

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

UNITED STATES OF AMERICA	§	
	§	
v.	§	CR NO. 3:04-CR-240-G
	§	
HOLY LAND FOUNDATION	§	
FOR RELIEF AND DEVELOPMENT,	§	
also known as the “HLF” (01)	§	
SHUKRI ABU BAKER, (02)	§	ECF
MOHAMMED EL-MEZAIN, (03)	§	
GHASSAN ELASHI, (04)	§	
HAITHAM MAGHAWRI, (05)	§	
AKRAM MISHAL, (06)	§	
MUFID ABDULQADER, (07) and	§	
ABDULRAHMAN ODEH (08)	§	

**GOVERNMENT’S MEMORANDUM IN OPPOSITION TO COUNCIL
ON AMERICAN -ISLAMIC RELATIONS’ MOTION FOR LEAVE TO
FILE A BRIEF *AMICUS CURIAE INSTANTER* AND *AMICUS* BRIEF IN
SUPPORT OF THE UNINDICTED CO-CONSPIRATORS’ FIRST
AND FIFTH AMENDMENT RIGHTS**

The United States, through its undersigned counsel, hereby submits its memorandum in opposition to the Council on American-Islamic Relations’(CAIR) motion for leave to file a brief *amicus curiae* and its accompanying memorandum of law (hereinafter Amicus), which asks this Court to strike its name and the names of all other unindicted individuals and organizations from Attachment A (“List of Unindicted Co-conspirators and/or Joint Venturers”) of the Government’s Trial Brief filed on May 29,

2007, and to “take any other action that it deems appropriate.” CAIR has filed its proposed Amicus in an effort to combat the negative press it allegedly incurred by being identified as a participant in a network of U.S.-based organizations affiliated with the designated foreign terrorist organization, Hamas. CAIR alleges that the Government’s identification of CAIR as an unindicted co-conspirator and/or joint venturer approximately six weeks prior to trial has caused it and others significant injury, resulting in a violation of their Fifth and First Amendment rights.

The Court should deny CAIR’s requested leave to file an amicus brief. The purpose of the proposed brief is not to assist the Court, as is required of a “friend of the court” brief, but rather to promote its own interests and the interests of other non-parties. Moreover, the proposed filing is untimely, coming months after the filing of the trial brief about which CAIR complains. In any event, even were the Court to accept CAIR’s proposed filing, CAIR lacks standing to pursue relief both on its own and on behalf of other organizations. CAIR fails to demonstrate any injury resulting from its inclusion in the appendix to the government’s trial brief, and fails to explain why any alleged decline in membership did not result from evidence already in the public domain well prior to the government’s May 29, 2007 brief, and now in evidence as a part of record in this case. Indeed, CAIR’s request to strike its name from the government’s co-conspirator’s list is moot, since its conspiratorial relationship with the Holy Land Foundation for Relief and

Development (HLF) was confirmed by testimony and documentary evidence admitted at trial prior to the date CAIR even filed its brief. CAIR's belated request to litigate its status diverts this Court's attention from an ongoing trial and could have been brought months earlier.

For these reasons, and those set forth below, the Government respectfully submits that CAIR's motion to participate as amicus in these proceedings should be denied.

FACTUAL BACKGROUND

1. On July 26, 2004, a federal grand jury indicted HLF; Shukri Abu Baker, HLF's Secretary and Chief Executive Officer; Mohammed El-Mezain, HLF's Director of Endowments; Ghassan Elashi, HLF's Chairman of the Board (as well as the founder of CAIR's Texas chapter); Haitham Maghawri, HLF's Executive Director; Akram Mishal, HLF's projects and grants director; Mufid Abdulqader, one of the HLF's top fundraisers; and Abdulrahman Odeh, the HLF's New Jersey representative.¹ In addition to charging the defendants with providing material support to a foreign terrorist organization, the indictment also charges the defendants with engaging in prohibited financial transactions with a Specially Designated Global Terrorist, money laundering, filing false tax returns, and several conspiracy charges, including: conspiracy to provide material support to a foreign terrorist organization, 18 U.S.C. § 2339B(a)(1); conspiracy to provide funds,

¹ The defendants Akram Mishal and Haitham Maghawri have not been arrested in this case and are fugitives.

goods and services to Specially Designated Global Terrorist, 50 U.S.C. §§ 1701-1706; and conspiracy to commit money laundering, 18 U.S.C. § 1956(h). The indictment also seeks the forfeiture of \$12.4 million in Hamas assets. The indictment did not discuss by name or identify CAIR.

