

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----X
:
AMERICAN CIVIL LIBERTIES UNION :
FOUNDATION :
125 Broad Street, 18th Floor :
New York, NY 10004 :
:
ADVOCACY INSTITUTE :
1629 K St. N.W., Suite 200 :
Washington, D.C. 20006 :
:
AMNESTY INTERNATIONAL USA :
5 Penn Plaza, 14th Floor :
New York, NY 10001 :
:
ASIAN AMERICAN LEGAL DEFENSE :
AND EDUCATION FUND :
99 Hudson Street, 12th Floor :
New York, NY 10013 :
:
BRENNAN CENTER FOR JUSTICE AT NEW :
YORK UNIVERSITY SCHOOL OF LAW :
161 Avenue of the Americas, 12th Floor :
New York, NY 10013 :
:
ELECTRONIC FRONTIER FOUNDATION :
454 Shotwell Street :
San Francisco, CA 94110-1914 :
:
NAACP SPECIAL CONTRIBUTION FUND :
4805 Mt. Hope Drive :
Baltimore, MD 21215 :
:
NAACP LEGAL DEFENSE AND :
EDUCATIONAL FUND, INC. :
99 Hudson Street, Suite 1600 :
New York, NY 10013 :
:
NATURAL RESOURCES DEFENSE COUNCIL :
40 West 20th Street :
New York, NY 10011 :
:
:

FOCUS PROJECT d/b/a OMB WATCH :
1742 Connecticut Avenue NW :
Washington, DC 20009 :

OUR BODIES OURSELVES :
34 Plympton Street :
Boston, MA 02118 :

PEOPLE FOR THE ETHICAL TREATMENT :
OF ANIMALS :
501 Front Street :
Norfolk, VA 23510 :

UNITARIAN UNIVERSALIST :
SERVICE COMMITTEE :
130 Prospect Street :
Cambridge, MA 02139 :

Plaintiffs, :

v. :

UNITED STATES OFFICE OF :
PERSONNEL MANAGEMENT :
1900 E Street NW :
Washington, DC 20415-1000 :

MARA T. PATERMASTER, :
Director :
Office of CFC Operations :
United States Office of Personnel Management :
1900 E Street NW :
Washington, DC 20415-1000 :

Defendants. :

-----X

COMPLAINT

Introduction

1. This is a complaint for declaratory and injunctive relief. Plaintiffs include organizations that receive or have received funds pursuant to a program known as the

Combined Federal Campaign (CFC). This program enables federal employees to contribute money from their paychecks to nonprofit organizations.

2. In 2004, for the first time, the CFC program required all organizations seeking to participate in the CFC program to sign a new, vague, and poorly drafted certification. As apparently construed by defendant Paternoster, the certification requires CFC-eligible organizations to screen every employee and every expenditure against a series of blacklists created by the government on the basis of secret information. This unprecedented effort to require nonprofit organizations to function as enforcement arms of federal authorities is prohibited by federal statute and is unconstitutional.

3. Plaintiffs seek declaratory and injunctive relief preventing the enforcement of the certification language and permitting them to participate in the CFC without signing the certification.

Jurisdiction And Venue

4. This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1361.

5. Venue properly lies in this Court pursuant to 28 U.S.C. §§1391(a)(1) and (e), because the defendants reside in this district.

Parties

6. The AMERICAN CIVIL LIBERTIES UNION (ACLU) FOUNDATION is a nationwide, nonprofit, nonpartisan organization that promotes civil liberties through a program of litigation and public education. Throughout its long history, it has taken the position that civil liberties must be preserved even during periods of national crisis. The ACLU Foundation is a 501(c)(3) corporation.

7. The ADVOCACY INSTITUTE, based in Washington, D.C., is a 501(c)(3) organization that supports social justice leadership through training, networking, and advanced learning opportunities. Its mission is to make social justice leadership strategic, effective, and sustainable in pursuit of a just world. The Advocacy Institute works primarily through capacity-building workshops and seminars that strengthen social movements from within. Since its founding in 1985, the Advocacy Institute has worked with more than 2,500 nonprofits and NGOs in over 65 countries and regions, as well as most U.S. states. Its newest initiative, www.advocacy.org, brings the lessons and resources of nearly 20 years of programs online to reach an even broader activist community.

