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

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 3:04-CR-240
	)	
HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, et. al.,	)	Hon. A. Joe Fish
	)	
Defendants.	)	

AMICUS CURIAE BRIEF OF THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS IN SUPPORT OF THE UNINDICTED CO-CONSPIRATORS' FIRST AND FIFTH AMENDMENT RIGHTS

NOW COMES, the Council on American-Islamic Relations ("CAIR"), by and through its undersigned counsel, respectfully submitting this *Amicus Curiae* brief in opposition to the public issuance of the unindicted co-conspirator list and seeking the Court to strike their name from the list, along with the names of all other unindicted individuals and organizations, and take any other action that it deems to be appropriate.

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INTEREST OF THE *AMICUS CURIAE*

The Council on American-Islamic Relations ("CAIR") is America's largest Islamic civil liberties group, with regional offices nationwide and in Canada and national headquarters on Capital Hill in Washington, D.C. CAIR is a nonprofit, grassroots civil rights and advocacy group, which was established in 1994 and has worked to promote a positive image of Islam and Muslims in America. Through media relations, lobbying, education, and advocacy, CAIR puts forth an Islamic perspective to ensure that the Muslim voice is represented. In offering this perspective, CAIR seeks to empower the American Muslim community and encourage their participation in political and social activism. In their mission to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding, CAIR has worked with various other faith communities, including the National Council of Churches, with other civil liberties groups, including the American Civil Liberties Union, Amnesty International, and the NAACP, as well as regularly meeting with US presidents, members of the administration, members of congress, and various state and local officials.

CAIR takes a special interest in the protection of the civil liberties of their members, the Muslim community, and the public at large, and are deeply concerned by the ramifications of the Department of Justice's public issuance of the unindicted co-conspirator list for the Holy Land Foundation case, which contained the names of three-hundred and six (306) individuals and organizations, including CAIR.

CAIR believes that the public issuance of this unindicted co-conspirator list raises important issues regarding individual and organizational rights, including the named individuals

and organizations' right to due process under the Fifth Amendment. See United States v. Briggs, 514 F.2d 794 (5th Cir. 1975). Furthermore, the public issuance of the named co-conspirators has a profound chilling effect upon these individuals and organizations' First Amendment free speech and association rights. Therefore, because the civil liberties of these individuals and organizations are compromised by the public issuance of the unindicted co-conspirator list, CAIR has a substantial interest in a just determination of this issue.

INTRODUCTION

The late Palestinian activist and Columbia University professor, Edward Said, wrote that:

> The [American] media runs the vilest racist stereotypes about Arabs.... Several generations of Americans have come to see the Arab world mainly as a dangerous place, where terrorism and religious fanaticism are spawned, and where gratuitous anti-Americanism is mischievously inculcated in the young by badly-intentioned clerics who are anti-democratic and virulently anti-Semitic. Ignorance is directly translated into knowledge in such cases....

Edward Said, Imperial Perspectives (July 24, 2003), *available at* http://www.zmag.org/content/showarticle.cfm?SectionID=22&ItemID=3949. A survey conducted by the Washington Post and ABC News in 2006 confirmed this statement, when it found that "a growing proportion of Americans are expressing unfavorable views of Islam, and a majority now say that Muslims are disproportionately prone to violence.... The poll found that nearly half of Americans – 46 percent – have a negative view of Islam, seven percentage points higher than in the tense months after [9/11]." Claudia Deane and Darryl Fears, Negative Perception of Islam Increasing, Washington Post at A01 (Mar. 9, 2006). Furthermore, in response to this survey, Richard Stockton, a professor of political science at the University of Michigan at Dearborn stated that "an exceptionally high percentage of non-Muslims feels the media depicts Arabs unfairly, yet

still holds negative opinions. You're getting a constant drumbeat of negative information about Islam." Deane and Fears, supra at A01. Michael Franc, from the conservative Heritage Foundation said that there"seems to me to be a real backlash against Islam and that congressional leaders do not help the problem by sometimes using language that links all Muslims with extremists." Deane and Fears, supra at A01.

The United States Attorney's Office and the Department of Justice were keeping with this trend of the demonization of all things Muslim when on May 29, 2007 they publicly filed a list naming three-hundred and seven (307) unindicted co-conspirators as part of the case against the Holy Land Foundation for Relief and Development. One of the named unindicted co-conspirators was CAIR. Such an inclusion is particularly insidious and ironic as CAIR is an organization dedicated to fostering acceptance of Muslims in American society and protecting the civil liberties of all Muslim-Americans.

The result of the public labeling of CAIR as an unindicted co-conspirator has resulted in significant inflammatory retorts from the American media, significantly impairing the main mission of CAIR to foster understanding and acceptance of Muslims in American society. Some of the most virulent reaction to the government's naming of CAIR as an unindicted co-conspirator can be seen by the reaction of various weblogging pundits. The website JihadWatch.org writes that with the naming of CAIR "[o]ne would think that would end forever the canny masquerade as a moderate civil rights organization, a charade it has been successfully pulling off for years." Unindicted co-conspirators in Hamas funding case say Muslim civil rights woes increasing, JihadWatch.org, *at* http://www.jihadwatch.org/ archives/016942.php. The website LittleGreenFootballs.com dismisses the civil rights report of CAIR, "one of the

unindicted co-conspirators in the case against Hamas-linked 'charity' the Holy Land Foundation" as "bogus" and "inflated." See Unindicted Co-Conspirators Whining Again, LittleGreenFootballs.com (June 15, 2007), available at http://littlegreenfootballs.com/weblog/?entry=25856_Unindicted_Co-Conspirators_Whining_Again&only; see also Patrick Poole, CAIR Fingered by Feds, FrontPageMagazine.com (June 8, 2007) (advocating that CAIR should be "abandoned by its friends in Congress, the media establishment, academia, and the federal government, due to the Department of Justice's identification of CAIR's terrorist ties").[1]

While the reaction from the many anti-Muslim and right-wing internet groups has been foreseeably hateful, many of the main traditional media outlets have reported on CAIR's inclusion as an unindicted co-conspirator. See Robert Barnes, Case Against Islamic Charity Opens, Washington Post, A06 (July 25, 2007); Greg Krikorian, Islamic Charity's Terrot Trial Starts Soon, L.A. Times (July 23, 2007); Josh Gerstein, Islamic Groups Named in Hamas Funding Case, N.Y. Sun (June 4, 2007). While these articles do not specifically denigrate CAIR, the mere publication of CAIR being named as an unindicted co-conspirator impresses upon the typical member of the American public that CAIR is involved in criminal activity. This is pure guilt by association.

This negative reaction by the American public can be seen in the decline of membership rates and donations resulting from the government's publicizing of CAIR as an unindicted co-conspirator.[2] Furthermore, the loss of support that CAIR receives from the American public and

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[1] Even though these websites may not be considered mainstream media, many people view these sites and the articles. LittleGreenFootballs.com typically averages around 100,000 views a day.

[2] See Abdus Sattar Ghazali, Washington Times Smearing Campaign Against CAIR: A Fresh Sinister Move to Defame American Muslim Organizations, CCUN.org (June 13, 2007); CAIR Membership Plummets,

the damage that this causes their goal of facilitating an understanding of Islam in American society is demonstrated by the abundant amount of hate mail and death threats that CAIR's offices and officers have received since being listed as an unindicted co-conspirator, some of which CAIR has reported to the Federal Bureau of Investigations.

By publicizing CAIR and other Muslim advocacy groups as unindicted co-conspirators, the government has significantly impaired groups engaging in protected free-speech activities by depriving those named groups of any due process rights that they would have had at trial. Being publicly labeled as a criminal organization, CAIR does not have any recourse under the law to fight this baseless accusation. The government is aware that it could never win a case against CAIR in a courtroom, so instead they decide to label and publicize them as unindicted co-conspirators, leading to the loss of American support for the group, and attempting to do in the realm of public opinion what they cannot do through judicial means. This action is clearly violative of CAIR and the other unindicted co-conspirators' constitutional rights, and as such CAIR seeks for the Court to strike its name and every other name from the list of unindicted co-conspirators.

ARGUMENT

I. THE GOVERNMENT'S PUBLIC IDENTIFICATION OF CAIR AND OTHER UNINDICTED CO-CONSPIRATORS VIOLATES THE DEPARTMENT OF JUSTICE'S ATTORNEY GUIDELINES

The public naming of third parties that have not been officially charged with a crime is clearly against the Department of Justice's guidelines in the United States Attorney's Manual. U.S.A.M. 9-11.130 specifically deals with limitations on naming persons or entities as unindicted

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WashingtonTimes.com (June 11, 2007).

co-conspirators. The guideline states that "[t]he practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severely criticized in United States v. Briggs, 514 F.2d 794 (5th Cir. 1975)." U.S.A.M. 9-11.130. Furthermore, the guideline states that:

> [o]rdinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with 'another person or persons known.' The identity of the person can be supplied, upon request, in a bill of particulars. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

U.S.A.M. 9-11.130. Finally, the guideline avers that "[i]n the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments." U.S.A.M. 9-11.130.

While that guideline deals with unindicted co-conspirators identified in indictments, the rationale for the prohibition in the guideline, that an entity identified as a third-party wrongdoer does not have an opportunity to defend itself, applies to any public identification of an uncharged third-party. Thus, U.S.A.M. 9-27.760 states that "[i]n all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-parties." Furthermore, in situations not pertaining to public plea and sentencing proceedings, "federal prosecutors should strive to avoid unnecessary public references to wrongdoing by uncharged third-parties. *With respect to bills of particulars that identify unindicted co-conspirators, prosecutors generally should seek leave to file such documents under seal.*" U.S.A.M. 9-27.760 (emphasis added). The Department of Justice carves out a narrow exception

to this rule, where "[p]rosecutors shall comply ... with any court order directing the public filing of a bill of particulars." U.S.A.M. 9-27-760.