2. On May 29, 2007, the Government submitted a Trial Brief in support of the evidence and arguments to be relied upon in its case-in-chief. As explained in the brief, its purpose was to provide the Court with an overview of the case, the scope of the conspiracy, and information regarding the different kinds of evidence that the Government intended to seek to admit at trial, as well as the evidentiary bases for the admission of that evidence. The Government did not detail all of the evidence that it intended to present in its case-in-chief, nor did it describe all of the evidence showing the existence of the alleged conspiracy and the statements made in furtherance of the conspiracy. Instead, the Trial Brief outlined the law with respect to types of evidence the Government intended to seek to admit and provided background to the Court for evaluating their admissibility.

With regard to the breadth of the conspiracy, the Government provided:

Although the indictment in this case charges the seven named individual defendants and the Holy Land Foundation for Relief and Development, it will be obvious that the defendants were not acting alone. . . . the defendants were operating in concert with a host of individuals and organizations dedicated to sustaining and furthering the Hamas movement. Several of the individuals who hold leading roles in the operation of Hamas

are referenced by name in the indictment. A list of unindicted coconspirators is attached to this trial brief. (Attachment A).

The object of the conspiracy was to support Hamas. The support will be shown to have take several forms, including raising money, propaganda, proselytizing, recruiting, as well as many other types of actions intended to continue to promote and move forward Hamas's agenda of the destruction of the State of Israel and establishment of an Islamic state in its place.

Trial Brief at 31.

Thus, to provide greater clarity to the Court and the defense regarding the complexity and magnitude of the global Hamas-affiliated conspiracy to be demonstrated in the Government's case-in-chief, the Government identified in an attachment to the Trial Brief those individuals and organizations for which it intended to prove were engaged in supporting Hamas. Attachment A to the Trial Brief listed 246 different individuals and organizations as either unindicted co-conspirators and/or joint venturers under one or more headings:

- (1) individuals/entities who are and/or were part of the HAMAS social infrastructure in Israel and the Palestinian territories;
- (2) individuals who participated in fundraising activities on behalf of HLF;
- (3) individuals/entities who are and/or were members of the U.S. Muslim Brotherhood's Palestine Committee and/or its organizations;
- (4) individuals/entities who are and/or were members of the Palestine Section of the International Muslim Brotherhood;
- (5) individuals who are and/or were leaders of HAMAS inside the Palestinian territories;

(6) individuals who are and/or were leaders of the HAMAS Political Bureau and/or HAMAS leaders and/or representatives in various Middle Eastern/African countries;

(7) individuals/entities who are and/or were members of the U.S. Muslim Brotherhood;

(8) individuals/entities that are and/or were part of the Global HAMAS financing mechanism;

(9) individuals/entities that Marzook utilized as a financial conduit on behalf and/or for the benefit of HAMAS;

(10) individuals who were HLF employees, directors, officers and/or representatives; and

(11) HAMAS members whose families received support from the HLF through the HAMAS social infrastructure.

CAIR is listed in the attachment under the third heading (individuals/entities who are and/or were members of the U.S. Muslim Brotherhood's Palestine Committee and/or its organizations). Besides the category descriptions, the Government did not provide any further information regarding specific individual and organizational links to the conspiracies described in the Indictment and in the Trial Brief.

3. The trial commenced on July 16, 2007. The Government called its first witness on July 25, 2007. As of the date of this response, the Court has entered into evidence a wide array of testimonial and documentary evidence expressly linking CAIR and its founders to the HLF and its principals; the Islamic Association for Palestine and

its principals; the Palestine Committee in the United States, headed by Hamas official Mousa Abu Marzook; and the greater HAMAS-affiliated conspiracy described in the Government's case-in-chief. *See, e.g.*, Government Exhibits 3-1, 3-12, 3-15, 3-17, 3-75, 3-85, 4-1, 5-130, 5-131, 5-133 through 5-149, 5-160, 5-161, 11-33, 14-31, 16-3, 16-53, 16-63, 17-1.

