

[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY)	
INFORMATION CENTER, <u>ET AL.</u> ,)	
)	
Petitioners,)	
)	
v.)	No. 10-1157
)	
JANET NAPOLITANO, in her official)	
capacity as Secretary of the U.S.)	
Department of Homeland Security,)	
<u>ET AL.</u> ,)	
)	
Respondents.)	
)	
)	
)	

**MOTION TO STRIKE PETITIONERS' OPENING BRIEF AND THE
AL-KHALILI DECLARATION; TO ORDER PETITIONERS TO REFILE
THEIR BRIEF; AND TO SUSPEND THE BRIEFING SCHEDULE AND HOLD
THE CASE IN ABEYANCE PENDING DISPOSITION OF THIS MOTION.**

Respondents Janet Napolitano, in her official capacity as Secretary of the U.S. Department of Homeland Security, et al., hereby move to: (1) strike petitioners' opening brief and the Declaration of Nadhira Al-Khalili; (2) order petitioners to refile the brief without any additional putative new petitioners; and (3) suspend the briefing schedule and hold the case in abeyance pending disposition of this motion. As described below, this relief is appropriate because, without any notice, petitioners

added Ms. Al-Khalili's name to the brief's caption as a supposed petitioner, even though she was not listed in the petition for review filed in this Court, and the time for her to file a petition has long since passed.

STATEMENT

1. On July 2, 2010, petitioners Electronic Privacy Information Center (EPIC), Chip Pitts, and Bruce Schneier filed in this Court a petition for review of agency action, seeking to challenge the Automated Imaging Technology (AIT) program of the Transportation Security Administration. The petition was filed pursuant to 49 U.S.C. § 46110, and purported to be timely because it was filed within 60 days of a May 28, 2010 letter from the Chief Counsel of TSA rejecting their request to halt the program. Ms. Al-Khalili is the General Counsel of an organization that was one of the signatories to the request to TSA; she thus certainly had notice of the TSA's May 28 rejection of that request.

2. On the same day they filed their petition for review, the three named petitioners also filed in this Court a motion styled as an "emergency motion" to halt the program, pending this Court's review. Respondents opposed this motion, which the Court denied on September 1, 2010. In opposing petitioners' emergency motion, respondents suggested that the three petitioners lacked standing to raise a challenge under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*,

to the AIT program, because neither the organizational petitioner nor the two individual petitioners asserted a religious objection to the program. *See* Opposition to Emergency Motion for Injunctive Relief (filed July 15, 2010) at 8 n.6.

3. Pursuant to the briefing schedule issued by this Court, petitioners lodged their opening brief with the Court on November 1, 2010. Under the briefing schedule, respondents' brief is due on December 1, 2010.

4. Without any explanation, petitioners' opening brief includes in the caption the name of "Nadhira Al-Khalili" as one of the petitioners; identifies her as a petitioner in the body of the brief; and discusses the nature of her religious objections to the AIT program. The brief is also accompanied by a declaration signed by Ms. Al-Khalili, which provides information about her.

5. Ms. Al-Khalili is a stranger to this litigation, never having filed a petition for review or being included in the petition filed on July 1, 2010.

REASONS WHY THE MOTION SHOULD BE GRANTED

We assume that petitioners wish to add Ms. Al-Khalili as a petitioner here in order to attempt to cure the RFRA standing defect identified by respondents in their opposition to petitioners' emergency motion. But, as we explain below, petitioners cannot unilaterally at this point amend their petition and add a new party to the case, as they surreptitiously attempted to do.

1. Rule 15(a), Fed. R. App. P., states in pertinent part that "[r]eview of an agency order is commenced by filing, within the time prescribed by law, a petition for review" with the clerk of the appropriate Court of Appeals, *id.* at R. 15(a)(1). That petition "must name each party seeking review either in the caption or the body of the petition" *Id.* at R. 15(a)(2)(A).

The relevant statute in the instant case, 49 U.S.C. § 46110, requires such a petition to be filed within 60 days of issuance of the challenged agency order, unless "reasonable grounds" exist for a tardy filing. *See id.* at § 46110(a). Thus, petitioners had 60 days from the date of TSA's letter of May 28, 2010 to file a timely petition for review as to that order, and petitioners EPIC, Pitts, and Schneier did so on July 2, 2010.

In the Al-Khalili Declaration and petitioners' brief, Ms. Al-Khalili is identified as Legal Counsel for the Council on American-Islamic Relations (CAIR) – an organization that EPIC describes as one of the signatories to its letter of April 21, 2010 to TSA, challenging the AIT program. *See* EPIC Opening Br. i, 14, 26-27. That letter gave rise to TSA's May 28, 2010 letter that petitioners EPIC, Pitts, and Schneier have asked this Court to review. Ms. Al-Khalili thus undoubtedly was both personally and professionally aware of this matter, and could have either placed her name on the petition for review filed on July 2, 2010, or filed her own petition for

review within sixty days of May 28, 2010 (*i.e.*, until July 27, 2010). For whatever reason, she did not do so, and she has offered no "reasonable grounds" for this failure. *See* 49 U.S.C. 46110(a).

2. We surmise that the unilateral and untimely addition of Ms. Al-Khalili to petitioners' opening brief caption as a purported petitioner was prompted by a realization, while petitioners were preparing their opening brief, that there is a serious problem with their standing to raise a RFRA claim here. This standing problem was raised in respondents' opposition to petitioners' emergency motion (filed July 15, 2010), at 8 n.6. After the standing defect was pointed out, Ms. Al-Khalili still had almost two weeks in which to file a petition for review or attempt to join the one already filed. A tardy and unexplained attempt to remedy a standing flaw is surely not "reasonable grounds" for filing a petition for review more than three months out of time -- even if Ms. Al-Khalili had actually filed such a petition, which she has not done in any event.

In sum, petitioners cannot cure their RFRA standing defect by unilaterally adding a new "petitioner," who has not even purported to file a petition for review, long after the time to file such a petition under 49 U.S.C. § 46110 has expired.

3. While the Court is considering this motion to strike, it should suspend the briefing schedule and hold the case in abeyance, because until the Court rules on the

motion, respondents cannot know whether or not to include any discussion of Ms. Al-Khalili in their brief.

CONCLUSION

For the foregoing reasons, the Court should strike petitioners' opening brief and the Al-Khalili Declaration, and order petitioners to file a corrected opening brief without any additional putative new petitioners. While this motion is pending, the Court should suspend the briefing schedule and hold the case in abeyance until the Court rules on the motion.

Respectfully submitted,

/s/ Douglas Letter

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2010, I caused the foregoing Motion to be filed electronically with the Court via the Court's CM/ECF system, and also caused four copies to be delivered to the Clerk of the Court by hand delivery within two business days. On that same date, service will be made automatically upon the following CM/ECF participants, and by first-class mail upon the *pro se* petitioner identified below:

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