The Department of Justice reasons that public disclosure of unindicted co-conspirators should be avoided because "there is ordinarily 'no legitimate governmental interest served' by the government's public allegation of wrongdoing by an uncharged party, and this is true '[r]egardless of what criminal charges may ... b[e] contemplated by the Assistant United States Attorney against the [third-party] for the future.'" U.S.A.M. 9-27.760 (quoting In re Smith, 656 F.2d 1101, 1106-07 (5th Cir. 1981)). The guidelines then proceed to identify cases in which "[c]ourts have applied this reasoning to preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings." See Briggs, 513 F.2d 794; Finn v. Schiller, 72 F.3d 1182 (4th Cir. 1996); United States v. Anderson, 55 F.Supp.2d 1163 (D. Kan. 1999); United States v. Smith, 992 F. Supp. 743 (D.N.J. 1998).

Finally, U.S.A.M. 9-27.760 states that "[i]n all but the unusual case, any legitimate governmental interest in referring to uncharged third-party wrongdoers can be advanced through means other than those condemned in this line of case."

A. The Government Failed to Exercise Sensitivity to the Privacy and Reputation Interests of CAIR And the Other Uncharged Third-Parties And Did Not Strive to Avoid Unnecessary Public References to Uncharged Third-Parties

The Assistant United States Attorneys' failed to follow the Department of Justice's Attorneys' Manual when they did not "remain sensitive to the privacy and reputation interests" of CAIR and the other uncharged third parties in their public filing of the list of unindicted co-conspirators. See U.S.A.M. 9-27.760. Furthermore, the Assistant United States Attorneys

violated the Department of Justice guidelines by not "striv[ing] to avoid unnecessary public references to wrongdoing by uncharged third-parties."

CAIR has a variety of privacy and reputation interests that were impinged by the public identification of its inclusion on the list of unindicted co-conspirators. As stated in the introduction, CAIR's main mission is to proliferate mutual understanding between Muslim-Americans and other members of the public in the United States and to protect the civil liberties of Muslim-Americans. In order to forward such goals, CAIR relies upon maintaining a level of legitimacy in the eyes of the American public. The public naming of CAIR as an unindicted co-conspirator undermines this goal, as now the name of CAIR has been smeared by association with a criminal case that ostensibly involves the charitable funding of a 'terrorist' group.

One of the main obstacles to the acceptance of Islam within the United States and the upholding of Muslim-Americans' civil liberties, is the unfounded belief that Islam is a violent religion that fosters and promotes the use of terrorism. CAIR has been working to educate the American public about the true non-violent nature of Islam and its followers and trying to dissociate the connection between "Muslims" and "terrorists." Since its founding, CAIR has on numerous occasions publicly condemned any acts of terrorism. However, the public naming of CAIR as an unindicted co-conspirator in a terrorism conspiracy case, turns the advocate into the victim. Now CAIR's name is smeared with the "terrorist" label, and CAIR does not have the ability to fight such an accusation as it has not been afforded a platform for vindication through indictment.

In naming CAIR as an unindicted co-conspirator, the government should have been aware and acted to protect the reputational interests of CAIR. However, in a bid to circumvent the

protections of due process, the government sought to smear CAIR's name by labeling it as an unindicted co-conspirator, hoping to shut down the Muslim advocacy group through extra-judicial means. Such abuse of prosecutorial power is clearly prohibited by the Department of Justice guidelines.

B. The Government Did Not Have a Legitimate Governmental Interest in Publicly Releasing the Name of CAIR and the Other Unindicted Co-Conspirators

Furthermore, the Assistant United States Attorneys had no legitimate governmental interest in publicly releasing the name of CAIR and the other unindicted co-conspirators. As the guidelines aver, "there is ordinarily 'no legitimate governmental interest served' by the government's public allegation of wrongdoing by an uncharged party." U.S.A.M. 9-27.760. The government has no significant justification for such a disclosure. Instead, the disclosure is the vindictive attempt of the government to smear a group which has been critical of the government's actions in aggressively and selectively prosecuting Muslim groups and persons.

The only use of the unindicted co-conspirator designation is for hearsay purposes at trial. If the government can demonstrate to the Court that a person or entity is a co-conspirator, the statements of that co-conspirator are excepted from the hearsay rule and admissible at trial. See Fed. R. Evid. 801(d)(2)(E). Therefore, the naming of unindicted co-conspirators is for a very specific evidentiary purpose. No other rationale exists for such a practice, and the public naming of such co-conspirators does not enhance the government's ability to make co-conspirators' statements admissible.

In most scenarios, the government has a legitimate interest in *not* disclosing the names of unindicted co-conspirators because there may be ongoing criminal investigations "and the

government has a strong interest in preventing disclosures that could tip off unindicted coconspirators or otherwise compromise such investigations." United States v. McGee, 408 F.3d 966, 973 (7th Cir. 2005) (finding that the government has a strong interest in preventing disclosure of unindicted co-conspirators in the context of the pre-sentence report). Furthermore, there may be a legitimate public interest in access to the trial proceedings, *after* the trial has ended, necessitating the disclosure of the co-conspirator whose statements were admitted into evidence during the trial, but this public reason does not exist during the preliminary stages of the trial. See United States v. Ladd, 218 F.3d 701, 704 (7th Cir. 2000) ("[W]hen the hearsay statement of an unindicted coconspirator is entered into evidence, it is a very different situation than one in which the alleged coconspirator is identified by the Government during a preliminary phase of the case."). Furthermore, some courts have found that the government's non-disclosure to protect "an individual's privacy or reputational interests may, in some circumstances, rise to the level of a compelling government interest and defeat" the public's right of access. In re Capital Cities/ABC, Inc's Application for Access to Sealed Transcripts, 913 F.2d 89, 94 (3d Cir. 1990) (citing United States v. Smith, 776 F.2d 1104, 1112-13 (3d Cir. 1985)). Therefore, it is non-disclosure that is a legitimate interest, not disclosure of the names of the unindicted co-conspirators. Essentially, the only possible legitimate interest that the government could even contend warrants the public disclosure of the unindicted co-conspirators is the public's interest to access to the trial to ensure the legitimacy of the criminal justice system. However, this interest does not overcome the privacy and reputational interests of the unindicted co-conspirators when the government seeks to disclose their names before the trial, and in some circumstances does not overcome the privacy and reputational interest of the unindicted co-conspirators after the trial.

Finally, while the guidelines carve out an exception in the case where a court orders the public filing of a document identifying unindicted co-conspirators, no such order exists in this case. See U.S.A.M. 9-27.760. The Court has never ordered the government to file its bill of particulars, trial brief, or list of unindicted co-conspirators publicly. Thus, this exception is unavailable and there is no other legitimate government interest in the public filing of such an incendiary document. The only reason for the public disclosure of the list of unindicted co-conspirators before the trial is the government's vindictive smearing of Muslim advocacy groups and Muslim activists that have been outspoken against the government's prosecution of other Muslims.

C. The Government Should Have Sought Other Means To Invoke the Co-Conspirator Hearsay Exception Instead of Attaching the List of Unindicted Co-Conspirators to Their Trial Brief

1. The Government Should Have Sought Leave to File the List of Unindicted Co-Conspirators Under Seal

The Department of Justice guidelines specifically state that "[w]ith respect to bills of particulars that identify unindicted co-conspirators, prosecutors generally should seek leave to file such documents under seal." U.S.A.M. 9-27.760. In this case, as the defense clearly had a right to be informed of the statements that the government intended to enter into evidence under the co-conspirator hearsay exception, the government should have filed the list of unindicted co-conspirators under seal. Such a procedure is common practice for prosecutors when they want to preserve a legitimate future investigatory interest. See Briggs, 514 F.2d at 805 (stating that public identification of unindicted coconspirators "may be tempered by protective orders."); McGee, 408 F.3d at 973 (finding that governmental interest in future investigations of co-

conspirators necessitates the bill of particulars naming the co-conspirators remaining sealed); see also Smith, 776 F.2d at 1112-13 (litigating a case where the press wanted access to a bill of particulars naming co-conspirators that was sealed by the government to protect the privacy rights of the co-conspirators). However, as stated above, the government was not concerned about preserving any legitimate interests, but rather about winning a battle in the court of public opinion by smearing the name of a legitimate advocacy group.

In exercising its discretion on whether to seal certain documents and filings, the Court must employ a balancing test, weighing "the public's common law right of access against the interests favoring nondisclosure." S.E.C. v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993) (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978)). The public does not have any strong interest in its right of access to the list of unindicted co-conspirators. The purpose of using an unindicted co-conspirator is for the narrow purpose of attempting to obtain an evidentiary exception to the hearsay rule. Besides this purpose, no other reason exists for any use of an unindicted co-conspirator.

Furthermore, during the trial, the government will have to meet the test enunciated in Bourjaily v. United States, 483 U.S. 171, 175 (1987). At that time, in order to establish the admissibility of the coconspirator statements, the government will likely have to reveal the identity of the coconspirator. At that point, the public will have access to the names of the unindicted coconspirators, and will view these names in their proper evidentiary context. See Smith, 776 F.2d at 1114n.5 (stating that even though the names may have to be disclosed during the trial, "[t]his does not mean, however, that the court was required to condone unnecessary risk of serious injury to third parties."). In its current form, the list of unindicted coconspirators does

not serve to bolster the public's knowledge about the trial proceedings, but rather as observed without its proper evidentiary context, the list offers the public a distorted and biased view. A reasonable member of the public would view an organization or individual's inclusion on a list of unindicted co-conspirators as a connection to some sort of wrongdoing or criminal activity.