4. On August 14, 2007, well after the presentation of trial evidence linking it to the conspiracy, CAIR filed a motion requesting that this Court permit it to submit an *amicus curiae* brief in opposition to the "public issuance" of the Government's list of unindicted co-conspirators and/or joint venturers filed with the Trial Brief. This Court has not ruled on CAIR's motion for leave to file an *amicus curiae* brief. CAIR's accompanying 55-page brief alleges that the inclusion of its name on the list has caused it concrete injury sufficient to violate its Fifth and First Amendment rights (as well as Department of Justice internal guidelines). Accordingly, it has moved this Court to strike its name from the list, and the names of all other unindicted individuals and organizations, and to take any other action the Court deems appropriate. As will be discussed below, the Government respectfully submits that CAIR's proposed amicus brief and request for relief is not a proper amicus submission and is neither "useful" nor "timely."

Accordingly, it should not be permitted. In addition, CAIR lacks standing to request that this Court undertake any action on behalf of itself or on behalf of other individuals or

organizations, and its claims are in any event moot.

ARGUMENT

I. LEAVE TO FILE AN UNTIMELY AND UNHELPFUL “AMICUS” BRIEF SHOULD BE DENIED

A district court has broad discretion to grant or deny an appearance as *amicus curiae* in a given case. *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295, 311 (W.D.N.Y.2007) (citing *United States v. Ahmed*, 788 F.Supp. 196, 198 n. 1 (S.D.N.Y.1992), *aff'd*, 980 F.2d 161 (2d Cir.1992)); *Long v. Coast Resorts, Inc.*, 49 F.Supp.2d 1177, 1178 (D.Nev.1999) (“There is no inherent right to file an amicus curiae brief with the Court. It is left entirely to the discretion of the Court.”); *Fluor Corp. & Affiliates v. United States*, 35 Fed. Cl. 284, 285 (1996).

Leave to file an amicus brief should be denied where the information offered is neither “timely” nor “useful.” *Long*, 49 F.Supp.2d at 1178 (quoting *Waste Mgmt. of Pennsylvania v. City of York*, 162 F.R.D. 34 (M.D.Pa.1995)). *See also Leigh v. Engle*, 535 F. Supp. 418 (DC Ill 1982) (“The privilege of being heard amicus rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise), citing 3A C.J.S. Amicus Curiae § 3. Amicus participation, moreover, goes beyond its proper role if the submission is used to present wholly new issues not raised by the parties. *See Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295 (W.D.N.Y.,2007), citing

Onondaga Indian Nation, 1997 U.S. Dist. LEXIS 9168 at *8-9 (quoting *Concerned Area Residents for the Env't v. Southview Farm*, 834 F.Supp. 1410, 1413 (W.D.N.Y.1993)); *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77, 83 (Em.App.1981) (absent exceptional circumstances, amicus curiae cannot implicate issues not presented by the parties). In this case, the brief offered by CAIR fails to assist the court in resolving any issue germane to the dispute between the named parties, and was untimely filed. Accordingly, the Court should exercise its discretion to deny leave to file.

A. The Proffered Amicus Brief is Not Useful To The Court.

CAIR's brief is not "useful" because it is not, in fact, an amicus brief at all, but rather an attempt to intervene in this case to achieve independent relief without satisfying the formal requirements of intervention. An "*amicus curiae*" is defined as one who interposes "in a judicial proceeding to assist the court by giving information, or otherwise, or who conduct[s] an investigation or other proceeding on request or appointment therefor by the court." 4 Am.Jur.2d, Am.Cur. § 1, at 109 (1962). An amicus cannot join issues not joined by the parties themselves. *See Leigh v. Engle*, 535 F.Supp. at 419-20. Here, CAIR is not offering its assistance to the Court in the resolution of the case before it, or even in the resolution of any pending legal issue. Instead, CAIR is seeking relief for itself and others, relief not requested by any party to the case.

Indeed, CAIR's only justification for seeking leave to file as *amicus curiae* is its belief that "the public issuance of this unindicted co-conspirator list raises important

issues regarding individual and organizational rights.” Motion for Leave at 2.