8. AMNESTY INTERNATIONAL USA (AIUSA), a nonprofit organization incorporated in New York, is the US-based section of Amnesty International (AI), the largest grassroots human rights organization in the world, with over 320,000 members in the U.S. dedicated to the global promotion and defense of human rights. AI's vision is of a world where every person enjoys the rights enshrined in the United Nations' "Universal Declaration of Human Rights," and AI protects those rights with a relentless integrated program of research, education, and action. As an impartial and independent organization, AI neither supports nor opposes any government, political ideology, economic interest, or religion. It was awarded the Nobel Peace Prize in 1977. AIUSA is a 501(c)(3) organization.

9. The ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF) is a 30-year old nonprofit 501(c)(3) organization that protects and promotes the civil rights of Asian Americans through litigation, advocacy, and community

education in the areas of immigrant rights, the elimination of hate violence, voting rights and civic participation, and economic justice for workers.

10. The BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW (BRENNAN CENTER) is a nonprofit 501(c)(3) organization that aims to unite thinkers and advocates in pursuit of a more just and generous democracy. Through litigation, scholarship, and public education, the BRENNAN CENTER fights for equality, human dignity, and fundamental freedoms.

11. The ELECTRONIC FRONTIER FOUNDATION (EFF) is a nonprofit 501(c)(3) civil liberties organization working to protect rights in the digital world. Through public education and litigation, EFF actively encourages and challenges industry and government to support free expression and privacy in the information society. Founded in 1990, EFF is based in San Francisco. EFF has over 13,000 members across the United States and maintains one of the most linked-to Web sites in the world, <<http://www.eff.org>>.

12. The NAACP SPECIAL CONTRIBUTION FUND (NAACP) is a 501(c)(3) non-profit unincorporated association. The NAACP's mission is to ensure the political, educational, social, and economic equality of minority group citizens; to achieve equality of rights; to remove all barriers of racial discrimination through democratic processes; and to seek enactment and enforcement of federal, state and local laws securing civil rights.

13. The NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (LDF) is a nonprofit 501(c)(3) corporation established under the laws of the State of New York, established to assist black persons in securing their constitutional and statutory

rights through the prosecution of lawsuits and public education, and to provide legal services to black persons suffering injustice by reason of racial discrimination. LDF has frequently appeared before the Supreme Court of the United States and other federal courts both as counsel and as *amicus curiae*.

14. The NATURAL RESOURCE DEFENSE COUNCIL, INC. (NRDC) is a national, 501(c)(3) not-for-profit membership corporation organized under the laws of the State of New York. NRDC has offices in New York City, Washington, D.C., Los Angeles, and San Francisco. Founded in 1970, NRDC has more than 480,000 members nationwide. NRDC's staff of scientists, lawyers, and environmental specialists is dedicated to protecting public health and the environment through litigation and public education.

15. The Focus Project, d/b/a OMB WATCH, is a 501(c)(3) national organization that promotes government accountability and citizen participation in public issues and decision-making. OMB Watch was formed in 1983 to lift the veil of secrecy shrouding the White House Office of Management and Budget (OMB), which oversees federal regulation, the budget, proposed legislation, testimony by agencies, information collection and dissemination, and much more. Over the years, this work has expanded to other concerns about the federal government's institutional responsiveness to public needs.

16. OUR BODIES OURSELVES (also known as the Boston Women's Health Book Collective) is a 501(c)(3) educational and advocacy organization that empowers women with information about health, sexuality, and reproduction. It is best known for the landmark book about women's health, "Our Bodies, Ourselves" (first published in

1970 and soon to appear in its 8th edition). OUR BODIES OURSELVES works in and for the public interest, to promote equality between women and men, and to build bridges among social justice movements. OUR BODIES OURSELVES is a non-profit 501(c)(3) organization.

17. PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA) is a 501(c)(3) nonprofit charity dedicated to exposing and ending animal exploitation and abuse wherever it occurs through education, investigations, grassroots campaigns, rescues, advocacy, and messages of compassion.

18. The UNITARIAN UNIVERSALIST SERVICE COMMITTEE (UUSC) is a 501(c)(3) nonprofit, nonsectarian human rights organization founded by individuals who helped refugees escape Nazi-occupied Europe just prior to the Second World War. Working to affirm the worth, dignity, and human rights of every individual, UUSC partners with people around the world who are challenging oppressive policies and confronting unjust power structures. UUSC promotes environmental justice, works to eradicate economic injustice, and defends civil liberties while engaging its 32,000 members and supporters to be citizen-activists.

19. The UNITED STATES OFFICE OF PERSONNEL MANAGEMENT (OPM) is the federal, executive branch agency responsible for operating the CFC. OPM is located in Washington, D.C.

20. MARA T. PATERMASTER is the Director of the Office of CFC Operations of OPM. Ms. Patermaster's office is in Washington, D.C. She is sued in her official capacity.

Facts

The Combined Federal Campaign

21. The Combined Federal Campaign (CFC) is a program administered by the Office of Personnel Management (OPM) that permits certain charitable organizations to solicit contributions from federal employees at their workplace, and permits those employees who wish to contribute to such organizations to do so by having a specified sum deducted from their paychecks.

22. The original precursor of the CFC was the President's Commission on Fundraising within the Federal Service, which sought to impose a structure on the solicitation of federal employees by setting up an advisory board to craft uniform solicitation guidelines. Executive Order 10728, 22 Fed. Reg. 7219 (September 6, 1957).

23. In 1961, President Kennedy issued Executive Order No. 10927, 26 Fed. Reg. 2383 (March 18, 1961). This Executive Order created the structure for the program that ultimately became the CFC. The stated purpose of the Order was to "make arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations."

24. It was the case in 1961, and is the case today, that the CFC is the only mechanism by which charitable organizations are authorized to solicit federal employees in the workplace, absent special circumstances approved by the federal government in cases of emergencies and disasters.

25. In 1983, President Reagan issued Executive Order No. 12404, 48 Fed. Reg. 6685 (February 10, 1983). This order sought to limit the groups that would be eligible to participate in the CFC program. More specifically, it mandated that organizations

seeking to receive funds through the program must “directly benefit human beings” and must not “seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves.”

26. Organizations that would have been excluded by President Reagan’s Executive Order commenced litigation challenging the proposed restrictions. A federal district court in this district thereafter entered an injunction barring enforcement of the Order.

27. In compliance with the injunction, OPM issued regulations in 1984 that did not include the restrictions that President Reagan had sought to impose. The 1984 regulations explicitly provided that any organization “organized, qualified and recognized by the Internal Revenue Service, under 26 U.S.C. 501(c)(3)” would be eligible to participate in the CFC. 5 C.F.R. 950.101(a)(15)(1984).

28. Following the promulgation of the 1984 regulations that removed President Reagan’s proposed restrictions, the litigation over the Executive Order reached the Supreme Court. The Court upheld the facial validity of the President’s Executive Order but remanded for further proceedings to determine whether the Order had been unconstitutionally applied in particular circumstances. *Cornelius v. NAACP Legal Defense & Educ’l Fund, Inc.*, 473 U.S. 788, 793 (1985).

29. OPM did not issue a new set of regulations reincorporating President Reagan’s Executive Order following the Supreme Court decision. Instead, in 1986 and again in 1987, Congress passed and the President signed legislation that effectively repealed President Reagan’s 1983 Executive Order, and codified the 1984 regulations.

P.L. 99-349, §204, 100 Stat. 710, 748-49 (1986); P.L. 100-202 §101 (m) [Title VI §618], 101 Stat. 1329-423-24 (1987), 5 U.S.C. §1101.