Therefore, the interests favoring non-disclosure are very strong. Courts have found that when the government is seeking to protect unindicted coconspirators' privacy and reputational interests from the harm of disclosure by sealing the identifying documents, this protection of privacy rises to the level of a compelling governmental interest that defeats the public's right to access. Id. at 1112. See also United States v. Anderson, 799 F.2d 1438 (11th Cir. 1986). Here, the disclosure can and has severely harmed the privacy, reputational, and economic interests of the uncharged third-parties. The naming of these persons and entities as unindicted coconspirators to an alleged "terrorism" conspiracy has harsh stigmatizing effects. These individuals and entities will suffer real economic and physical effects from this stigmatization. Employment will be harder to maintain and/or find. These named third parties are now more likely to suffer physical harm and harassment from certain bigoted members of the public as a result of being labeled 'terrorists.'[3] With CAIR, the formal and public co-conspirator accusation has already resulted in a precipitous decline in their donations and, therefore, their ability to effectively advocate on the part of Muslim-Americans. Simply stated, the private interests favoring non-disclosure through the sealing of the trial brief and the attached list of unindicted

[3] See Council on American-Islamic Relations, The Status of Muslim Civil Rights in the United States 2007, available at http://www.cair-net.org/pdf/2007-Civil-Rights-Report.pdf (indicating that in 2006, there were 2,467 civil right complaints processed by CAIR, increasing 25.1 percent from 2005). However, this harm is not merely theoretical, as CAIR has already received hate mail and death threats from members of the American public because of their inclusion as an unindicted co-conspirator.

co-conspirators far outweigh the public right to access of court documents. Thus, the government should have sought to file the list under seal, and the Court should have granted the request.

2. The Government Should Have Identified the Identity and Status of a Co-Conspirator Through the Introduction of Proof Sufficient to Invoke the Co-Conspirator Hearsay Exception Without Subjecting CAIR and the Other Uncharged Third Parties to the Burden of a Formal Accusation

Furthermore, there is no reason for the purpose of specifying the charges in the indictment to publicly identify the co-conspirators, as it would have been sufficient for the government to allege that the defendants conspired with "another person or persons known," without actual identification. See U.S.A.M. 9-11.130. The defense could have been fully informed of the charges in the indictment by the identification of the co-conspirators through a bill of particulars filed under seal. This would have allowed the government to identify the co-conspirators at trial through the introduction of proof sufficient to invoke the co-conspirator hearsay exception, without formally accusing CAIR and the other uncharged third-parties of participation in the conspiracy. There is absolutely nothing in Federal Rule of Evidence 801(d)(2)(E), the co-conspirator exception, that necessitates the public filing of a list of the co-conspirators before trial. The burden of proof to establish the admissibility of the statements remains the same whether the identity of the co-conspirators was published before trial, or brought up during the trial. In fact, while there is no due process violation in the government's identification of unindicted co-conspirators during the trial to obtain admission of the co-conspirator's statements, pretrial public identification of unindicted co-conspirators is fundamentally a violation of those unindicted co-conspirators' Fifth Amendment due process

rights. See Anderson, 55 F.Supp.2d at 1169 ("The mere fact that the government eventually needed legitimately to let the cat out of the bag at trial, however, does not alter the court's conclusion that the movants' pretrial public identification was a violation of due process because there is an important distinction between being unqualifiedly identified in a pretrial document as an 'unindicted coconspirator' and being identified as a coconspirator at trial for purposes of 801(d)(2)(E).").

II. THE GOVERNMENT'S PUBLIC DISCLOSURE OF CAIR AND OTHER UNCHARGED ENTITIES AND INDIVIDUALS AS UNINDICTED CO-CONSPIRATORS VIOLATES THE UNCHARGED PARTIES' FIFTH AMENDMENT DUE PROCESS RIGHTS

In publicly naming CAIR and the other unindicted co-conspirators during the pre-trial proceedings, the government has clearly violated the uncharged parties' Fifth Amendment due process rights. The Fifth Amendment guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law...." U.S. Const. amend. V. The Fifth Circuit and other courts have unequivocally held that the public naming of unindicted co-conspirators in pre-trial proceedings violates the due process rights of the uncharged parties. In re Smith, 656 F.2d 1101, 1106-07 (5th Cir. 1981); United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); United States v. Smith, 776 F.2d 1104, 1112-13 (3d Cir. 1985); United States v. Anderson, 55 F.Supp.2d 1163 (D. Kan. 1999).

A. Fifth Amendment Due Process and the Public Naming of Unindicted Co-Conspirators

1. Fifth Circuit Case Law

The seminal case on the issue is United States v. Briggs. In Briggs, the Fifth Circuit found that the public naming of unindicted co-conspirators in an indictment by a grand jury

violated the unindicted co-conspirators' Fifth Amendment due process rights. 514 F.2d at 796. The Fifth Circuit employed a balancing test, weighing the government's interest in publicly naming the unindicted co-conspirators versus the unindicted co-conspirator's liberty and property interest in their privacy and reputation. Id. at 806. The Fifth Circuit held that:

> having balanced the governmental interest in the grand jury's functions and the harm caused thereby to individuals ... the grand jury acted beyond its historically authorized role, and we are shown no substantial interest served by its doing so. The balance tips wholly in favor of the adversely affected appellants. The scope of due process afforded them was not sufficient.

Id.

In Briggs, a grand jury issued an indictment charging a conspiracy to violate various federal statutes regarding a group's political demonstrations and disruptions at the Republican Party National Convention in 1972. Id. at 796. The indictment named seven defendants but also specifically named three unindicted co-conspirators. Id. Two of the three unindicted co-conspirators filed a petition with the trial court to have their names expunged from the indictment, claiming "injury to their good names and reputations and impairment of their ability to obtain employment." Id. at 797. The trial court denied the petition, finding that since the unindicted co-conspirators were not defendants, they did not have standing to object to their inclusion in the indictment. Id. After the trial and the acquittal of the defendants on the charges, the unindicted coconspirators appealed the district court's decision to the Fifth Circuit.

The Fifth Circuit found that a person's good name, reputation and ability to obtain employment "are substantial and legally cognizable interests entitled to constitutional protection against official governmental action that debases them." Id. (citing Wisconsin v. Constantineau, 400 U.S. 433 (1971)). The Court continued that "a person's good name, reputation, honor, or

integrity" are protected and that "[i]t would be naive" not to find that official acts that negatively characterize an individual "will expose him to public embarrassment and ridicule." Id. 797-98 (quoting Constantineau, 400 U.S. at 435-36). Furthermore, accusing one publicly of being a criminal is "a stigma, an official branding of a person, the imposition of a degrading and unsavory label."[4] Id. at 798 (quoting Constantineau, 400 U.S. at 437).

In the context of Briggs, the Court found that the unindicted co-conspirators had a strong, cognizable interest in the:

> protect[ion of] their reputations ... against the opprobrium resulting from being publicly and officially charged by an investigatory body of high dignity with having committed serious crimes. In addition to being serious, the offenses charged were given wide notoriety and were peculiarly offensive. An alleged conspiracy to disrupt the national nominating convention of a major political party strikes at the core of democratic institutions.[5]

Id. at 799.

Furthermore, the Court found that in such cases where the reputation and dignity of a

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[4] The Fifth Circuit also invokes other precedent in finding that a person's good name and reputation is a liberty interest protected by the Fifth Amendment. The Fifth Circuit discussed Boards of Regents v. Roth, 408 U.S. 564 (1972), where "a teacher's interest in liberty would be adversely affected in the state, in declining to rehire him, made any charge against him that might seriously damages his standing and associations in his community." Briggs, 514 F.2d at 798. The Fifth Circuit also references how the labeling of someone as an unindicted co-conspirator is similar to the body of law regarding defamation in which "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third person from associating or dealing with him." Id. at 798n.5 (citation omitted).

Moreover, the Fifth Circuit also recognizes that businesses and organizations have a right to their good names and reputations. See Application of American Society for Testing and Materials, 231 F. Supp. 686 (E.D. Pa. 1964). Specifically, the Fifth Circuit cites to Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), where "[t]he legally protected right... was that of a charitable organization to carry on its work, free from defamatory statements of the kind discussed. Briggs, 514 F.2d at 798.

The Fifth Circuit also found that the public naming of persons as unindicted co-conspirators has economic effects and that the "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference... [is] within the 'liberty and 'property' concepts of the Fifth Amendment... It would be unrealistic to deny that an accusation, even if unfounded, that one has committed a serious felony may impinge upon employment opportunities." Id.

[5] The Fifth Circuit "reject[ed] as frivolous the contention that if appellants have suffered injury it is at the hands of only the news media to whom they should repair for relief." Id. at 799.

person or entity is impinged by the public naming as an unindicted co-conspirator, that person or entity deserves due process as "[a person] should not be subject to a quasi-official accusation of misconduct which he cannot answer in any authoritative forum." Id. at 802. The Court then continues in analogy that:

> [t]he medieval practice of subjecting a person suspected of a crime to the rack and other forms of torture is universally condemned; and we see little difference in subjecting a person to the torture of public condemnation, loss of reputation, and blacklisting in their chosen profession, in the manner here attempted by the grand jury. The person so condemned is just as defenseless as the medieval prisoner and the victim of the lynch mob..."

Id. at 803.

While the Court finds a strong, cognizable interest in the uncharged third-persons in their reputation, good-name, and economic interests, the Court finds that the government has no legitimate interest in the public naming of unindicted co-conspirators in an indictment. The Court holds that there are no "legitimate interests of the government that are served by stigmatizing private citizens as criminals while not naming them as defendants or affording in this case, indeed, affirmatively opposing access to any forum for vindication. The Department of Justice suggests nothing that rises to the dignity of a substantial interest." Id. at 804. The Fifth Circuit finds as unconvincing the implication by the government that the naming of the unindicted co-conspirators was needed to forward the evidentiary goal of the co-conspirator hearsay exception.[6] The Fifth Circuit explains that:

If the prosecutorial goal is to expose the named defendants to the broadest possible

[6] The Fifth Circuit also holds that there is no legitimate governmental interest in inducing a person to testify through their public 'outing' in the indictment. "If the implied governmental interest of necessity to prove the conspiracy relates to inducing persons to testify as prosecution witnesses, the government has available other and less injurious means than those employed in this case." Id. at 805.