Conspicuously absent from CAIR’s motion for leave to file an amicus brief is how its brief will assist the Court in the resolution of any issue pending in this criminal case. To the extent CAIR’s “amicus” brief seeks affirmative relief, it plainly goes beyond the bounds of amicus participation and impermissibly seeks the right to participate as a party to the litigation. *See United States v. State of Michigan*, 940 F.2d 143 (6th Cir. 1991) (“Amicus curiae may not and, at least traditionally, has never been permitted to rise to the level of a named party/real party in interest nor has an amicus curiae been conferred with the authority of an intervening party of right without complying with the requirements of Fed.R.Civ.P. 24(a), nor accorded permissible intervention without meeting the criteria of Fed.R.Civ.P. 24(b).”). Because the brief offered by CAIR will not assist the Court, leave to file as amicus should be denied.

B. CAIR’s Filing Is Untimely.

The government’s Trial Brief setting forth its legal position with respect to co-conspirators and joint venturers was filed May 29, 2007. Rather than seeking immediate relief, however, CAIR waited until August 14, 2007, to request leave to file an amicus brief, after the trial in this case was well underway. CAIR offers no explanation as to why it did not immediately seek leave to file its amicus brief, nor does CAIR explain why it waited two and a half months – after the government already presented its evidence

regarding CAIR's participation in the conspiracy – to seek the requisite permission. At this late date, the proposed amicus filing would needlessly divert the Court's attention from the pressing task of completing a lengthy, on-going criminal trial. The Court should therefore exercise its discretion to deny CAIR's untimely motion for leave to file.

II. CAIR'S CLAIMS ARE MOOT

Even were the Court to allow CAIR's proposed amicus brief, the Court would lack jurisdiction to act on the requested relief. Article III of the U.S. Constitution limits the jurisdiction of federal courts to the resolution of "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). The law is well-settled that federal courts have no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); see also *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (Mootness is "the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."). Moreover, because mootness goes to the heart of the constitutional power of a federal court to consider the rights of the parties and afford any relief, it is a "jurisdictional question" that "a federal court must resolve before it assumes jurisdiction." *North Carolina v. Rice*, 404 U.S. 244, 246

(1971).

Generally, any set of circumstances that eliminates an actual controversy after the commencement of a lawsuit renders that action moot. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). That means, “throughout the litigation, the plaintiff ‘must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.’” *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis*, 494 U.S. at 477) (emphasis added). Thus, if an event occurs while a case is pending that makes it impossible for the court to grant “meaningful relief” to a prevailing party, the case must be dismissed as moot. *Church of Scientology*, 506 U.S. at 12.

CAIR’s claims against the Government are plainly moot. CAIR has asserted no justiciable claim because no “meaningful relief” is available, in light of the fact that CAIR’s participation as a joint-venturer and co-conspirator is a matter of public record in this case, and was a matter of public record even prior to the filing of the government’s Trial Brief.² *See, e.g.*, Government Exhibits 3-17 (objective of the Palestine Committee is to support Hamas); 3-1 (showing Omar Ahmad as part of the Palestine Committee and

² The role of CAIR founder Omar Ahmad on the Palestine Committee, and the presence of Ahmad and Nihad Awad at the 1993 meeting of the Palestine Committee in Philadelphia, were described during the public trial of Muhammad Hamid Khalil Salah and Abdelhaleem Hasan Abdelraziq Ashqar in November 1996. *See United States v. Salah, et al.*, Case No. 03-978 (N.D. Ill. 2006). During that trial, defendant Ashqar was represented by William B. Moffitt, author of CAIR’s current motion for leave to file an amicus brief.

Mousa Abu Marzook as its head); 3-78 (listing IAP, HLF, UASR and CAIR as part of the Palestine Committee, and stating that there is “[n]o doubt America is the ideal location to train the necessary resources to support the Movement worldwide . . .”); *see also* Testimony of Special Agent Lara Burns and supporting exhibits (placing Nihad Awad and Omar Ahmad at 1993 Philadelphia conference, and describing Omar Ahmad’s mediation of a 1994 dispute between Abdelhaleem Ashqar and HLF over fundraising by Hamas founder Sheik Jamil Hamami.)