30. Specifically, Public Law 100-102 (set out after 5 U.S.C. §1101) expressly repealed the changes that President Reagan had instituted. *See* P.L. 100-202 §101 (m) (a) & (b)(1)(C). Moreover, to ensure that the eligibility standards would not be amended in “this or any fiscal year hereafter,” through executive order or further administrative action, the 1987 statute provided that “[a]ny requirements for eligibility to receive contributions through the Combined Federal Campaign shall . . . remain the same as the criteria in the 1984 regulations, except as otherwise provided in this section.” *Id.* at (a) & (b)(1)(A). The statute also provided that “[p]ublic accountability standards shall remain similar to the standards which were by regulation established with respect to the 1984-87 Combined Federal Campaign.” *Id.* at (b)(1)(D).

31. The 1984 regulations contained no eligibility standard similar to the certification requirement at issue in this case, and Congress has never authorized the addition of such a requirement.

32. The 1984 regulations contained no accountability standard similar to the certification requirement at issue in this case, and Congress has never authorized the addition of such a requirement.

33. The essential structure of CFC has thus remained the same since 1984. Certain non-profit groups may apply to participate in the program. If they are approved for participation, they are listed in a booklet distributed to all federal employees. Employees who wish to contribute to any of the listed organizations may designate the organizations and the amounts they wish to contribute. This amount is then automatically

deducted from the employee's paycheck and eventually sent to the designated organizations.

34. Nearly 10,000 nonprofit organizations participate in the CFC program. In fiscal year 2002, the CFC distributed nearly \$237 million, and in fiscal year 2003, a total of \$248.5 million to those organizations. Approximately 1,345,000 federal employees (or approximately 1/3 of all of those given an opportunity to contribute) participated by contributing some portion of their salary to an eligible organization.

35. People who are in the habit of making their charitable contributions through a salary check-off system such as the CFC are less likely to make contributions by writing individual checks to organizations. Some federal employees who use the CFC check-off system, upon finding that an organization is not listed, will give the funds that they would have contributed to the unlisted organization to another organization that is listed.

36. CFC also permits individuals to contribute to organizations anonymously, protecting them from receiving further solicitations.

37. Because the CFC is the only method by which the plaintiffs can solicit directly from federal employees, it is the only method by which the plaintiffs can target a solicitation specifically to such persons by emphasizing those of its activities that affect federal employees.

Certification Requirement

38. In 2004, the CFC circulated its standard application form to previously eligible organizations. For the first time in the history of the program, the form required applicants to sign the following certification:

I certify that, as of ____ (date) the organization named in this application does not knowingly employ individuals or contribute funds to organizations found on the

following terrorist related lists promulgated by the U.S. Government, the United Nations, or the European Union. Presently these lists include the Department of the Treasury's Office of Foreign Assets Control Specially Designated Nationals List, the Department of Justice's Terrorist Exclusion List, and the list annexed to Executive Order 13224. Should any change of circumstances occur during the year OPM will be notified within 15 days of such change.

39. Prior to adding this certification to the application, OPM did not publish its intent to do so in the Federal Register. In fact, OPM has never published any notice about this certification in the Federal Register. Publication in the Federal Register provides affected individuals and organizations the opportunity to comment on and seek to influence the agency's action.

40. On July 31, 2004, defendant Paternoster was quoted in The New York Times as saying that the certification required organizations to "inspect[] the lists." This quote in the newspaper does not represent an official agency statement. It is, however, the only guidance that defendants have even purported to provide regarding the meaning and scope of the new certification. For example, defendants have not even purported to explain, official or unofficially:

- a. How frequently participant organizations are required to check to see if employees' (or prospective employees') names are on the lists;
- b. How close a match between an employees' (or prospective employees') name and a name on a list is required to be to be considered a match;
- c. Whether participant organizations are required to take any steps to determine if employees (or prospective employees) belong to organizations named on the lists;
- d. Whether the certification requires participant organizations to do anything relating to any lists promulgated by the United Nations and/or the

European Union, in light of the certification's vague and unelaborated reference to "the following terrorist related lists promulgated by ... the United Nations or the European Union."

