No. 03-775

In the Supreme Court of the United States

THE HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Following the terrorist attacks on this Nation of September 11, 2001, the President directed the Secretary of the Treasury to employ all appropriate measures to stop the flow of money supporting international terrorists. As part of that effort, and pursuant to authority conferred by statute and delegated by Executive Order, the Secretary designated petitioner as a Specially Designated Global Terrorist and a Specially Designated Terrorist, and has accordingly blocked all transactions involving property in which petitioner has an interest. The questions presented are as follows:

1. Whether the court of appeals misapplied Federal Rule of Civil Procedure 56 in holding that the government was entitled to summary judgment on certain of petitioner's statutory and constitutional claims.

2. Whether the Secretary's blocking authority is limited to property in which a foreign country or national holds a "legally enforceable" interest.

3. Whether the court of appeals' consideration of classified information in its review of the challenged designations violated petitioner's rights under the Due Process Clause of the Fifth Amendment.

4. Whether the administrative procedures employed by the Secretary in connection with the challenged designations were consistent with the Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 333 F.3d 156. The opinion of the district court (Pet. App. 23-72) is reported at 219 F. Supp. 2d 57.

JURISDICTION

The court of appeals entered its judgment on June 20, 2003. A petition for rehearing was denied on August 22, 2003 (Pet. App. 76-77). The petition for a writ of certiorari was filed on November 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, authorizes the President to "declare[] a national emergency with respect to" "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. 1701(a). In the event of such an emergency,

> [t]he President may * * * investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. 1702(a)(1)(B), as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 106(1), 115 Stat. 277.

b. On September 25, 2001, in response to the terrorist attacks of September 11, the President issued Executive Order No. 13,224, which was designed to prevent the flow of funds used to support international terrorist activities. 66 Fed. Reg. 49,079. In that Executive Order, the President declared a national emergency with respect to the "grave acts of terrorism * * * and the continuing and immediate threat of further attacks on United States nationals or the

United States." *Ibid.* Among other authorities, the President invoked IEEPA, and he determined that actual and threatened terrorist acts constitute "an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." *Ibid.* Executive Order No. 13,224 identified 27 terrorists, terrorist organizations, and their supporters, designated them as such, and blocked their property and property interests subject to the jurisdiction of the United States. *Ibid.*; see *id.* at 49,083. The Executive Order also authorized the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate additional individuals or entities whose property or interests in property should be blocked because they "act for or on behalf of," or are "owned or controlled by," designated terrorists, or because they "assist in, sponsor, or provide * * * support for," or are "otherwise associated" with, designated terrorists or their supporters. *Id.* at 49,079-49,080.

"[B]ecause of the pervasiveness and expansiveness of the financial foundation of foreign terrorists," the President noted the need for "financial sanctions" against those who engage in or support terrorism. Exec. Order No. 13,224, 66 Fed. Reg. at 49,079. The Executive Order directed "[a]ll agencies of the United States Government * * * to take all appropriate measures within their authority to carry out the provisions" of the Executive Order. *Id.* at 49,081. The Executive Order also stated that, in light of the ability of property owners "to transfer funds or assets instantaneously, * * * prior notice to * * * persons [subject to blocking] of measures to be taken pursuant to this order would render these measures ineffectual." *Ibid.* The President accordingly determined that "there need

be no prior notice of a listing or determination made pursuant to this order." *Ibid.*

Finally, Executive Order No. 13,224 granted the Secretary of the Treasury authority to "employ all powers granted to the President by IEEPA." 66 Fed. Reg. at 49,081. The President specifically authorized the Secretary to promulgate rules and regulations to carry out the purposes of the Order, and to redelegate such functions if necessary. *Ibid.* The Secretary has in turn delegated his authority to the Treasury Department's Office of Foreign Assets Control (OFAC).

c. Executive Order No. 13,224 supplements a prior order, Executive Order No. 12,947, which declared a national emergency to deal with the threat to the United States posed by the "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process." 60 Fed. Reg. 5079 (1995). Executive Order No. 12,947 blocked all property and interests in property of listed terrorist organizations. That Order has been renewed annually since 1995. See, *e.g.*, 68 Fed. Reg. 3161 (2003). Executive Order No. 12,947 authorized the Secretary to designate additional entities whose property should be blocked because they are "owned or controlled by," or "act for or on behalf of," the organizations designated by the President. 60 Fed. Reg. at 5079.

d. In administering economic sanctions programs under IEEPA and other authorities, OFAC has promulgated regulations that define certain terms found in IEEPA, including the terms "property" and "interest" in property. See, *e.g.*, 31 C.F.R. 500.311-500.312, 575.308, 575.315, 595.307, 595.310. OFAC has promulgated additional regulations that permit an individual or entity to seek a license to engage in transactions involving blocked property. See 31 C.F.R. 501.801-

501.802. The regulations also establish a procedure by which a person may seek "administrative reconsideration" of a designation. 31 C.F.R. 501.807.

