

[ORAL ARGUMENT NOT YET SCHEDULED]

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

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

PETITIONERS' OPPOSITION TO 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

**STATEMENT OF FACTS**

1. On November 1, 2010, Petitioners timely filed their opening brief, 49 U.S.C. § 46110, in this matter as ordered by this Court on September 1, 2010.
2. On November 5, 2010, Respondents moved this Court to “strike Petitioner’s opening brief and the Al-Khalil 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.”

3. The sole basis of Respondents' motion is the inclusion of "Nadhira Al-Khalili" (quotation marks appear in Respondents' motion), as a named party in Petitioners' opening brief.

4. Ms. Nadhira Al-Khalili is Legal Counsel of the Council on American Islamic Relations, a member of the District of Columbia bar, and a devout Muslim.

5. Ms. Al-Khalili set out in her affidavit her objections to the agency practice that is the subject of this litigation.

6. Ms. Al-Khalili drafted the section of the petition to the agency concerning the Religious Freedom Restoration Act that is the subject of this litigation. *See* Ex. 1 at 6-7; AR 125.

7. Millions of devout Muslims are subject to the agency practice that Ms. Al-Khalili and Petitioners oppose.

8. Much of Respondents' motion is filled with odd innuendo that appears to call into question factual matters that are not in dispute. For example, regarding the filing of Petitioners' Petition for Review in this lawsuit, Respondents state at one point it was "purported to be timely," Resp't Mot. at 2, but later concede that Petitioners did "file a timely petition for review," Resp't Mot. at 4.

9. Respondents treat Ms. Al-Khalili's standing claim in a similarly inconsistent fashion, arguing on the one hand that "Ms. Al-Khalili is a stranger to this litigation," Resp't Mot. at 3, while conceding that Ms. Al-Kahlili, Legal

Counsel to CAIR, signed the petition to the agency which is the subject of this litigation, Resp't Mot. at 4.

**THE RESPONDENTS' MOTION SHOULD BE DENIED**

First, the omission of Ms. Al-Khalili's name at the outset does not prevent the Court from recognizing that Ms. Al-Khalili's claims and Petitioners claims as "rising and falling as one" for purposes of R. 15(a)(2)(A). See *Rampengan v. Gonzalez*, 206 Fed. Appx. 248, 252 (4th Cir. 2006). Ms. Al-Khalili's organization signed the April 21, 2010 petition now before the Court, and she is Legal Counsel for the organization. Ex. 1 at 9; AR 125.

Second, there is no prejudice to Respondents if Ms. Al-Khalili participates as a party to the proceeding. Respondents have ample time to address the arguments set out in Petitioners' brief. Petitioners previously raised the same arguments in their petition to the agency and their Emergency Motion in this case.

Third, Ms. Al-Khalili's claims are reflected in the petition submitted to the agency that is the focus of this litigation. Ex. 1 at 6-7; AR 125. Indeed, Ms. Al-Khalili drafted much of the language in the petition to the agency and ensured that her organization, the Council on American Islamic Relations, was a signatory to the petition that is the subject of this litigation. Her standing in this matter derives directly from her objections to the agency practice, the substance of the claims set

out by Petitioners, and her involvement in the drafting of the petition now properly before this Court. D.C. Cir. Rule 28(a)(7).

Fourth, it would frustrate judicial economy for Ms. Al-Khalili to file separately in this Court to raise matters that are already before the Court arising from the April 21, 2010 petition. Joinder would be the likely outcome of such an effort. The inclusion of Ms. Al-Khalili in Petitioners' opening brief expedites the Court's full review of this matter.

Fifth, Petitioners filed an *opening brief* on November 1, 2010 as per the Court's order. This is analogous to the filing of a complaint in which all parties are named. *See Elkins Carmen v. Surface Transportation Board*, 335 U.S. App. D.C. 212, 170 F.3d 1144, 1145 (D.C. Cir. 1999). The inclusion of Ms. Al-Khalili at the outset of this litigation creates no problem for Respondents under Rule 15(a).

Sixth, Petitioners were surprised that Respondents raised a standing objection to the Religious Freedom Restoration Act ("RFRA") claims in response to the July 2, 2010 Emergency Motion since Respondents previously sought to address these claims in their May 28, 2010 answer to the April 21, 2010 petition. While Petitioners do not agree with Respondents regarding their standing analysis, Ms. Al-Khalili's participation helps to overcome Respondents' concern unless Respondents are, for some reason, reluctant to address the RFRA claims on their merits.

## CONCLUSION

Respondents are simply afraid to have the Religious Freedom Restoration Act claims heard by this Court. Respondents hope by seeking to exclude Ms. Al-Khalili, the leading spokesperson on the religious freedom claim set forth in Petitioners' petitions and lawsuit against the agency, they will avoid judicial scrutiny of an agency practice that substantially burdens the free exercise of religion in violation of federal law. Respondents also hope to further delay these proceedings with motions that seek "to strike petitioner's opening brief" and to "hold this case in abeyance." Resp't Mot. at 1, 6.

In light of the urgency of this matter, the lack of prejudice to Respondents, and the Court's opportunity to consider all issues that were fairly before the agency at the time it decided to subject air travelers, including many Muslims of devout religious belief, to the body scanner program, Respondents' motion should be denied.

Respectfully submitted,

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Dated: November 9, 2010

## CERTIFICATE OF SERVICE

I hereby certify that on the 9th 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 identified below:

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