41. The new CFC certification language also provided no guidance as to what, if any, steps must be taken by a participant organization if it were to find that it had an employee or prospective employee with a name similar to or identical to a name that appeared on one of the specified lists. For example, if a participant organization with an employee named Steven Smith were to discover that the name "Steven Smith" appeared on one of the specified lists, must it fire the employee within 15 days in order to remain eligible for participation in the CFC? Are there steps that the participant organization must or may take to determine whether its employee is the same person as the person whose name is on the list? If the participating organization had an employee named Steven A. Smith, and discovered that the name "Steve Smith" or "Steven B. Smith" appeared on one of the lists, would the organization be required to do anything? If so, what?

42. OPM has provided no guidance on the meaning of the word "knowingly." It is not clear whether "knowingly" requires actual knowledge that an employee or prospective employee is the same person named on one of the specified lists, or whether a participant organization that does not take certain unspecified steps to determine whether an employee or prospective employee is the same person named on one of the specified lists can be found to have violated the certification because it "should have known" that its employee was on one of the lists.

43. Upon information and belief, organizations participating in the CFC have been confused about the meaning of the certification and have taken very different approaches even when they have signed it. For example, some have apparently checked some federal lists; some have not.

The SDN and Executive Order Lists Mentioned in the Certification

44. The Specially Designated Nationals List (SDN) is administered by the Department of the Treasury's Office of Foreign Assets Control (OFAC). It is comprised of 14 separate lists, each created as a result of a different Executive Order. The OPM certification separately includes both the SDN list and the list attached to Executive Order 13224, even though the list attached to Executive Order 13224 is included within the SDN list.

45. The SDN list was created pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §1701 et seq. Under that Act, the President may declare a "national emergency." If he does so, he may then "investigate, regulate, or prohibit" economic transactions during the period of the emergency. IEEPA is enforced by both civil and criminal penalties.

46. Pursuant to IEEPA, various Presidents have delegated to the Department of the Treasury the authority to create lists of individuals and organizations and have restricted or prohibited economic transactions with them.

47. IEEPA does not expressly require that all persons engaged in economic transactions consult these lists and does not contain explicit language that prohibits hiring an individual who is on the SDN list or who is a member of an organization on the SDN

list. Thus, nothing in IEEPA itself requires CFC participant organizations to check the SDN list.

48. Because the CFC certification goes beyond the requirements of IEEPA, IEEPA cannot provide authority for the CFC certification.

49. Different rules apply to different persons and organizations on the SDN list, depending on the terms of the Executive Order that created that portion of the list. For example, U.S. citizens or residents are prohibited from contributing even humanitarian aid to the organizations listed on the portion of the list attached to Executive Order 13224. Humanitarian aid is not prohibited, however, to organizations listed in other portions of the SDN list.

50. The SDN list includes both individuals and organizations. When an organization is listed, there is no information listed about the members of the organization. The SDN list is currently 166 pages in length and includes approximately 6,300 names.

51. The SDN list changes frequently. Names are added frequently.

52. The SDN list includes a number of extremely common names. For example, the list includes “Manuel Diaz.” Internet phone books alone report that there are more than 300 people with that name in New York, Florida, California, and Texas. The list includes “Michael P. Dooley.” There are at least 65 people with the name “Michael Dooley” in New York, California, Texas, and Massachusetts. The SDN list includes “Miguel A. Lopez,” “Manuel Torres,” and “Oscar Hernandez.” There are more than 100 people with those names in Texas and more than 100 in Florida.

53. In most, though not all instances, the SDN list does have additional information about the individual. For example, the listing for Manuel Diaz lists three addresses, a date of birth, a “cedula” number, and a country. It is not clear how many of those items must be matched before a participant organization must conclude that the employee or prospective employee is the Manuel Diaz on the SDN list. The listing for Michael Dooley has only a country name, and it is not clear whether that country is the country of Mr. Dooley’s birth, citizenship, residence, or ancestry.