2. The Islamic Resistance Movement, also known as "Hamas," has been designated by the President as a Specially Designated Global Terrorist pursuant to Executive Order No. 13,224. Pet. App. 26. Hamas was also listed in Executive Order No. 12,947 as a terrorist organization that threatens to disrupt the Middle East peace process. See 67 Fed. Reg. 12,633-12,634 (2002); 60 Fed. Reg. at 5081.

3. In December 2001, pursuant to the authority delegated to him by Executive Order Nos. 13,224 and 12,947, the Secretary of the Treasury designated petitioner Holy Land Foundation for Relief and Development as a Specially Designated Terrorist and a Specially Designated Global Terrorist, thereby blocking all transactions involving petitioner's property. See Pet. App. 4, 23. "The designations were based on information supporting the proposition that [petitioner] was closely linked to Hamas." *Id.* at 4. As the district court explained, the administrative record developed by OFAC

> contains ample evidence that (1) [petitioner] has had financial connections to Hamas since its creation in 1989; (2) [petitioner's] leaders have been actively involved in various meetings with Hamas leaders; (3) [petitioner] funds Hamas-controlled charitable organizations; (4) [petitioner] provides financial support to the orphans and families of Hamas martyrs and prisoners; (5) [petitioner's] Jerusalem office acted on behalf of Hamas; and (6) FBI informants reliably reported that [petitioner] funds Hamas.

Id. at 39.

4. In March 2002, petitioner brought suit in federal district court to challenge the designations and the attendant blocking of its property. Pet. App. 28. Petitioner contended that the designations violated its rights under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 28. Petitioner raised additional statutory and constitutional challenges to the designations as well. *Ibid.* The administrative record developed by OFAC was submitted to the district court for its review pursuant to the APA. Classified information in the administrative record was made available to the district court *in camera*, in accordance with the USA PATRIOT Act's amendment of IEEPA. See 50 U.S.C. 1702(c), added by USA PATRIOT Act, § 106(2), 115 Stat. 278.[1]

While the suit was pending in the district court, and based on additional information, the Secretary proposed to redesignate petitioner as a Specially Designated Terrorist and a Specially Designated Global Terrorist. See Pet. App. 32 n.8. As part of the redesignation process, petitioner was permitted to submit any information or material that it considered relevant to the Secretary's decision. *Ibid.* By letter dated May 14, 2002, petitioner responded to some of the materials contained in the existing administrative record. See C.A. App. A886-A891. And, at petitioner's request, the agency added to its administrative record affidavits and other materials that petitioner had submitted to the district court in support of petitioner's

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[1] The district court found it unnecessary to consider the classified information in order to resolve this case. See Pet. App. 29 n.3. The court of appeals, however, treated the classified information as part of the record before it and relied in part on that information in reaching its decision. See *id.* at 16.

challenge to the prior designations. See Pet. App. 4-5, 31 & n.7. On May 31, 2002, based on the expanded administrative record, the Secretary redesignated petitioner as a Specially Designated Terrorist and a Specially Designated Global Terrorist. See *id.* at 4-5, 32 n.8.

5. The district court ruled in the government's favor on all but one of petitioner's claims.[2]

a. The district court denied petitioner's request to supplement OFAC's administrative record with petitioner's own evidentiary submissions. Pet. App. 29-32. The court explained that "the scope of review under the APA is narrow and must ordinarily be confined to the administrative record." *Id.* at 29 (citing *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973)). The court found that petitioner's allegations of agency bad faith were unsupported, see *id.* at 30-31, and it concluded that petitioner had failed to demonstrate any legitimate reason to "depart from traditional record review analysis in this case," *id.* at 32.

b. The district court granted summary judgment to the government on petitioner's APA claims. Pet. App. 33-52. The court held that IEEPA's grant of authority to the President to block "property in which any foreign country or a national thereof has any interest" (50 U.S.C. 1702(a)(1)(B)) is not limited to property in which a foreign country or national holds a "legally enforceable interest." *Id.* at 34-36. The court also held that

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[2] The district court denied the government's motion to dismiss one count of petitioner's complaint, which asserted a Fourth Amendment challenge to a search of its premises that had been conducted incidental to the Secretary's designation. Pet. App. 58-62. That count remains pending in the district court, and it has been stayed pending this Court's disposition of the certiorari petition.