> attribution of the acts of others, it can be attained without actually naming non-defendants as unindicted conspirators. The government may introduce evidence at trial of a person's participation in a conspiracy and thereby ascribe his acts and statements to the co-conspirators even if that person is not named in the indictment.

Id. at 805 (citing Cooper v. United States, 256 F.2d 500, 501 (5th Cir. 1958) and Heflin v. United States, 132 F.2d 907, 909 (5th Cir. 1943)).

Finally, relevant to our case, the Fifth Circuit puts the public naming of the anti-war activists as unindicted co-conspirators in context. The Court explains that:

> [n]ine of the ten persons named in the indictment were active in the Vietnam Veterans Against the War, an anti-war group.... *There is at least a strong suspicion that the stigmatization of appellants was part of an overall governmental tactic directed against disfavored persons and groups. Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extra-judicial punishment or to chill their expressions and associations, is not a governmental interest that we can accept or consider.* It 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. It would be intolerable to our society."

Id. at 805 (emphasis added).

In In re Smith, 656 F.2d 1101 (5th Cir. 1981), the Fifth Circuit expanded the holding in Briggs beyond indictments. The Court found that the inclusion of the petitioner's name in the factual resumes during the plea colloquy was "a violation of his liberty and property rights guaranteed by the Constitution" and that the motion to strike his name and seal the document should have been granted. Id. at 1107.

In that case, Smith was the head of an agency under investigation for a bribery conspiracy and his name appeared in the factual resumes filed in connection with the guilty pleas of the two defendants. Id. at 1101. During the plea hearing, the Assistant United States Attorney "read in open court and filed in the criminal case a factual resume prepared by her for the purposes of the

plea hearing.... the resume... state[d] that [the defendant] had paid sums to other unnamed ... employees, but also specifically named [Smith]." Id. at 1102. Following the plea hearing, the media widely reported the story of the "bribery scandal, and, as was to be expected when any person in position of responsibility and power is implicated in such a scandal, the news media reported that, as a matter of public and official courtroom record, Mr. Smith had been paid bribe monies...." Id. at 1104. Smith filed motions in the criminal case seeking for the court to strike his name from the factual resumes. Id. The district court denied the motions, and the Fifth Circuit overturned the district court's decision. Id.

The Fifth Circuit employed the balancing test under Briggs. The Court stated that:

> The case involves the struggle between society's interests in bringing those guilty of violating the law to justice and an individual's interest in preserving his personal reputation. Although our Constitution provides for both interests to exist, oftentimes the judiciary is called upon to balance those interests when a conflict arises between them. Today, after balancing the interests, we find the scales of constitutional liberty tip in favor of the individual.

Id. at 1102.

Smith claimed "that the accusations of a criminal offense, by inclusion of his name in the factual resume, has so damaged his name, reputation and economic interests that the government's actions have violated his liberty and property interests contrary to [the Fifth Amendment's due process protection]." Id at 1105. The Fifth Circuit agreed.

The government in this case could not articulate a legitimate interest in naming Smith in the factual resume, but instead argued that Briggs only forbids the naming of unindicted coconspirators by a federal grand jury in an indictment. The Court rejected this argument, holding that:

> [t]he point made in the Briggs decision is that no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights. We can think of no reason to distinguish between an official defamation originating from a federal grand jury or an Assistant United States Attorney. The Briggs decision would be rendered meaningless if it could be so easily circumvented by actions of an Assistant United States Attorney.

Id. at 1106. The Fifth Circuit then further finds that "no possible legitimate purpose could have been served by these official condemnations." Id. The Court continues:

> Certainly the purposes of Rule 11 were not advanced by the attack on the Petitioner's good name. Regardless of what criminal charges may have been contemplated by the Assistant United States Attorney against the Petitioner for the future, we completely fail to perceive how the interests of criminal justice were advanced at the time of the plea hearings by such an attack on the Petitioner's character. The presumption of innocence, to which every criminal defendant is entitled, was forgotten by the Assistant United States Attorney in drafting and reading aloud in open court the factual resumes which implicated the Petitioner in criminal conduct without affording him a forum for vindication.

Id. at 1106-07.

Therefore, the Fifth Circuit's holding in In re Smith makes clear that a public smearing of a person's reputation by the government without affording that person any chance to clear his name is a violation of the Fifth Amendment, no matter if it occurs in an indictment or in any other official government filing. Furthermore, In re Smith buttresses Briggs in averring that there can be no legitimate governmental interest in an official smear campaign.

2. Other Jurisdictions' Case Law

United States v. Anderson, 55 F.Supp.2d 1163 (D. Kan. 1999), most closely resemble the case at bar as to the form of the public disclosure of the unindicted co-conspirators. In Anderson, the unindicted coconspirators, who were "[w]idely known and highly respected health care lawyers," moved the court to expunge their names from a pretrial memorandum and from the trial transcripts. Id. at 1163. The District Court of Kansas held that there was no due process

violation stemming from the government's identification of them at trial, but the pretrial public identification of the lawyers as unindicted co-conspirators violated their due process rights and entitled them to expungement of their names from the pretrial memorandum. Id.

In Anderson, while the bill of particulars which identified all co-conspirators was filed under seal, three of the unindicted co-conspirators were identified in a memorandum of support filed by the government. Id. at 1165. After the filing, "[t]he government's identification of the movants as coconspirators was notoriously reported in the legal and healthcare community." Id. at 1165-66.

Following the precedent of Briggs and In re Smith, the court undertook "a due process balancing inquiry, balancing the interests of the government in naming unindicted coconspirators against the individual harm that stems from being accused without having a forum in which to obtain vindication." Id. at 1167.

The court found that the movants suffered serious injury as "there were numerous press reports affecting the movant's good names and reputations. It is undisputed that the movants here are widely known and highly respected health care lawyers, and the government has not tried to refute their claim that being labeled as criminal coconspirators injured their reputations." Id. at 1168.

The court continues in finding no legitimate governmental interest that:

> the movants suffered a violation of due process when the government publicly named them in its moving papers on the conflict of interest issue.... [T]he court can find no reason why the government might have 'forgotten' the presumption of innocence in such a public pleading which would 'rise to the dignity of a substantial interest.' The very real stigmatization suffered by the movants from this government action far outweighs the nonexistent government interest in publicly naming them as coconspirators.

Id. (citing Briggs, 514 F.2d at 804 and In re Smith, 656 F.2d at 1107). Furthermore, while the government insinuated that the identification of the co-conspirators was part of an effort to illustrate the admissibility of the evidence it intended to enter under the co-conspirator hearsay exception, the court finds that "the government provides no explanation for why its moving papers were not submitted under seal." Id. at 1168n.5.

The government also tried to argue that the identification of the unindicted co-conspirators was inevitable, as the government would have to identify the co-conspirators at trial in order to demonstrate the admissibility of their statements under Fed. R. Evid. 801(d)(2)(E). Id. at 1169. The court found that there was no due process violation in the identification of the unindicted co-conspirators at trial.[7] Id. The court then immediately counters that:

> [t]he mere fact that the government eventually needed legitimately to let the cat out of the bag at trial, however, does not alter the court's conclusion that the movants' pretrial public identification was a violation of due process because there is an important distinction between being unqualifiedly identified in a pretrial document as an 'unindicted coconspirator' and being identified as a coconspirator at trial for purposes of 801(d)(2)(E).[8]

Id. at 1169. See also United States v. Smith, 776 F.2d 1104, 1114n.5 (3d. Cir. 1985) (finding

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[7] The court found that "[t]he government clearly had a substantial interest in identifying these coconspirators for 801(d)(2)(E) purposes. The governmental interest outweighed the movants' private injuries because their private injuries, while important, must yield to the proper administration of criminal justice under these circumstances. Id. (citing United States v. Durland, 575 F.2d 1306, 1310 (10th Cir. 1978)).

[8] The court further explains that "[p]ursuant to the court's ruling, and 801(d)(2)(E) conspirator is not necessarily a criminal." This is because:

> [a]ll that is required is that he or she be a 'joint venturer' in a common plan. In fact, at the government's request, the court found at trial that Ms. Kaiser and Mr. Holden were 'coconspirators' for purposes of Rule 801(d)(2)(E) in the sense that they were participants of a common plan to put together and facilitate and operate and carry out the relationship between [two health care organizations] for the continuum of care. They participated in a joint venture, if you will, for the purposes of 801(d)(2)(E). And whether there was criminal intent on the part of any or all of those individuals [was not reached].

Id. at 1169.

that while the court recognizes that names must be disclosed during trial, "this does not mean, however, that the court was required to condone unnecessary risk of serious injury to third parties"). The Fifth Circuit continues that while:

> the government's identification of the movants as 801(d)(2)(E) coconspirators at trial does not allow for the reasonable inference that they are criminals ... the government's unqualified identification of the movants as unindicted coconspirators in its pretrial moving papers allows for the reasonable inference that they have been labeled criminals.

Id. at 1169-70. Therefore, "the movants suffered a due process violation." Id. at 1170.

3. An Unindicted Co-Conspirators Privacy Interest Versus the Public's Right to Access to Court Records

The other situation in which the privacy and reputational interests of unindicted co-conspirators arise is where members of the press seek access to sealed court records, citing their common law and First Amendment rights to access. These cases have overwhelmingly held that the privacy and reputation of unindicted co-conspirators are compelling governmental interests that override the right of the press to access court records.