54. Some listings include information that would make it difficult, if not impossible, for participant organizations to utilize the list to check employees or prospective employees. For example, the listing for Miguel Angel Rodriguez Orejuela lists two different birth dates and aliases, including “Dr. M.R.O.” and “Patricia.” It is not clear, for example, what if any steps a participant organization must take with respect to an employee or prospective employee named “Patricia Rodriguez.”

55. The SDN list includes a listing for “Ali Khan.” That name is also listed as an alias for several other listings. There are at least 38 people with that name in New York, California, New Jersey, and Michigan.

56. The SDN list also includes names that are shared by well-known people. For example, there is a Manuel A. Diaz who is Mayor of the City of Miami. There is an Ali Khan who is a professor of economics at Johns Hopkins University. There are three “Charles Taylors” (including, for example, Charles (Junior) Taylor) on the list. There is a Charles H. Taylor who is a congressional representative from North Carolina, a Charles A. Taylor who is a professor at Stanford University, a Charles Taylor who is a professor

at Northwestern University, and a Charles Taylor who is a writer and frequent contributor to the online publication Salon.com.

57. There are many names on the SDN list that are not complete names. For example, the list includes an “Ahmed the Tall” and an “Ahmed the Egyptian.” There are many names on the list with “Abu,” which means “father of,” followed by another name. For example, the listings include: Abu Anis, Abu Ali, Abu Abdallah, Abu Ahmed, and others. In some instances, these listings include multiple aliases and, in the case of “Ahmed the Tall,” multiple birth dates. In some instances, such as “Ahmed the Egyptian,” it is not clear whether the person’s actual name appears on the list, or whether only known aliases appear.

58. The name Antonio Romero appears on the SDN list. Although the name is accompanied by aliases and a date of birth, there is no other information about Mr. Romero on the SDN list.

59. The Executive Director of plaintiff ACLU is Anthony Romero. Mr. Romero is sometimes known as Antonio. The birth date listed for the Antonio Romero on the SDN list is not the same birth date as that of the Anthony Romero who is Executive Director of the ACLU. It is not clear if that fact alone is sufficient for the ACLU to sign the required certification, or whether the ACLU must take some further, unspecified steps before it may do so.

60. In the event that a plaintiff organization determines that it has an employee or prospective employee whose name matches in some fashion a name on the SDN list, plaintiffs do not know the degree of similarity that is necessary for the certification to be violated. For example, if a plaintiff organization seeks to employ or does employ a

person from Egypt with the name Ahmed, can the plaintiff organization rely on any information given by the employee or prospective employee that, although his name is Ahmed, and he is Egyptian, he is not the person on the SDN list? If so, what information is sufficient? If not, what further steps must the plaintiff organization take?

61. If a plaintiff organization seeks to employ or does employ a person with a name on the SDN list, and the person asserts that he has one characteristic that does not match the person on the SDN list (such as a different birth date or country), is that sufficient to fulfill the obligation of the certification? If one characteristic (such as country) matches but another (such as date of birth) does not, is that discrepancy sufficient to fulfill the obligation of the certification?

62. In the event that a plaintiff organization determines that it has an employee or prospective employee whose name matches a name on the SDN list, there is no reliable method of determining if the employee or prospective employee is the actual person on the SDN list, or simply someone with a similar or identical name.

63. There are no procedures by which an organization participating in the CFC may challenge the listing of an individual or organization on the SDN list. Although an organization or individual may seek a license from the government to engage in economic transactions with an organization or individual on the SDN list, it is not clear whether obtaining such a license would constitute compliance with the CFC certification requirement, because the individual or organization would remain on a specified list. Moreover, the government is not bound by any definitive standards in granting or denying a license, need not provide any of its evidence to the person or organization seeking a license, and may rely on secret evidence in denying the license.

64. It may be possible for a person or organization denied removal from the SDN list to bring an action arguing that the government's refusal to remove the name was arbitrary and capricious, but even if such a possibility exists, the deference given the government, combined with evidentiary limitations, makes such a possibility largely illusory.