IEEPA's "humanitarian aid exception" (50 U.S.C. 1702(b)(2)) does not apply to donations of money. *Id.* at 36-38. Finally, the court held that the Secretary's decision to designate petitioner was not arbitrary or capricious because the "administrative record provides ample support for OFAC's conclusion that HLF acts for or on behalf of Hamas." *Id.* at 39; see *id.* at 39-52.

c. The district court dismissed petitioner's constitutional challenges to the OFAC designations. Pet. App. 53-58, 63-67. In rejecting petitioner's procedural due process claim, the court explained that petitioner was not entitled to pre-designation notice because of the nature of the challenged agency action—the blocking of funds to prevent their transfer to a terrorist organization, pursuant to the President's declaration of a national emergency—and because prior notice would have allowed the funds to be removed from the country, thereby frustrating the achievement of the blocking of assets. *Id.* at 53-56. The court also rejected petitioner's substantive due process challenge, based on its determination "that OFAC's designation of [petitioner] and blocking of its assets was not arbitrary and capricious under the APA." *Id.* at 56; see *id.* at 39-52. Finally, the district court dismissed petitioner's claims that the designations violated petitioner's rights under the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb-1, explaining that neither the First Amendment nor the RFRA confers a right to provide material support to designated terrorist organizations. Pet. App. 63-70.

6. The court of appeals affirmed. Pet. App. 1-20.

a. The court of appeals sustained as reasonable the Secretary's determination that petitioner had provided funding to Hamas, explaining that "Treasury's decision to designate [petitioner] as [a Specially Designated

Global Terrorist] was based on ample evidence in a massive administrative record." Pet. App. 8; see *id.* at 8-9. The court rejected petitioner's contention that IEEPA blocking orders must be limited to property in which foreign entities hold a "legally enforceable interest." *Id.* at 9-10. The court explained that the statutory text imposes no such limitation; that OFAC has reasonably defined the term "interest" in a more expansive fashion; and that the restriction advocated by petitioner would hinder the achievement of IEEPA's purposes. *Ibid.* The court concluded that

> [i]n this case, there was ample evidence of foreign "interests" in [petitioner's] assets. There was evidence demonstrating that [petitioner] operated as a fundraiser for Hamas in the United States and that Hamas officials provided [petitioner] with funds. Therefore, OFAC did not exceed its authority when it blocked the assets after the designation, because OFAC needed only to determine that Hamas had an interest in [petitioner's] property, and the record provided substantial evidence to support that conclusion.

Id. at 10.

b. The court of appeals affirmed the district court's dismissal of petitioner's due process claims. Pet. App. 11-13. In rejecting petitioner's claim that the absence of pre-designation notice and an opportunity to be heard rendered the designations unconstitutional, the court explained that any defect in the initial designations had been cured by the May 2002 redesignations, which occurred only after petitioner had been given an opportunity to supplement the administrative record. *Id.* at 11-12. The court further held that, in light of "the primacy of the Executive in controlling and exercising

responsibility over access to classified information," OFAC's failure to disclose the classified portions of the administrative record did not violate petitioner's rights under the Due Process Clause. *Id.* at 13.

c. The court of appeals held that the district court had erred in dismissing petitioner's constitutional and RFRA claims under Federal Rule of Civil Procedure 12(b)(6), but that petitioner had suffered no resulting prejudice and that the error should therefore be treated as harmless. Pet. App. 14-19. The court explained that dismissal under Rule 12(b)(6) was inappropriate because the district court's rejection of those claims rested in part on its consideration of evidence showing that petitioner had provided funding to Hamas, rather than on the district court's assessment of the complaint standing alone. Pet. App. 14-15. Under those circumstances, the court of appeals concluded, the district court should have converted the government's motion to dismiss into one for summary judgment under Federal Rule of Civil Procedure 56. See Pet. App. 15.

