by Congress' amendments to federal law); *Spencer v. Kemna*, 523 U.S. 1 (1998) (habeas petition claiming wrongful revocation of parole mooted because petitioner failed to make required showing of ongoing harm and collateral consequences); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (public employee's challenge to state constitution's requirement that official acts be conducted in English mooted when employee voluntarily resigned to work in private sector). Unlike each of these cases, no intervening event or act has removed the source of petitioners' injury, which is the government's public naming of them in its pre-trial brief appendix.

was continuing); *Anderson*, 55 F.Supp.2d at 1167-68 (granting relief after trial to unindicted co-conspirators publicly named in government pre-trial papers and during the trial itself).[9]

In support of its argument that petitioners' motion is untimely, the government alleges that petitioners "inexplicably delayed" seeking relief from this Court. Gov't Opp. at 8. But, as the government itself knows and does not dispute here, petitioners' counsel contacted the lead HLF prosecutor within a month after the government's pre-trial brief and three weeks before the first trial started; the parties subsequently engaged in a months-long negotiation. Reinberg Decl. at ¶¶ 5-11, App. 0111-0113. From the inception of these discussions, the government reiterated that it did not believe petitioners had engaged in wrongdoing and stated that petitioners were named only as a legal tactic; the government indicated its willingness to remove petitioners' name from the government's publicly available unindicted co-conspirator list. *Id.* at ¶¶ 5-6, App. 0112-0113. With no reason to doubt the government's good faith, petitioners also had no reason to resort to litigation. To the contrary, petitioners abstained from seeking judicial intervention because the government led them to believe it was unnecessary.

The government repeatedly told petitioners' counsel it would remedy petitioners' harm. Three days before the HLF trial, the government agreed to amend its pre-trial brief to remove petitioners' names and to clarify that they had not violated any criminal law. *Id.* Twice during the trial, the lead HLF prosecutor wrote to apologize for his delay in filing the amendment and he also apologized for the problems the public naming was causing petitioners. *Id*. ¶¶ 9-10, App. 0112. After CAIR filed its *amicus* brief, petitioners' counsel again contacted the lead HLF

[9] Instead of addressing these precedents, the government relies on cases in which plaintiffs either failed to act for inordinately long periods of time or acted in bad faith (which the government does not allege here). *See, e.g.*, *Hays v. Port of Seattle*, 251 U.S. 233 (1920) (plaintiff's contract claim barred because he brought it 17 years after he stopped performing under the contract); *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1418 (5th Cir. 1995) (court dismissed plaintiff's claims after he "willfully and in bad faith refus[ed] to comply with the court's …orders").

prosecutor who responded that he was trying to determine what effect a filing with respect to petitioners would have on *other* alleged co-conspirators. *Id*. ¶ 11, App. 0112-0113. Petitioners' counsel continued to follow up with the government through April 2008. *Id*. Then, as the new trial date approached, petitioner NAIT's counsel called the government in the second week of June, 2008, only to be told – for the first time – that the government would not be willing to remove petitioners from its public unindicted co-conspirator list. Siddiqi Decl. ¶ 9, App. 0086. The following week, petitioners sought relief from this Court using the procedures the Fifth Circuit identified as appropriate in circumstances as extraordinary as the government's public naming of an unindicted co-conspirator. *Briggs*, 514 F.2d at 799 (motion for equitable relief appropriate vehicle for challenge); *Smith*, 656 F.2d at 1104 (court can "exercise [its] equitable powers and grant the requested relief despite the fact that no formal rules provided for such a procedure in a criminal case"). Petitioners' claim for equitable relief is timely. *Briggs*, 514 F.2d at 806 (courts cannot tolerate the government's use of the co-conspirator stigma as a tactic because "[i]t would circumvent the adversary process which is at the heart of our criminal justice system and of the relation between government and citizen under our constitutional system").

CONCLUSION

For the foregoing reasons, and those stated in petitioners' opening motion, petitioners respectfully urge the Court to grant their request for equitable relief.

DATED: July 21, 2008

Respectfully submitted,

/S/ Hina Shamsi

Hina Shamsi (admitted *pro hac vice*)
State Bar No. NY 2995579
L. Danielle Tully (admitted *pro hac vice*)
State Bar No. NY 4334512
Jameel Jaffer (admitted *pro hac vice*)
State Bar No. NY 3064201
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

125 Broad Street, 18th Floor
New York, NY 10004
hshamsi@aclu.org
Tel.: (212) 549-2500
Fax: (212) 549-2583

Lisa Graybill (Texas Bar No. 24054454)
Legal Director
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS
PO Box 12905
Austin, TX 78711
LGraybill@aclutx.org
Tel: (512) 478-7300 x 116
Fax: (512) 478-7303

David Broiles, Local Counsel
State Bar No. 03054500
CAGLE AND BROILES
100 N. Forest Park, Suite 220
Ft. Worth, Texas 76102
Tel. (817) 335-3311
Fax: (817) 335-7733

CERTIFICATE OF SERVICE

I certify that on July 21, 2008, I electronically submitted the foregoing document with the Clerk of Court for the U.S. District Court for the Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system will send a "Notice of Electronic Filing" to the following individuals:

James T. Jacks
Assistant United States Attorney
1100 Commerce St., Third Floor
Dallas, Texas 75242

Elizabeth Shapiro
U.S. Department of Justice
20 Massachusetts Ave., NW
Room 7152
Washington, D.C. 20592

Linda Moreno
Law Office of Linda Moreno
P.O. Box 10985
Tampa, Fl. 33679

Joshua L. Dratel
Aaron J. Mysliwiec
Law Office of Joshua L. Dratel
2 Wall St., 3rd Floor
New York, NY 10005

Nancy Hollander
Theresa M. Duncan
Freedman Boyd Hollander Goldberg & Ives
20 First Plaza, Suite 700
Albuquerque, NM 87102

Marlo P. Cadeddu
Law Office of Marlo P. Cadeddu
3232 McKinney Ave., Suite 700
Dallas, TX 75204

John D. Cline
Jones Day
555 California St., 26th Fl.
San Francisco, CA. 94104-1500

Greg Westfall
Westfall, Platt & Cutrer
Mallick Tower
One Summit Ave., Suite 910
Fort Worth, TX 76102

In addition, I have served on this same day, by electronic mail, the following counsel for the government:

James T. Jacks
Assistant United States Attorney
1100 Commerce St., Third Floor
Dallas, TX 75242
jim.jacks@usdoj.gov

Elizabeth Shapiro
U.S. Department of Justice
20 Massachusetts Ave., NW
Room 7152
Washington, D.C. 20592
elizabeth.shapiro@usdoj.gov

/S/ Hina Shamsi
Hina Shamsi