Of course, in the context of a public trial, such disclosure is perfectly proper. The law is well-settled that the public has a presumptive right of access to the records of judicial proceedings, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984), and that public information regarding “[t]he source of evidence admitted at trial and the circumstances surrounding its admittance are important components of the judicial proceedings and crucial to an assessment of the fairness and the integrity of the judicial proceedings,” *Napue v. Illinois*, 360 U.S. 264, 269 (1959). *See also United States v. Briggs*, 514 F.2d 794, 805 (5th Cir. 1975) (“[I]t must be recognized in the process of balancing private injury and governmental interests that wholly different, and valid, governmental interests apply to naming the private citizen . . . in trial testimony.”).

Indeed, CAIR does not dispute that once such information is admitted into evidence at trial, the public right of disclosure outweighs the privacy interests of

unindicted co-conspirators. *See* Amicus Br. at 16 (*citing United States v. Ladd*, 218 F.3d 701, 704 (7th Cir. 2000)) (noting that “when the hearsay statement of an unindicted co-conspirator is entered into evidence, it is a very different situation than one in which the alleged co-conspirator is identified by the Government during a preliminary phase of the case”). In *Ladd*, the Court of Appeals held that the names of unindicted co-conspirators, whose hearsay statements were considered at trial, were subject to disclosure by the public. *Id.* at 701. “For coconspirator statements to be admitted pursuant to Rule 801(d)(2)(E), the Government must prove by a preponderance of the evidence that a conspiracy existed, that both the declarant and the defendant were members of the conspiracy, and that the statements were made in the course and in furtherance of the conspiracy.” *See id.* at 704. The Court further noted that such judicial scrutiny “provides a reasonable degree of certainty that the individuals are in fact coconspirators.” *Id.* at 706.

In the instant case, striking CAIR’s name from the attachment to the Trial Brief will not prevent its conspiratorial involvement with HLF, and others affiliated with Hamas, from becoming a matter of public record. That has already occurred as a consequence of the presentation of evidence at trial.

In support of CAIR’s argument that it asserts a justiciable claim for relief, notwithstanding its public identification at trial as a co-conspirator, CAIR relies upon

United States v. Anderson, 55 F.Supp.2d 1163, 1169 (D.Kan. 1999). In *Anderson*, a district court found certain unindicted co-conspirators, identified in pretrial papers and during trial as co-conspirators for Fed. R. Evid. 801(d)(2)(E) purposes,³ to have made justiciable claims and to have suffered due process violations for being identified in pretrial documents (but not for being identified at trial). In *Anderson*, however, the court found a “traceable injury” resulting from pretrial identification and likely relief by expunging the names from pretrial records, because the movants, as described by the government at trial, were merely joint venturers in a lawful common plan, not participants in the alleged Medicare kickback scheme. *Anderson*, 55 F.Supp.2d at 1169. Unlike the “innocent” 801(d)(2)(E) co-conspirators in *Anderson*, CAIR has been identified by the Government at trial as a participant in an ongoing and ultimately unlawful conspiracy to support a designated terrorist organization, a conspiracy from which CAIR never withdrew. Because this Court is unable to provide CAIR with any “meaningful relief,” as contemplated by law, CAIR’s requests (to the extent an amicus brief can request relief) must be rejected as moot.

III. CAIR LACKS STANDING

An “essential and unchanging part” of the case-or-controversy requirement is also

³ Federal Rule of Evidence 801(d)(2)(E) provides that “a statement by a coconspirator of a party during the course and in furtherance of the conspiracy” is not hearsay. *See* Fed. R. Evid. 801(d)(2)(E). *See also United States v. Saimiento-Rozo*, 676 F.2d 146 (5th Cir. 1982) (noting that an 801(d)(2)(E) co-conspirator is not necessarily a criminal, and may be merely a “joint venturer” in a common plan).

the doctrine of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must, at an “irreducible constitutional minimum,” demonstrate: (1) an injury-in-fact; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The party invoking federal jurisdiction bears the burden of establishing these elements and of coming forward with evidence of specific facts which prove standing. *Grant v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003); *Lujan*, 504 U.S. at 561.