The court of appeals explained, however, that petitioner "could have suffered prejudice only if the failure of the [district] court to convert the proceeding prevented [petitioner] from coming forward with evidence sufficient to create a substantial question of fact material to the governing issues of the case." Pet. App. 15. The court observed that "[t]he ample record evidence (particularly taking into account the classified information presented to the court *in camera*) establishing [petitioner's] role in the funding of Hamas and of its terrorist activities is incontrovertible." *Id.* at 16. The court also noted that petitioner had attempted to supplement the record on appeal after the district court's judgment, but that the additional material submitted at that time "could not have defeated the

proposition established by the record evidence that [petitioner] was a funder of the terrorist organization Hamas." *Ibid.* Because petitioner had ultimately been given "every opportunity and incentive" to produce evidence rebutting OFAC's assessment of its activities, and had failed to cast significant doubt on the agency's determination that it provided funding to Hamas, the court of appeals concluded that the outcome of the case could not have been different if the district court had converted the government's motion to dismiss into one for summary judgment. *Id.* at 17.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. The Court recently denied review in another case raising similar challenges to a blocking order, see *Global Relief Foundation, Inc.* v. *O'Neill*, 315 F.3d 748 (7th Cir. 2002), cert. denied, 124 S. Ct. 531 (2003), and review is unwarranted in this case as well.

1. The court of appeals agreed with petitioner that, because the district court's rejection of petitioner's constitutional and RFRA claims was based in part on evidence contained in OFAC's administrative record, rather than simply on the allegations of petitioner's complaint, those claims were not properly subject to dismissal under Federal Rule of Civil Procedure 12(b)(6). See Pet. App. 14-15. The court of appeals further held, however, that the district court's error in this case was harmless: petitioner "suffered no prejudice as a result" of the Rule 12(b)(6) dismissal because the government would have been entitled to summary judgment under Federal Rule of Civil Procedure 56 in any event. Pet. App. 15; see *id.* at 15-19. Petitioner contends (Pet. 19-21) that the court of appeals erred in

its application of Rule 56, and that summary judgment could not properly have been entered on petitioner's constitutional and RFRA claims because (a) petitioner was not permitted to obtain discovery from the government, (b) the court considered unsworn and hearsay testimony in reaching its decision, and (c) the court effectively resolved disputed factual issues by rejecting petitioner's contention that it did not fund Hamas. Those claims lack merit.

a. Petitioner's complaint (see Pet. App. 78-110) sought judicial review and invalidation of federal agency action—namely, the Secretary's designation of petitioner as a Specially Designated Terrorist and a Specially Designated Global Terrorist. The APA provides the statutory grant of authority for judicial review by the district court not only of petitioner's contention that the designations were arbitrary and capricious (see *id.* at 39-52), but also of its statutory and constitutional claims. See 5 U.S.C. 706(2)(A)-(C) (directing the court in an APA action to set aside agency action found to be "not in accordance with law," "contrary to constitutional right," or "in excess of statutory jurisdiction [or] authority"); Pet. App. 107 (petitioner's complaint invokes Section 706(2)(A)-(C)). The plaintiff in an APA suit has no right to obtain discovery from the government. Rather, the reviewing court must "decide, *on the basis of the record the agency provides*, whether the action passes muster under the appropriate APA standard of review." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (emphasis added); see Pet. App. 29 (district court recognizes that "the scope of review under the APA is narrow and must ordinarily be confined to the administrative record").

The assertion of a constitutional claim as a separate ground for setting aside agency action under the APA

does not entitle a plaintiff to seek discovery that would not otherwise be permitted in an APA suit. That is particularly so where, as here, the disposition of petitioner's constitutional claims turns on the resolution of a question of fact—*i.e.*, whether petitioner had provided funding to Hamas—that was considered at length by the relevant agency and was central to the administrative determination under review.[3] Petitioner was allowed to submit to OFAC any information it deemed relevant to the redesignation decision, and it was entitled to judicial review of the agency's decision (under an appropriately deferential standard, see pp. 14-15, *infra*), but it would not have been entitled to discovery in this APA action even if the district court had denied the government's Rule 12(b)(6) motion. Accordingly, the district court's failure to convert the government's motion to dismiss petitioner's constitutional claims to a motion for summary judgment had no practical effect on petitioner's ability to obtain discovery.