In United States v. Smith, 776 F.2d 1104 (3d Cir. 1985), the Third Circuit found that "the need to protect individual privacy rights may, in some circumstances, rise to the level of a compelling governmental interest and defeat First Amendment right of access claims." Id. at 1112. In this case, the press sought access to the list of unindicted co-conspirators that was attached to the bill of particulars and was sealed by the court, through the request of the government. Id. at 1106. The district court had found that disclosure of the list of unindicted co-conspirators:

> would subject the unindicted co-conspirators to publicity stigmatizing them as having been named by the United States Attorney as alleged participants in the conspiracy alleged in the indictment at a time when they have not been charged and would have no

> judicial forum in which to defend against the accusations. The publicity generated from release of the names to the media would probably subject the persons named therein to embarrassment, annoyance, ridicule, scorn, traduction, and loss or repetition in the community.

Id. at 1106-07.

The Third Circuit, using language similar to Briggs, In re Smith, and Anderson found that:

> [i]f published, the sealed list will communicate to the general public that the named individuals in the opinion of the chief federal law enforcement official of the District, are guilty, or may be guilty, of a felony involving breaches of the public trust. This broad brush assertion will be unaccompanied by any facts providing context for evaulating the basis for the United States Attorney's opinion with respect to any given individual.... Finally,... the named individuals have not been indicted and, accordingly, will not have an opportunity to prove their innocence at a trial. This means that the clearly predictable injuries to the reputations of the named individuals is likely to be irreparable. The individuals on the sealed list are faced with more than embarrassment. It is no exaggeration to suggest that publication of the list might be career ending for some. Clearly, it will inflict serious injury on the reputations of all.

Id. at 1113-14. Based on this reasoning, the Third Circuit held that "[i]n these circumstances, we have no hesitancy in holding that the trial court had a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals."[9] Id. at 1114.

A number of other cases also held that protection of an unindicted co-conspirator's privacy rights is a compelling governmental interest that overrides the press' right to access. See United States v. Anderson, 799 F.2d 1438, 1442 (11th Cir. 1986) ("A request fo a list of 'unindicted co-conspirators'... is a discovery request that is not a matter of public record."); In re

[9] This case also has a lengthy analysis of the ways in which a bill of particulars is similar to an indictment, thus, bolstering the holding of In re Smith, that Fifth Amendment due process claims should be expanded beyond the indictment. The Third Circuit states that "[h]istorically and functionally, the bill of particulars is closely related to the indictment.... [W]e believe Rule 7(f) provides some evidence that bills of particulars were regarded by the drafters of the rules as supplements to the indictment..." Id. at 1111.

Capital Cities, 913 F.2d 89, 90 (3d Cir. 1990) (recognizing that "the government can assert individual privacy interests in attempting to meet its burden of demonstrating the compelling interest that justifies denial of a media organization's First Amendment right to access to court records"); Matter of Search Warrants Issued on June 11, 1988, for the Premises of Three Buildings at Unisys, Inc., 710 F. Supp. 701, 704 (D. Minn. 1989) ("Privacy interests may be compelling enough to overcome the public's first amendment interest in disclosure.").

B. The Briggs Balancing Test Applies to Facts of this Case to Determine if the Unindicted Co-Conspirator's Have Been Denied Their Fifth Amendment Due Process Rights

First, before analyzing CAIR and the other unindicted co-conspirators' privacy, reputational, and economic interests, it must be noted that the same balancing test occurs no matter if the unindicted co-conspirators' names appear in the indictment, the bill of particulars, any other pretrial filings, or in sentencing filings. The operative problem that triggers the balancing test enunciated in Briggs is the situation where a person or entity has been singled out and identified as a participant in criminal activity, but that person or entity does not have a forum to attempt to vindicate themselves from that allegation. The particular filing where this labeling occurs is not relevant. For instance, courts have engaged in a balancing of the uncharged third parties' privacy and reputational interests where the government publicly named them in the indictment, see Briggs, 514 F.2d 794, in a factual resume during the plea colloquy, see In re Smith, 656 F.2d 1101, and in a pretrial memorandum of support, see Anderson, 55 F.Supp.2d 1163, in an attachment to a bill of particulars, see Smith, 776 F.2d 1104. The only place that courts have allowed for identification of unindicted co-conspirators is during the actual trial itself. See Anderson, 55 F.Supp.2d at 1169. But see United States v. Crompton Corp., 399

F.Supp.2d 1047 (N.D. Cal. 2005) (finding that a plea agreement is not criminal, but contractual in nature, and that the inclusion of a person's name in the plea agreement to indicate that the person does not have non-prosecution protection does not allege any criminal activity on the part of that person, thus not impinging any due process rights).[10]

In the case at bar, the list of unindicted co-conspirators was filed as an attachment to the government's trial brief, informing the court of the evidentiary issues that it anticipated at trial. As in Anderson, the government will have the chance to identify these individuals listed as unindicted co-conspirators during the trial as part of their argument for applying the co-conspirator hearsay exception. Instead, though, the government publicly identified these persons and entities in a pretrial filing. The filing is very similar to a bill of particulars, which has necessitated the balancing test in the past.[11] See Smith, 776 F.2d 1104. However, no matter the form that the Assistant United States Attorneys chose to publicly identify the unindicted co-conspirators, the public identification of the unindicted co-conspirators clearly implicates the privacy, reputational and economic interests of all the named uncharged parties. As the Fifth Circuit warned in In re Smith, there is "no reason to distinguish between an official defamation originating from a federal grand jury or an Assistant United States Attorney. The Briggs decision would be rendered meaningless if it could be so easily circumvented by actions of an Assistant

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[10] That case also strongly holds that "[d]istrict courts cannot refuse to expunge the name of an unindicted coconspirator from an indictment because no government interest is sufficient to justify 'stigmatizing private citizens as criminal' without affording them 'access to any forum for vindication.'" Crompton Corp., 399 F.Supp.2d at 1049 (quoting Briggs, 514 F.2d at 804).

[11] Furthermore, in almost every case that the government has filed a bill of particulars containing the names of unindicted co-conspirators, the government seeks leave to file it under seal. See, e.g., Anderson, 55 F.Supp.2d 1163; Smith, 776 F.2d 1104. This suggests that most Assistant United States Attorneys are aware of the sensitive nature of publicly revealing unindicted co-conspirators' names.

United States Attorney" by changing the form of the public smearing. See In re Smith, 656 F.2d at 1102.

Therefore, because the reputational, privacy, and economic interests of the unindicted co-conspirators are clearly endangered by their public pretrial identification by the government, the Briggs balancing test should be employed weighing the unindicted co-conspirators' liberty and property interests against any of the government's legitimate interests in publicizing the unindicted co-conspirators' names.

C. The Unindicted Co-Conspirators Have a Strong and Compelling Interest in the Protection of Their Good Name, Reputation, Privacy, and Economic Well-Being

Each and every one of the over three hundred listed unindicted co-conspirators, whether an individual or an organization, suffer massive harm to their good names, their reputations, their privacy, and their economic well-being. Included on the list are main political members of Hamas, both living (Mousa Abu Marzook and Khalid Mishal) and dead (Abdel Aziz Rantisi and Ahmed Yassin), persons who have pled guilty to material support of Hamas (Mohamed El Shorbagi), persons who have been acquitted of engaging in a Hamas conspiracy (Mohammad Salah and Adbelhaleem Ashqar), persons awaiting trial (Ismail Elbarasse), a slew of person that have never been indicted, and a variety of organization engaged in advocacy on the part of Muslim Americans and Palestinians.

In this case, the public smear accomplished by the public naming of all of these unindicted co-conspirators is even greater than any case in the past. In Briggs and the other cases, the branding that was accomplished by publicly naming the unindicted co-conspirators was that of 'criminal.' The Briggs Court found that the unindicted co-conspirators had a due process

right to "protect their reputations ... against the opprobrium resulting from being publicly and officially charged by an investigatory body of high dignity with having committed a serious crime. Briggs, 514 F.2d at 799. In In re Smith, the Fifth Circuit was again concerned with the public naming of the petitioner which "implicated [him] in criminal conduct without affording him a forum for vindication. 656 F.2d at 1106-07. Furthermore, in Anderson, the court was concerned with the unindicted co-conspirators damaged reputations from "being labeled as criminal coconspirators." 55 F.Supp.2d at 1168. In this case, however, the damage to the reputation of the unindicted co-conspirators' is two-fold. First, as stated in the aforementioned cases, the unindicted co-conspirators are branded as "criminals" with all the accompanying damage to their reputations. Also, however, because of the nature of this case, the unindicted co-conspirators are labeled as "terrorists" by their association to a "terrorist" conspiracy, thus multiplying any damage done to their reputations and good names. The naming of the unindicted co-conspirators as terrorist-criminals is a huge stigma, and "an official branding of a person" of the most "degrading and unsavory label." See Briggs, 514 F.2d at 798. Like in Briggs, where "the offenses charged... were peculiarly offensive" as "[a]n alleged conspiracy to disrupt the national nominating convention of a major political party strikes at the core of democratic institutions," here, in the current political climate, the offense charged of participating in a terrorist conspiracy is 'peculiarly offensive,' striking at the core fear of the American public. See id. at 799.