A. CAIR Has Not Satisfied Any of its Constitutional Standing Requirements.

CAIR has no justiciable claims resulting from the Government’s decision not to file the portion of its Trial Brief enumerating unindicted co-conspirators and/or joint venturers under seal. Specifically, CAIR has failed to show that it is suffering from any direct and cognizable injury as a result of being named as an unindicted co-conspirator and/or joint venturer publicly by the Government in its Trial Brief approximately six weeks prior to being named by the Government publicly in the ongoing trial. Nor could it, since CAIR’s co-conspirator role was previously made public during the criminal trial of Muhammad Salah and Abdelhaleem Ashqar, eight months prior to the filing of the government’s Trial Brief in this case. To obtain prospective relief – the type of relief at issue here – it is not enough that a plaintiff may have suffered a past injury, if

unaccompanied by any continuing, present adverse effects. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). In an attempt to demonstrate such continuing injury, CAIR has sought to demonstrate that it has suffered from a decline both in membership and fundraising as a direct result of being named by the Government on May 29, 2007. That effort, however, fails.

As support for its alleged injury-in-fact, CAIR provided this Court with data solely from a time period *prior* to the Government's submission of its Trial Brief, a period when the alleged improper disclosure could not have affected such membership. CAIR alleges that the "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 coconspirator" (Amicus Br. at 10); that "the donations that they rely on for funding have suffered since the government named them as an unindicted co-conspirator"(Amicus Br. at 38); and that "the government's labeling of them as an unindicted co-conspirator has chilled their associational activity" (Amicus Br. at 51-52). In support for these assertions, however, CAIR relies upon a June 2007 article in the Washington Times, which revealed (by reviewing CAIR's tax filings) that CAIR's membership declined 90 percent from 2001 through 2006, down from 29,000 members to less than 1,700. *See* Audrey Hudson, *CAIR Membership Falls 90% since 9/11*, *The Washington Times* (June 12, 2007), available at <http://www.washingtontimes.com>

(originally posted as an online exclusive the evening of June 11, 2007, entitled *CAIR Membership Plummets*). The article provides no further factual information regarding CAIR's declining membership since 2006. Ironically, the very same article, upon which it now relies, was publicly discredited by CAIR executive director, Nihad Awad, who claimed the article was "false and misleading."⁴

CAIR thus cannot satisfy the causation requirement of standing. All of the harms alleged by CAIR in its memorandum to this Court pertain to its decreasing membership and donations resulting from CAIR's negative reputation within the United States *prior* to being named as an unindicted co-conspirator in this prosecution. CAIR does not show a further decline resulting from the Government's actions over the 6-week period at issue, and CAIR cannot claim a continuing injury separate from any alleged injury resulting from the Government's identification of CAIR as an unindicted co-conspirator and joint venturer at trial. Consequently, it has not demonstrated any "causal connection between the [alleged] injury and the conduct complained of," such that the injury is "fairly traceable to the challenged action . . . and not the result of the independent action of some

⁴See News Release - *CAIR Accuses Washington Times of 'Agenda-driven Reporting'* (June 12, 2007) (noting that "[o]ur membership is increasing steadily, as is our donor base, annual budget and attendance at CAIR events. . . ." and further stating that the Washington Times author's "apparent bias leads her to 'cook' CAIR's membership figures and to tarnish the journalistic reputation of the Washington Times"), available at <http://www.cair.com>. See also Audrey Hudson, *CAIR Blames Justice for its Troubles*, The Washington Times (Aug. 21, 2007), available at <http://washingtontimes.com> (noting CAIR's wavering view of its June 2007 article).

third party not before the court.” *See Lujan*, 504 U.S. at 560.

Finally, as discussed in connection with the above mootness argument, and for the reasons set forth therein, there is no likelihood that CAIR’s alleged injury could be redressed by a favorable decision by this Court to strike CAIR’s name from the Government’s Trial Brief attachment, as its involvement as a participant in the criminal scheme has been disclosed at trial. *See, e.g., Lujan*, 504 U.S. at 560-61; *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“The injury must be ‘fairly’ traceable to the challenged action, and relief from the injury must be ‘likely’ to follow from a favorable decision.”)