b. For similar reasons, the district court did not err in considering hearsay and unsworn statements in its review of the designations. Neither the APA nor IEEPA prohibits the Secretary from considering such materials, or requires him to adhere to the Federal Rules of Evidence and Civil Procedure, in determining whether a particular entity should be designated as a Specially Designated Terrorist or Specially Designated

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[3] At least in this Court, petitioner does not contend that the restrictions imposed pursuant to IEEPA on the transfer of funds to Hamas impair its rights under the First Amendment. To the contrary, petitioner states that "[n]o one would dispute the importance of cutting off financing for terrorists, including Hamas." Pet. 4. Petitioner's First Amendment claims rest instead on the assertion that petitioner has not in fact provided such funding.

Global Terrorist. See pp. 21-22, *infra*. Because those materials were properly made part of the administrative record, the court of appeals was entitled (indeed, required) to consider them in its review of the agency's decision.

c. The court of appeals might properly have rested its decision on the foregoing general principles governing judicial review of administrative agency decisions. In addition, however, the court of appeals assumed arguendo that the additional evidence submitted by petitioner (including petitioner's attempt to supplement the record while the case was pending on appeal) was properly before it, and the court assessed whether that evidence might have affected the outcome of the case if it had been considered by the district court on a motion for summary judgment. See Pet. App. 16. The court concluded that "the supplementary material could not have defeated the proposition established by the record evidence that [petitioner] was a funder of the terrorist organization Hamas," and that the additional evidence therefore "would have made no difference" in the ultimate disposition of the case. *Ibid.* That fact-specific holding is correct and raises no legal issue of general importance warranting this Court's review.

Petitioner notes that it "submitted sworn declarations of its chief executive officer and two other key officials that it did not fund Hamas," and it contends that summary judgment was inappropriate in light of the parties' dispute on that factual question. See Pet. 20-21. Even when adjudicating constitutional challenges to federal agency action, however, a reviewing court should give deference to the factual determinations of the expert agency. That is particularly so in a case, like the instant one, that implicates questions of national security and foreign relations. See, *e.g.*,

Kleindienst v. *Mandel*, 408 U.S. 753, 770 (1972) (decision to exclude alien, thereby depriving citizens of claimed First Amendment right to associate with him, should be upheld on the basis of "a facially legitimate and bona fide reason"). The courts below, in reviewing the challenged designations, were therefore charged with determining whether the Secretary's factual determinations about the nature of petitioner's activities were supported by substantial evidence—not whether the courts would have reached the same result if they had weighed the evidence de novo. Petitioner's declarations denying involvement in funding Hamas would not prevent a reviewing court from finding OFAC's determination to be reasonable and granting summary judgment to the government, even assuming that those declarations were properly regarded as part of the record before the court of appeals.

2. The court of appeals correctly rejected petitioner's contention (Pet. 26-29) that the blocking authority conferred by IEEPA is limited to property in which a foreign national or government holds a "legally enforceable" interest.

a. This Court has recognized "the broad authority of the Executive when acting under" IEEPA. *Dames & Moore* v. *Regan*, 453 U.S. 654, 672 (1981); see *Regan* v. *Wald*, 468 U.S. 222, 232-233 n.16 (1984) (referring to the "sweeping statutory language" of the Trading with the Enemy Act (TWEA) and noting that IEEPA "tracks the language" of TWEA). IEEPA by its terms encompasses "*any* property in which any foreign country or a national thereof has *any* interest." 50 U.S.C. 1702(a)(1)(B) (emphasis added). OFAC regulations broadly define the statutory term "interest" in property to mean "an interest of any nature whatsoever, direct or indirect." 31 C.F.R. 500.312; see 50 U.S.C.

1704 (authorizing the issuance of "such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by" IEEPA). And, as the court of appeals recognized, the danger at which the IEEPA blocking provisions are directed—*i.e.*, the risk that assets held within this country will be used to support terrorist activities overseas—"is at least as much raised by the prospect of the foreign terrorists holding the beneficial interest, or an interest not defined in traditional common law terms as it is by a legal interest which might be a pure fiction." Pet. App. 10.