Furthermore, this case generally and the list of unindicted co-conspirators specifically have gained wide notoriety through many media outlets, thus increasing the damage done to the unindicted co-conspirators' privacy, reputations and economic well-being. See id. (finding

widespread coverage of the trial increased the damage done to the reputation of the unindicted co-conspirators). As in In re Smith, where "the news media carried many accounts concerning the ... bribery scandal, and,... [where] the news media reported that, as a matter of public and official courtroom record," the defendant was involved in the scandal, here the mainstream media has reported that CAIR and some of the other unindicted co-conspirators have been implicated in the 'terrorism' conspiracy. See, e.g., Robert Barnes, Case Against Islamic Charity Opens, Washington Post, A06 (July 25, 2007) (reporting that "the case is also drawing intense scrutiny in the American Muslim community because of a listing of 300 individuals and groups named in the indictment as unindicted co-conspirators, including established organizations such as the Council on American-Islamic Relations."); Greg Krikorian, Islamic Charity's Terror Trial Starts Soon, L.A. Times (July 23, 2007) (writing that 300 individuals and groups were named as unindicted co-conspirators, including CAIR and the Islamic Society of North America ("ISNA")); Josh Gerstein, Islamic Groups Named in Hamas Funding Case, N.Y. Sun (June 4, 2007) (indicating that the unindicted co-conspirator label was applied to CAIR, ISNA, and the North American Islamic Trust, as well as 300 others). Furthermore, the list of unindicted co-conspirators has spread and gained notoriety through non-mainstream media, as well, including various "anti-terrorism" weblogs. These weblogs are often extremely biased and inaccurate in their reporting, leading to even more severe damage to the reputation of the unindicted co-conspirators. See, e.g., Feds Name CAIR in Plot to Fund Hamas, WorldNetDaily.com (June 4, 2007) (stating that CAIR, "which brands itself as a mainstream promoter of civil rights has been named with two other prominent U.S. Islamic groups as an 'unindicted co-conspirator' in a plot to fund the terrorist group Hamas"); HLF Trial Update, Counterterrorismblog.org (June 29,

2007) (writing that "prosecutors have recently named [CAIR] and [ISNA] as Muslim Brotherhood front groups in addition to unindicted co-conspirators" and attaching the unindicted co-conspirator list to the article); Government Documents Reveal CAIR is Hamas - ISNA Also Named, MilitantIslamMonitor.org (June 6, 2007) (stating that CAIR is incontestably linked to Hamas because of their listing as an unindicted co-conspirator); A Really Bad CAIR Day, LittleGreenFootballs.com (June 4, 2007) ("Three radical Islamic front groups have been named by federal prosecutors as participants in a criminal conspiracy to support Hamas- including the Council on American Islamic Relations.").[12]

It is clearly evident that the public smearing of the unindicted co-conspirators as linked to criminal terrorism has severely damaged the reputation, good name, and dignity of these uncharged individuals and organizations. However, the public naming of these individuals and organizations have had a serious economic impact as well. The Court can be sure that many of the named individuals will have difficulty either maintaining their current job or finding new employment. Furthermore, the stigmatization of being branded a criminal and a terrorist can have a severe impact on these individuals immigration and travel rights. Being branded as a 'terrorist' also increases the possibility that the named individuals and the members of named organizations will be subject to violence from certain segments of the American public.[13] See Annual Civil Right Reports - Executive Summaries, CAIR.com, available at

[12] This list continues indefinitely with many of the webblogs stating that the inclusion of CAIR, ISNA, and the North American Islamic Trust on the list of unindicted co-conspirators proves that they are terrorist front organizations. Furthermore, a quick search engine search reveals that many of these cites have also linked to a copy of the unindicted co-conspirator list.

[13] As for CAIR, the harassment has already begun with the receipt of numerous pieces of hate mail and death threats.

http://www.cair.com/asp/crr-exec-sum.asp (finding a progressively increasing number of yearly reports of harassment, violence, and discriminatory treatment of Muslim-American since the 9/11 attacks).

Moreover, Muslim-American advocacy groups such as CAIR, that rely on charitable donations for funding, have suffered severe damage to their ability to carry out their stated goals of the protection of Muslim-American civil rights and the fostering the acceptance of Muslim-Americans in United States' society. First, the donations that they rely on for funding have suffered since the government named them as an unindicted co-conspirators.[14] The public naming of CAIR as an unindicted co-conspirator has impeded its ability to collect donations as possible donors either do not want to give to them because they think they are a 'terrorist' organization or are too scared to give to them because of the possible legal ramifications of donating money to a 'terrorist' organization. Any harm to the receipt of donations fundamentally affects CAIR's ability to carry out its mission statement.

Furthermore, though, the public 'outing' of CAIR as an unindicted co-conspirator fundamentally undercuts their central mission to protect Muslim-Americans' civil rights and foster an atmosphere of acceptance of Muslims in American society. Any message that CAIR tries to deliver to the American public, will be undercut by the insinuation that they are a criminal terrorist organization. The American public and the media which CAIR uses to deliver its message will no longer believe in the veracity of such message because CAIR will be perceived as a terrorist front organization. The public backlash from the government's action in publicly

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[14] See Abdus Sattar Ghazali, Washington Times Smearing Campaign Against CAIR: A Fresh Sinister Move to Defame American Muslim Organizations, CCUN.org (June 13, 2007); CAIR Membership Plummets, WashingtonTimes.com (June 11, 2007).

listing CAIR as an unindicted co-conspirator is seen in the copious amounts of hate mail and death threats that CAIR has received since their officially sanctioned condemnation. Essentially, CAIR's freedom of expressive association and advocacy will be chilled irreparably.[15] See Section II.E. and III.

The government has subjected CAIR and the other unindicted co-conspirators "to the torture of public condemnation, loss of reputation, and blacklisting in their chosen profession" and the condemned unindicted co-conspirators are "just as defenseless as the medieval prisoner and the victim of the lynch mob." See Briggs, 514 F.2d at 803. Therefore, the unindicted co-conspirators have strong property and liberty interests in their reputations, good names and economic well-being that the government's proffered legitimate interest in publicizing the list of unindicted co-conspirators must be weighed against.

D. The Government Does Not Have Any Legitimate Interest For Publicly Revealing the Names of the Unindicted Co-Conspirators

It should be noted that while the Fifth Circuit and other courts have employed a balancing test of the interests involved in determining if there has been a Fifth Amendment violation, the courts have found that there is unequivocally no legitimate governmental interest in publicizing the names of unindicted co-conspirators during pretrial proceedings. The Fifth Circuit has held that there are not any "legitimate interests of the government that are served by stigmatizing private citizens as criminals while not naming them as defendants or affording ... affirmatively opposing access to any forum for vindication." Briggs, 514 F.2d at 804 (finding that "[t]he

[15] The same as persons not wanting to donate to CAIR for fear that they will be branded as providing material support to a terrorist organization, the membership ranks of CAIR will also dwindle for the fear of associating with an organization that has been branded as supporting terrorism.

Department of Justice suggests nothing that rises to the dignity of a substantial interest"). See also In re Smith, 656 F.2d at 1106 (finding that no "legitimate purpose could have been served by these official condemnations"); Crompton Corp., 399 F.Supp.2d at 1049 ("[N]o government interest is sufficient to justify stigmatizing private citizens as criminals without affording them access to any forum for vindication."). In Anderson, the court found that "the very real stigmatization suffered by the movants from this government action far outweighs the *nonexistent government interest in publicly naming them as coconspirators.*" 55 F.Supp.2d at 1168 (emphasis added). Therefore, as in those above cases, there is nothing that the government can offer in this case that would "rise to the dignity of a substantial interest." See Briggs, 514 F.2d at 804.

This is where the case law differs from the Department of Justice's guideline. While generally prohibiting the pretrial identification of unindicted co-conspirators, the guidelines temper this prohibition with the phrases "[i]n the absence of some significant justification," see U.S.A.M. 9-11.130, 9-16.500 and 9-27.760, or "[i]n all but the unusual case." U.S.A.M. 9-27.760. However, even though the Department of Justice wants to carve out an exception, the case law makes clear that there is absolutely no legitimate reason for an Assistant United States Attorney to stigmatize individuals by publicly identifying unindicted co-conspirators during pretrial proceedings. See Briggs, 514 F.2d at 804; In re Smith, 656 F.2d at 1106; Anderson, 55 F.Supp.2d at 1168. The Department of Justice seems to be relying on their rejected argument forwarded in Briggs, that "the interest of justice may on occasion require" the naming of unindicted co-conspirators. 514 F.2d at 804. The Court, however, rejected this argument, labeling it as "conclusory" and stating that the "Department of Justice suggests nothing that rises

to the dignity of a substantial interest." Id. Therefore, this exception to the general rule that there is no legitimate governmental interest in publicizing the names of the unindicted co-conspirators is nothing but wishful thinking on the part of the Department of Justice. The Department of Justice and no other person have ever been able to articulate a legitimate governmental interest served in stigmatizing uncharged parties, without allowing them access to a forum for vindication.

The cases go through the proffered governmental interests individually, and reject every one. First, Assistant United States Attorneys have proffered the justification that the pretrial naming of unindicted co-conspirators was "necessary in order to prove, or facilitate the proof, of conspiracy by the persons named as defendants." Id. at 804. The Fifth Circuit rejects this reason because:

> if the prosecutorial goal is to expose the named defendants to the broadest possible attribution of acts of others, it can be attained without actually naming non-defendants as unindicted co-conspirators. The government may introduce evidence at trial of a person's participation in a conspiracy and thereby ascribe his acts and statements to the co-conspirators even if that person is not named in the indictment.[16]

Id. at 805 (citations omitted). Furthermore, if the government wants to demonstrate to the Court the admissibility of the evidence of co-conspirator statements that it intends to use at trial, such a document can be filed under seal. Anderson, 55 F.Supp.2d at 1168n.5. See also Briggs, 514 F.2d at 805 (the public impact of a pretrial document naming the unindicted co-conspirators "may be tempered by protective orders entered by the court"). There is absolutely no legitimate reason why the unindicted co-conspirators' names should be made public.

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[16] The Fifth Circuit also rejects the reason that publicizing the names is legitimate in order to attempt to induce persons to testify as the prosecution's witnesses. Id. at 805.