B. CAIR Has Not Satisfied Any of its Prudential Standing Requirements.

In addition to satisfying the prerequisites for constitutional standing, a plaintiff also must meet prudential standing requirements. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). These additional limitations on standing are based on the principle that the judiciary should “avoid deciding questions of broad social import where no individual rights would be vindicated,” and are designed to “limit access to the federal courts to those litigants best suited to assert a particular claim.” *Id.* In the absence of any injury, CAIR’s complaint essentially boils down to a “generalized grievance” that the Government’s conduct violates the Constitution. CAIR argues that this Court should divert itself from this prosecution to consider whether publicly identifying unindicted co-conspirators and joint venturers, despite a lack of discernible injury, violates the Fifth and

First Amendments. *See* Amicus Br. at 7 (“CAIR believes that the public issuance of this unindicted co-conspirator list raises important issues regarding individual and organizational rights.”); Amicus Br. at 46 (requesting that this “Court should hold that the practice of publicly naming unindicted co-conspirators is unconstitutional on its face and as applied.”). The doctrine of prudential standing, however, prohibits CAIR from seeking relief from any “generalized grievances” shared in substantially equal measure by all or a large class of citizens. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Moreover, the Supreme Court has “repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.” *Allen*, 468 U.S. at 754 (“Respondents here have no standing to complain simply that their Government is violating the law.”). Because CAIR has not demonstrated that it has or continues to be sustaining a direct injury for which the Government can provide redress, CAIR’s quest for this Court to opine on the constitutionality (alleged due process harms or associational constraints) of publicly identifying co-conspirators in an attachment to a Trial Brief is a matter outside of this Court’s jurisdiction.

C. CAIR Lacks Standing to Request this Court to Act on Behalf of All Other Named Individuals and/or Organizations.

The doctrine of prudential standing further prohibits CAIR from being able to seek relief on behalf of the other individuals and organizations named by the Government as

unindicted co-conspirators and/or joint venturers. The specific requirements of prudential standing also include that a party “assert his own legal interests rather than those of third parties.” *Phillips Petroleum Co.*, 472 U.S. at 804. As the Supreme Court has explained, federal courts “must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation,” and courts “should not adjudicate such rights unnecessarily.” *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). It may be, for example, that the holders of those rights either do not wish to assert them or will be able to enjoy them regardless of the litigation. *Id.* Moreover, the “third parties themselves usually will be the best proponents of their own rights,” and the courts should “construe legal rights only when the most effective advocates of those rights are before them.” *Id.* See also *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15 n.7 (2004) (“There are good and sufficient reasons for the prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.”) (citation omitted). Thus, CAIR lacks standing to bring a motion on behalf of all other unindicted co-conspirators and/or joint venturers.

D. CAIR Attempts to Improperly Extend The Fifth Circuit’s Standing Requirements for Unidentified Co-Conspirators.

Although CAIR cites to numerous legal precedents prohibiting the naming of

unindicted co-conspirators in indictments and pretrial moving papers, CAIR has failed to provide any legal support for its argument that an unindicted co-conspirator identified in a trial brief, *and subsequently identified at trial as a member of an ongoing, unlawful conspiracy*, has any justiciable claim for relief. CAIR improperly attempts to apply the legal reasoning set forth in *United States v. Briggs*, 514 F.2d 794 (5th Cir.1975), and extended by *United States v. Smith*, 656 F.2d 1101 (5th Cir. 1981), as the basis for its asserted jurisdiction. However, no case cited by CAIR has granted the type of relief CAIR seeks where there is no concrete injury resulting from being named, and the subject's identity has been subsequently disclosed at trial.

The Fifth Circuit has not found the public pretrial identification of unindicted co-conspirators to violate the constitution, regardless of harm. In *Smith*, in extending the reasoning set forth in *Briggs*, the Fifth Circuit found that the petitioner, whose reputation and economic interests were significantly impacted by being named in documents accompanying a plea agreement, had standing to seek expungement of his name to prevent future harm and further violations of his liberty and property interests. *Id.* The *Smith* case, however, relied upon the petitioner's injury as the basis for jurisdiction, a circumstance not established in the present case.