b. The D.C. Circuit's ruling on this issue is consistent with the only other court of appeals decision that has squarely addressed the question presented here. See *Global Relief Foundation, Inc.* v. *O'Neill*, 315 F.3d 748, 753-754 (7th Cir. 2002), cert. denied, 124 S. Ct. 531 (2003). The plaintiff in *Global Relief Foundation* argued that the word "interest" in 50 U.S.C. 1702(a)(1)(B) should be construed "as referring to a *legal* interest, in the way that a trustee is legal owner of the corpus even if someone else enjoys the beneficial interest." 315 F.3d at 753; see Pet. App. 10 (discussing *Global Relief Foundation*). In rejecting that contention, the Seventh Circuit explained that IEEPA "is designed to give the President means to control assets that could be used by enemy aliens," and that construing the term "interest" as limited to legal interests would impair "the United States' ability to respond to an external threat." 315 F.3d at 753. The court concluded that "the focus must be on how assets could be controlled and used, not on bare legal ownership. [Global Relief Foundation] conducts its operations outside the United States; the funds are applied for the benefit of non-citizens and thus are covered by

§ 1702(a)(1)(B)." *Ibid.* Similarly here, the D.C. Circuit correctly found that the existence of a foreign "interest" in petitioner's assets was established by "evidence demonstrating that [petitioner] operated as a fundraiser for Hamas in the United States and that Hamas officials provided [petitioner] with funds." Pet. App. 10.

c. Petitioner's reliance (Pet. 27-28) on *Centrifugal Casting Machine Co.* v. *American Bank & Trust Co.*, 966 F.2d 1348 (10th Cir. 1992), is misplaced. In *Centrifugal Casting*, the Tenth Circuit held that Iraq had no cognizable "interest," for purposes of OFAC's blocking authority, in funds paid to a United States corporation as a down payment for services performed for an Iraqi agency pursuant to a letter of credit transaction. See *id.* at 1350-1354. In reaching that conclusion, the court relied heavily on legal principles governing letter of credit transactions, which are not implicated here. See *id.* at 1351-1353.

As petitioner observes (Pet. 28), the Tenth Circuit in *Centrifugal Casting* referred to the fact that Iraq lacked any "legally cognizable property interest" in the relevant funds. See 966 F.2d at 1353, 1354. The court did not suggest, however, that the facially unqualified IEEPA term "interest" is categorically limited to "legally cognizable" interests, much less that the OFAC regulations—which define the term more broadly—reflect an *unreasonable* construction of the statute. Rather, the thrust of the Tenth Circuit's analysis was that the mere *possibility* that domestically-owned funds in the possession of a party to an arm's-length contractual relationship with a foreign entity will someday be transferred to that entity is insufficient to give the foreign entity an "interest" in the property. See *id.* at 1353 ("[W]e know of no legal authority for the pro-

position that a *potential* breach of contract claim, prior to the commencement of litigation, gives a putative plaintiff a legally cognizable property interest in the assets of the putative defendant."). The Tenth Circuit simply did not address the very different situation presented here, in which OFAC's determination that foreign entities have an "interest" in petitioner's property was based on abundant evidence of actual and extensive financial and other connections between petitioner and Hamas.

3. Contrary to petitioner's contention (Pet. 21-24), the court of appeals' consideration of classified information in reviewing the challenged designations (see note 1, *supra*) is consistent with the Due Process Clause of the Fifth Amendment. As the court of appeals recognized, "IEEPA expressly authorizes *ex parte* and *in camera* review of classified information" by a court reviewing the Secretary's decision, and the statute specifically contemplates that a designation may be "'based on classified information.'" Pet. App. 12 (quoting 50 U.S.C. 1702(c)). Where, as here, classified or otherwise confidential information is directly relevant to the merits of an Executive or Judicial Branch decision, the Constitution does not categorically preclude such *in camera* inspection. See, *e.g.*, *EPA* v. *Mink*, 410 U.S. 73, 93 (1973) ("Plainly, in some situations, *in camera* inspection [of requested agency records] will be necessary and appropriate" to resolve suits under the Freedom of Information Act.); *Global Relief Foundation*, 315 F.3d at 754 (citing with approval court of appeals decisions upholding *ex parte* judicial consideration of classified information, and observing that "[t]he Constitution would indeed be a suicide pact if the only way to curtail enemies' access to

assets were to reveal information that might cost lives") (citation omitted).[4]

Both "the primacy of the Executive in controlling and exercising responsibility over access to classified information, and the Executive's compelling interest in withholding national security information from unauthorized persons in the course of executive business," support the consideration of classified information in reviewing designations made by the Secretary pursuant to IEEPA. Pet. App. 13 (internal quotation marks omitted). Although judicial reliance on evidence that is not disclosed to one of the parties is appropriate only in unusual situations (see Pet. 22), petitioner cites no decision that has categorically foreclosed judicial consideration of classified information, or that has held unconstitutional the IEEPA provision (50 U.S.C. 1702(c)) that expressly authorizes *ex parte* review of such evidence in the current setting. The Seventh Circuit in *Global Relief Foundation* considered and rejected a due process challenge to the use of classified information under circumstances not meaningfully different from those presented here. See 315 F.3d at 754.