Nor can the government justify its pretrial exposure of the unindicted co-conspirators by relying on the contention that identification of the co-conspirators is inevitable at trial for purposes of determining the admissibility of their statements. As Anderson states, "[t]he mere fact that the government eventually needed legitimately to let the cat out fo the bag at trial, however, does not alter the court's conclusion that the movants' pretrial public identification was a violation of due process." 55 F.Supp.2d at 1169. There is simply no legitimate reason why the government should be allowed to stigmatize the good names and reputations of over three hundred organizations and persons without allowing the uncharged third parties a forum in which to vindicate themselves.

The question, remains, however of what the Assistant United States Attorneys' real motive was in publicizing the names of the unindicted co-conspirators during the pretrial proceedings. Adam Braun, a former Assistant United States Attorney, said of the publicizing of the unindicted co-conspirators: "It seems like the government is painting with a pretty broad brush" and that the United States' Attorney's policy was to refrain from "'sullying someone's reputation unnecessarily,' limiting use of named co-conspirators unless there is proof of wrongdoing." Greg Krikorian, Islamic Charity's Terror Trial Starts Soon, L.A. Times (July 23, 2007). Furthermore, the article reports that other federal prosecutors that refused to be identified on the record "were critical of the tactic, calling it 'improper' and 'unfair.'" Id.

Looking to the Government's Trial Brief, it is interesting to note that only five unindicted co-conspirators from the unindicted co-conspirator list are specifically named: Ismail Elbarasse, Mousa Abu Marzook, Yousef Salah, Abdelhaleem Ashqar, and Muin Shabib. In their sixty-five (65) page brief, that thoroughly explains the evidence that they plan to submit at trial, the

government informs the Court about only five persons whose statements the government intends to enter under the co-conspirator hearsay exception. The government does not explain the import of the approximately three hundred other unindicted co-conspirators. Any statements made by CAIR or ISNA are beyond the pale of the evidence discussed in the trial brief that the government intends to use at trial, and it is incomprehensible that any statements from these organizations would qualify under the co-conspirator hearsay exception.

However, the Fifth Circuit's reasoning in Briggs hints at why the government would choose to stigmatize such a large group of Muslim Americans, including various mainstream Muslim-American advocacy organizations.

E. The Only Reason For the Government to Reveal the Names of the Unindicted Co-Conspirators Is To Vindictively Smear the Names of Groups and Persons Engaged in Unpopular Political Association and Advocacy

In Briggs, The Fifth Circuit writes of the indicted and unindicted conspirators that "[n]ine of the ten persons named in the indictment were active in the Vietnam Veterans Against the War, an anti-war group. The naming of appellants as unindicted conspirators was not an isolated occurrence in time or context. The same procedure was employed in other cases." 514 F.2d at 805. The Fifth Circuit cites to a number of cases arising in the same time period, where the United States government sought to punish unpopular political causes through conspiracy indictments. See United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972) (reversing the convictions of two anti-war activists in the "Chicago Seven" trial, whereby the indictment had charged eight defendants and twelve unindicted co-conspirators); United States v. Marshall, No. 51942 (W.D. Wash. Dec. 14, 1970) (entering a mistrial as to anti-war activists charged with a conspiracy, where eight were named as defendants and eight were named as unindicted co-

conspirators); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973) (affirming substantive convictions of two anti-war activists, in a case where the conspiracy charges were dropped in a conspiracy case against eight defendants and four unindicted co-conspirators); United States v. Russo, No. 9373 (C.D. Cal. May 11, 1973) (terminating proceedings against activists where two were charged as defendants and two were named as unindicted co-conspirators); United States v. Rudd, No. 70-CR-195 (N.D. Ill. Jan 3, 1973) (dismissing indictment against dissident group where a conspiracy was alleged with twelve defendants and twenty-eight unindicted co-conspirators). In all these cases, the United States was seeking to criminalize unpopular advocacy against the war in Vietnam, and used the public naming of the co-conspirators as a way to stigmatize persons who the government did not have any evidence against, but wanted to punish anyway for their views and statements critical of the government's foreign policy.

While it may be a cliche, the adage that history oft repeats itself is also true. The groups and the causes may be different, but it is the same pattern. Despite the ostensible protections of the First Amendment for political speech, even if it is unpopular, the government will attempt to chill this expressive activity either by criminalizing it or by stigmatizing those who engage in it. Change the Vietnam War to the War on Terrorism and change the dissidents from those speaking out against the abuses in Vietnam to the dissidents speaking out against the abuses of civil liberties in the name of fighting terrorism. Already, two of the government's alleged 'terrorism' conspiracy cases have ended in a jury acquitting the defendants on the conspiracy charges. See United States v. Al-Arian, 8:03-CR-77 (M.D. Fla. Dec. 6, 2005); United States v. Salah, 03-CR-978 (N.D. Ill. Feb. 1, 2007). Each of those cases contained a list of unindicted co-conspirators as well, yet the government was not so capricious as to identify the unindicted co-conspirators

publicly.

As in Briggs, in this case "[t]here is at least a strong suspicion that the stigmatization of appellants was part of an overall governmental tactic directed against disfavored persons and groups," with the disfavored group being advocates for Muslim-American civil liberties rather than anti-war protestors. See 514 F.2d at 806. This Court should follow the reasoning in Briggs that "[v]isiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extra-judicial punishment or to chill their expressions and associations, is not a governmental interest that we can accept or consider." Id. The public smearing of the names and reputations of over three hundred Muslim individuals and many Muslim-American advocacy groups "circumvent[s] 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. It would be intolerable to our society." Id.

The main issue with the smearing of the names of these Muslim-American activists is that it has the effect of chilling their First Amendment expressions and associations. Not only, as in In re Smith and Anderson, are merely the names and economic well-being of the unindicted co-conspirators threatened, but the public smearing of advocacy groups has the effect of chilling their protected advocacy. Thus, the due process violation here is greater, as there is not only a deleterious effect upon the unindicted co-conspirators' liberty and property interests, but also on their ability to effectively exercise their First Amendment rights. See N.A.A.C.P. v. State of Alabama ex. rel. Patterson, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause ... which embraces freedom of speech."). Donations

to the advocacy organizations will dwindle, membership ranks will languish, advocates will self-censor their words, all based on the fear of the possible repercussions from the organizations having been branded terrorist co-conspirators. The government was aware of this effect, and this is the precise reason why they decided to publicize the names of the unindicted co-conspirators, to silence the voices of the dissenters by extra-judicial means because they could not accomplish the silencing through official avenues.

Therefore, the Court should conclude that the unindicted co-conspirators' interests in their reputations, good names, economic well-being, and their First Amendment expressive associations far outweigh the government's illegitimate interest in defamation of character in order to staunch dissenting voices. Thus, the Court should find that the government has violated the Fifth Amendment due process rights of the unindicted co-conspirators in publicly identifying them as unindicted co-conspirators before the trial.

III. THE GOVERNMENT'S PUBLIC DISCLOSURE OF CAIR AND OTHER UNCHARGED ENTITIES AND INDIVIDUALS AS UNINDICTED CO-CONSPIRATORS VIOLATES THEIR FIRST AMENDMENT RIGHTS

Besides violating the unindicted co-conspirators' Fifth Amendment due process rights, the government has also directly violated the unindicted co-conspirators' First Amendment rights, independent of any Fifth Amendment violation. The governmental practice of publicly naming unindicted coconspirators results in a chilling effect on expressive associations and does not forward a substantial governmental interest. Therefore, the Court should hold that the practice of publicly naming unindicted co-conspirators is unconstitutional on its face and as applied.

A. CAIR, ISNA and Other Unindicted Co-Conspirator Groups and Individuals Engage

in Core Political Speech and Advocacy, Deserving the Strictest Standard of Protection from the First Amendment

The Supreme Court has held that "abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." N.A.A.C.P v. Button, 371 U.S. 415, 429 (1963) (citations omitted). The First Amendment protects all types of advocacy, not merely "the expression of ideas that are conventional or shared by a majority." Kingsley Intern. Pictures Corp. v. Regents of University of State of New York, 360 U.S. 684, 689 (1959). Furthermore, the First Amendment does not permit the government:

> to make criminal the peaceful expression of unpopular views. A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 383 (1992) (citations omitted). "Suspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government, because there is a strong risk that the government will act to censor ideas that oppose its own" Ridley v. Massachusetts Bay Transp. Authority, 390 F.3d 65, 86 (1st Cir. 2004) (citing Texas v. Johnson, 491 U.S. 397, 411-17 (1989)).

In this case, it is clear that CAIR and ISNA have engaged and continue to engage in core political speech and advocacy. Recent press releases from ISNA advocate against the use of

attaching the word "Muslim" to terrorist attacks, Sikhs and Muslims Against Profiling, ISNA.net (July 19, 2007), denounce the recent terrorist attacks in Glasgow, London and Yemen, ISNA Statement in Response to Recent Bombings, ISNA.net (July 10, 2007); and critique the journalist, Steve Emerson, for his anti-Islamic views. Steve Emerson's Fantastic Obsession, ISNA.net (July 5, 2007). In fact, the press releases from ISNA, while definitely political in nature, cannot even be described as 'unpopular' or 'dissident' as most of the press releases deal with trying to foster an acceptance of Islam in American society. However, it seems that attempts to foster acceptance of Islam is antithetical to the government's quest to stigmatize a religion in order to carry out their foreign policy objectives.

CAIR also engages in core political advocacy and speech. CAIR compiles statistics about Muslim-American civil right violations, releases annual reports regarding these statistics, and advocates for the cause of Muslim-Americans' civil liberties. CAIR also attempts to foster an understanding of Islam in American society. Furthermore, CAIR releases statements condemning terrorist actions. While these political activities are rather non-controversial, CAIR also engages in advocacy that is critical of the government. CAIR reports and publicizes biased statements that are made by various government officials and legislators and asks their members to take actions of protest against them. CAIR also routinely criticizes the government for expanding the war on terror and vitiating the civil liberties of both Muslim-Americans and all citizens.