Indeed, although CAIR states that "the Court should hold that the practice of publicly naming unindicted co-conspirators is unconstitutional," *see* Amicus Br. at 46,

under all circumstances, the law does not currently go so far. The Government respectfully submits that many courts have granted “requests for bills of particulars identifying co-conspirators in cases where the number of defendants was large, where the alleged conspiracy spanned long periods of time and where the alleged schemes were wide-raising.” *United States v. Reddy*, 190 F.Supp.2d 558, 570 (S.D.N.Y. 2002) (citing cases); *see also United States v. Johnson*, 225 F.Supp.2d 982 (N.D. Iowa 2002) (citing cases).

IV. CAIR LACKS ANY ENFORCEABLE RIGHTS IN DOJ’S POLICIES AND PROCEDURES.

CAIR also maintains that the Government violated its own internal policy in disclosing the identities of unindicted co-conspirators and/or joint venturers in the Trial Brief. *See* Amicus Br. at 11-19. The Department of Justice policies governing its internal operations do not create rights which may be enforced against the Department of Justice. *See United States v. Caceres*, 440 U.S. 741, 754 (1979). As expressly set forth in the United States Attorneys’ Manual (USAM), the guidelines provide only internal Department of Justice guidance. “It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.” USAM § 1.1000. “Federal courts have held this disclaimer to be effective.” *United States v. Lee*, 249 F.3d 485, 493 (8th

Cir. 2001); *Nichols v. Reno*, 124 F.3d 1376 (10th Cir.1997); *United States v. Busher*, 817 F.2d 1409, 1411-12 (9th Cir.1987). Thus, the USAM does not provide CAIR with any legal grounds to strike its name from the Trial Brief attachment.

In any event, CAIR also misconstrues USAM policy, which does *not* advise federal prosecutors against the naming of unindicted co-conspirators for trial purposes. The USAM explicitly notes that “the identity of the person can be supplied, upon request, in a bill of particulars.” The USAM does not require that the Government file this information under seal. Additionally, “[w]ith 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.”⁵ In the present case, the Government’s naming of the unindicted co-conspirators and/or joint venturers was merely intended to provide greater specificity to this Court and the defendants, after three years of pretrial proceedings, regarding the scope and extent of the conspiracy alleged, and to identify those individuals and organizations for which the

⁵ Moreover, although the Fifth Circuit prohibits the naming of unindicted co-conspirators in indictments, the USAM gives federal prosecutors outside of the Fifth Circuit permission to name unindicted co-conspirators in indictments when there is “*some significant justification*.” See USAM § 9-11.130 (emphasis added). Even CAIR notes that the USAM does not absolutely prohibit the naming of unindicted co-conspirators in indictments: “*Ordinarily*, there is no need to name a person as an unindicted co-conspirator in an indictment.” See Amicus at 12 (*citing* USAM § 9-11.130) (emphasis added). The USAM additionally does not categorically prohibit federal prosecutors from naming unindicted co-conspirators in plea or sentencing proceedings, or in other public contexts. See USAM § 9-27.760 (providing that “[i]n the context of public plea and sentencing proceedings, this means that, *in the absence of some significant justification*, it is not appropriate to identify [unindicted co-conspirators]” and “federal prosecutors should strive to avoid *unnecessary* public references to wrongdoing by uncharged third-parties) (emphasis added).

Government intended to show at trial were a part of the larger U.S.-based, Hamas-affiliated network. Due to the complexity and range of the evidence to be submitted at trial, the Government concluded that providing a list of all of the relevant names as opposed to identifying the unindicted co-conspirators and/or joint venturers by numbers (1- 246) would be less confusing both to this Court and to the Defendants. Because the Government intended to immediately introduce evidence at trial in support of the co-conspirator status, which it has done, the Government did not seek to file the Attachment to its Trial Brief under seal.

CONCLUSION

For all the foregoing reasons, the Government respectfully requests that this Court deny CAIR's motion for leave to file an *amicus curiae* brief and its accompanying request to strike its name and the names of all other unindicted individuals and organizations from Attachment A of the Government's Trial Brief.

Date: August 28, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I further certify that a copy of this response was served upon counsel for CAIR by placing the same in the United States mail this ____ day of September, 2007.

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