4. Petitioner also asserts a due process challenge to the administrative procedures employed by OFAC in connection with its decisions to designate and subsequently redesignate petitioner pursuant to IEEPA.

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[4] Even apart from the government's compelling interest in cutting off the flow of funds to international terrorists, there is an independent national security interest in ensuring that classified information remains secure. Indeed, this Court has recognized that the government has a "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980)).

See Pet. 24-26. Petitioner does not challenge the determination by the President and the Secretary that *pre-blocking* notice was inappropriate in light of the exigencies involved here. See, *e.g.*, Pet. 24 (acknowledging this Court's "approval of limited pre-deprivation procedures"); *Global Relief Foundation*, 315 F.3d at 754 ("Although pre-seizure hearing is the constitutional norm, postponement is acceptable in emergencies."); Pet. App. 53-56. Petitioner contends (Pet. 24-26), however, that the agency failed to provide constitutionally adequate *post-blocking* procedures for challenging the designations. That claim lacks merit.

Petitioner received notice immediately following the initial designation, with a specific reference to OFAC's established procedures for seeking administrative reconsideration of a designation. C.A. App. A892-A893; see 31 C.F.R. 501.807. Because petitioner chose not to pursue that post-designation remedy, it cannot now complain that the agency procedures are inadequate. In any event, petitioner received an ample opportunity to submit relevant evidence and argument during the redesignation process, which took place during the pendency of this litigation in the district court and was completed less than six months after the initial designation and attendant blocking of petitioner's assets. See Pet. App. 4, 12, 27-28, 31 n.6, 32 n.8.

Petitioner was given a copy of the unclassified portion of the administrative record, and "[o]n April 30, 2002, OFAC sent [petitioner] formal notification that it was considering redesignating [petitioner] as" a Specially Designated Terrorist and a Specially Designated Global Terrorist. Pet. App. 32 n.8. OFAC afforded petitioner an opportunity to respond to the information in the existing administrative record and to submit any evidence that it believed was relevant to

the redesignation decision, and the agency "committed to consider any information that [petitioner] submitted prior to the agency's action on the redesignation." *Ibid.* In so doing, "Treasury provided [petitioner] with the requisite notice and opportunity for response necessary to satisfy due process requirements." *Id.* at 12.

By letter dated May 14, 2002, petitioner responded to some of the materials contained in the existing administrative record. See C.A. App. A886-A891. And, in accordance with petitioner's request, the administrative record compiled by OFAC in connection with the redesignation process included materials submitted by petitioner to the district court during the instant litigation. See Pet. App. 4-5, 31 & n.7. Petitioner was thus allowed to, and in fact did, participate substantially in the creation of the administrative record that underlay OFAC's redesignation decision.

Contrary to petitioner's suggestion (Pet. 25), the Due Process Clause does not require federal agency determinations to be based upon a full-blown trial-like procedure. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Gilbert* v. *Homar*, 520 U.S. 924, 930 (1997). This Court has frequently upheld administrative decisions based on procedures that do not include cross-examination or other mechanisms associated with a judicial proceeding. See, *e.g.*, *Brock* v. *Roadway Express, Inc.*, 481 U.S. 252, 266 (1987). As the court of appeals correctly held, petitioner "has no right to confront and cross-examine witnesses," because the Due Process Clause "do[es] not require an agency to provide procedures which approximate a judicial trial." Pet. App. 12. Nor is there any constitutional prohibition on the Secretary's use of hearsay information

(see Pet. 26) in administrative decision-making. See *Richardson* v. *Perales*, 402 U.S. 389, 407-408 (1971).

Petitioner identifies no case holding that the procedures utilized by OFAC in connection with IEEPA designation decisions are constitutionally deficient. Absent any conflict in authority, petitioner's due process challenge to those procedures does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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