Therefore, because CAIR, ISNA, and other unindicted co-conspirators have engaged and continue to engage in core protected political speech and advocacy, though it may be critical of the government and unpopular to the majority, their speech and advocacy deserves the utmost

protection of the First Amendment.

B. The Government's Action of Publicly Naming Unindicted Co-Conspirators Has an Impermissible Chilling Effect on the Expressive Associational Activities of the Stigmatized Unindicted Co-Conspirators

In N.A.A.C.P v. State of Alabama ex. rel. Patterson, the Supreme Court found that "[i]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." 357 U.S. 449, 461 (958). The Court has held that where a "case ... involves ... the freedom of individuals to associate for the collective advocacy of ideas. Freedoms such as ... this are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." N.A.A.C.P. v. Alabama ex rel. Flowers, 377 U.S. 288, 309-10 (1964) (quoting Bates v. City of Little Rock, 361 U.S. 516, 523 (1960)). Therefore, the First Amendment can be violated by seemingly unrelated government conduct that does not directly restrain speech or association, such as the government practice of publicizing the names of unindicted co-conspirators.[17] See N.A.A.C.P v. State of Alabama, 357 U.S. at 461 ("The government action challenged may appear to be totally unrelated to protected liberties.").

The Supreme Court first developed expressive association jurisprudence in N.A.A.C.P. v.

[17] However, in the case at bar, the publicizing of the names of the unindicted co-conspirators is a thinly veiled attempt by the government to stigmatize the uncharged parties' names and reputations, which would inevitably chill their expressive associational activities. The point is, though, that while the government may deny that impingement upon the co-conspirators' associational rights was their intent, it does not matter. Purposeful or not, government action still falls under the protection of expressive association jurisprudence if it has the effect of chilling expressive association.

State of Alabama ex rel. Patterson.[18] The Court found that:

> [e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause..., which embraces freedom of speech. Of course, 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.

357 U.S. at 460-61 (citations omitted). Furthermore, "[t]he right to join together for the advancement of beliefs and ideas ... include[s] the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" Buckley v. Valeo, 424 U.S. 1, 65-66 (1976) (citations omitted).

Subsequent cases interpreting N.A.A.C.P v. State of Alabama have found that the party alleging that their First Amendment rights have been violated by the government action must either demonstrate that the government action has actually chilled their expressive association or that there is a "reasonable probability" of a chill of expressive associational activities. See In re Grand Jury Proceeding, 842 F.2d 1229, 1235-36 (11th Cir. 1988) (interpreting Buckley v. Valeo). The Court must then engage in a balancing test as "[t]he right to associate for expressive purposes is not ... absolute." Id. at 1236 (quoting Roberts v. United States Jaycees, 468 U.S. 609,

[18] It should be noted that these expressive association cases generally involve the case where a subpoena compels disclosure of membership in certain groups and the effect that the compelled disclosure will have on the group's association. However, nothing in these cases limits expressive associational jurisprudence to government subpoenas. Many of these cases express concern with the harassment, threats, and reprisals that group members will receive for the publicizing of their membership in the group. These harassments, threats and reprisals will then chill their likelihood of continuing to engage in protected advocacy. That is essentially the same as the facts of the case at bar, even though the government action is the publication of unindicted coconspirators. Because of the government's publicizing of these unindicted co-conspirator organizations as associated with a criminal or terrorist group, the perceived association will subject members of the unindicted co-conspirator organizations to threats, harassment, and reprisals, which will chill their expressive associational activities.

623 (1984)). "[T]here are governmental interests sufficiently important to outweigh the possibility of infringement.... [T]he government may take action that would infringe upon the freedom of association when it can demonstrate a substantial relation to a compelling interest." In re Grand Jury Proceeding, 842 F.2d at 1236 (citing Buckley, 424 U.S. at 64, 66 and Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 546 (1963)). In this case the serious actual chilling of CAIR and the other unindicted co-conspirators' expressive activities far outweighs the nonexistent governmental interest in publicizing the uncharged parties' names prior to trial.

1. The Government Action of Publicizing the Names of the Unindicted Co-Conspirators Has Caused a Demonstrable Chill to CAIR and the Other Unindicted Co-Conspirators' Expressive Association

First, it should be noted that all publicized unindicted co-conspirators have a reasonable belief that the publication of their names as co-conspirators subjects them to threats, harassment and reprisals. The vitriol emanating from conservative commentators, branding all unindicted co-conspirators as terrorists is demonstrative of the threats and harassment that the unindicted co-conspirators have faced and will continue to receive. Furthermore, though, as previously stated, the publication of CAIR's name as an unindicted co-conspirator has already resulted in a demonstrable chilling of their associational activities. Since being named as unindicted co-conspirators, their membership ranks have shrunken. Furthermore, the amount of donations that they have been receiving has dwindled well below their monthly budget, and as their associational activity necessarily relies upon donations from the public, the government's

labeling of them as an unindicted co-conspirator has chilled their associational activity .[19] See N.A.A.C.P. v. State of Alabama, 357 U.S. at 459-60 (indicating that the "reasonable likelihood that the Association itself through diminished financial support and membership may be adversly affected" demonstrates an injury to the N.A.A.C.P.).

Also, their ability to deliver their political message has been undercut, as their name has been sullied as being a 'terrorist' group, resulting in public derision and hate. In N.A.A.C.P v. State of Alabama, the Supreme Court held that a showing that the government action on past occasions exposed group members to "economic reprisal, loss of employment, *threat of physical coercions, and other manifestations of public hostility,*" constituted a sufficient demonstration of a "chill." Id. at 463. Here the officers and members of CAIR have been subjected to numerous threats of physical coercion and public hostility through the receipt of hate mail and death threats as a result of the government's inclusion of the organization in the list of unindicted co-conspirators.

Clearly, such aforementioned proof demonstrates a real and objective chill to CAIR's expressive associational activities. However, in a case such as this, where the government action of publicizing the names of the unindicted co-conspirators so obviously has drastic effects on the individuals and organizations reputations, not much proof of a chilling effect is necessary. Here, "the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the [government's actions] cannot be constitutionally applied." See Buckley, 424 U.S. at 71.

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[19] See Abdus Sattar Ghazali, Washington Times Smearing Campaign Against CAIR: A Fresh Sinister Move to Defame American Muslim Organizations, CCUN.org (June 13, 2007); CAIR Membership Plummets, WashingtonTimes.com (June 11, 2007).

2. The Government Does Not Have a Compelling Interest That Is Substantially Related to Their Pretrial Publication of the Names of the Unindicted Co-Conspirators

As stated above in the Fifth Amendment section, the government does not even have a mere legitimate interest in the pretrial publication of the names of the unindicted co-conspirators, much less a compelling interest. While demonstrating the admissibility of the co-conspirator statements may rise to a compelling interest if it was done under seal, the public naming of the unindicted co-conspirators invalidates any government interest. Publication of the names of the co-conspirators only serves to smear and stigmatize the names of uncharged parties, and there are no "legitimate interests of the government that are served by stigmatizing private citizens as criminals while not naming them as defendants." See Briggs, 514 F.2d at 804.

Moreover the Supreme Court has held that "there are some purported interests - such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas - that are so plainly illegitimate that they would immediately invalidate the rule [that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest]." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). Also, "[o]fficial reprisal for protected speech offends the Constitution because it threatens to inhibit exercise of the protected right, and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." Hartman v. Moore, 547 U.S. 250, 256 (2006) (citations omitted).

The government publicly named the three hundred unindicted co-conspirators to suppress

support of unpopular Muslim-American causes such as the protection of civil liberties from unchecked national security investigations and to staunch the advocacy on the behalf of oppressed Muslims, such as the Palestinians. The government's public 'outing' of many Muslim-American advocacy groups represents an official reprisal against their protected speech that has been critical of the United States. Such a reason for the government action of publicly identifying the unindicted co-conspirators' names is "so plainly illegitimate" as to not even approach the dignity of a legitimate interest. Thus, the interest of the government in this continued practice is so insignificant and the threat and actual damage to the unindicted co-conspirators' expressive associations so severe, that the Court should find that the practice of pretrial identification of unindicted co-conspirators is unconstitutional in violation of the First Amendment.

CONCLUSION

This brief has incontestably demonstrated that the government's public identification of the unindicted co-conspirators in their pretrial filing violated the Department of Justice's own regulations regarding unindicted co-conspirators and the First and Fifth Amendments. The Fifth Amendment was violated because the public naming of the unindicted coconspirators damaged their reputation, good name, and economic well-being, without offering a forum for vindication, and without a legitimate governmental reason for doing so. The First Amendment was violated because the governmental action of publicly naming the unindicted co-conspirators chilled the expressive associational activities of the unindicted co-conspirators and the government does not have a substantially related compelling interest for their action.

However, the question remains of what action the Court should take. Undoubtedly, the

practice of naming unindicted co-conspirators needs to be proscribed from the outset. Such a practice should be per se unconstitutional, because once the government publicizes the names of the unindicted co-conspirators, the damage to their reputations, economic well-being, and expressive associations is done. The post hoc relief of striking the unindicted co-conspirators names from the record and sealing the list does little good as their names and the wrongful association that these persons and groups have with criminal and terrorist activity will not be struck from the consciousness of the American public. In this case, the government had nothing to lose by violating the Department of Justice guidelines and the Constitution, as their stigmatizing of these 'unpopular' groups and persons could not be undone, even if the co-conspirators' names were eventually struck from the record. While the government is able to engage in such practice with impunity, they will continue to "stigmatiz[e] [uncharged parties as a] part of an overall governmental tactic directed against disfavored persons and groups [and to] [v]isit[] opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extra-judicial punishment or to chill their expressions and associations." See Briggs, 514 F.2d at 805.

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