The Terrorist Exclusion List Mentioned in the Certification

65. The certification refers to the "Department of Justice's Terrorist Exclusion List." A search of the Department of Justice's website reveals no such list.

66. There is a Terrorist Exclusion List on the Department of State's web site. <http://www.state.gov/s/ct/rls/fs/2004/32678.htm>. That Terrorist Exclusion list is comprised solely of organizations, not persons, and thus does not include the names of persons who belong to those organizations.

67. According to the Department of State, the Terrorist Exclusion list is created by the Secretary of State "in consultation with or upon the request of the Attorney General, to designate terrorist organizations for immigration purposes." *Id.*

68. Other than the CFC certification, there appears to be no other provision of law that requires CFC participant organizations (or anyone other than U.S. immigration authorities) to consult the Terrorist Exclusion list for any reason.

69. The Secretary of State may add organizations to the Terrorist Exclusion List at any time and has added organizations in the past.

70. None of the lists referred to in the CFC certification provides any facts explaining how or why a person or organization has been placed on the list.

71. All of the lists referred to in the CFC certification are compiled in part on the basis of facts that the United States government will not reveal to CFC participant organizations, to the public, or to the persons or organizations listed.

Application of the Certification

72. Plaintiff ACLU Foundation began participating in the CFC over a decade ago through an umbrella organization called America's Charities. In fiscal year, 2003, the ACLU Foundation received approximately \$500,000 through the CFC.

73. Plaintiff Advocacy Institute has participated in the CFC since 1995, and has received more than \$16,000 through CFC contributions.

74. Plaintiff AIUSA was projecting Fiscal Year 2005 income from the CFC in excess of \$330,000, on the basis of past contributions.

75. Plaintiff AALDEF has participated in the CFC through America's Charities since 1999 and has received approximately \$85,000 in contributions from federal employees.

76. Plaintiff Brennan Center has participated in the CFC since 2001. It has received approximately \$2000 per year from the CFC.

77. Plaintiff EFF has participated in the CFC since 2002. To date, EFF has received \$36,461.45 from the CFC out of a total pledge amount of \$69,555.18.

78. Plaintiff NAACP has participated in the CFC since 1981 and in the past several years has received approximately \$200,000 annually in contributions.

79. Plaintiff LDF received approximately \$225,725 from the CFC for calendar year 2002, net of administration expenses paid to America's Charities. Distribution of

funds contributed to the 2003 CFC is not yet complete, but to date LDF has received approximately \$115,000 net from the 2003 campaign.

80. Plaintiff NRDC has participated in the CFC for more than 15 years. NRDC participates through Earth Share, a nationwide network of environmental organizations.. During the last year, NRDC received approximately \$137,000 through the CFC.

81. Plaintiff OMB Watch has received approximately \$3,700 through the CFC in the past five fiscal years. OMB Watch is currently preparing its application for the coming year.

82. Plaintiff Our Bodies Ourselves has participated in the CFC for more than a decade. Our Bodies Ourselves has received hundreds of dollars in contributions from federal employees participating in the CFC.

83. Plaintiff PETA has participated in the Combined Federal Campaign since 1991. Since 1992, PETA has received approximately \$2.5 million from the CFC.

84. Plaintiff UUSC has participated in the Combined Federal Campaign since 1986 and has received a total amount of \$1,962,394 through the CFC.

85. Each plaintiff's mission includes activity protected by the First Amendment. Persons employed by the plaintiffs assist the plaintiff organizations in carrying out their First Amendment goals.

86. The CFC certification requires participant organizations to certify that they do not "contribute funds to organizations found on" the specified lists. Some plaintiff organizations regularly provide attorneys to represent other organizations in litigation involving those clients' rights under the Constitution and laws of the United States. Such client organizations might appear on one or more of the specified lists. Plaintiffs

ordinarily pay the costs of all litigation in which a lawyer for the organization is counsel. These costs may include travel costs for clients or witnesses or other costs associated with litigation. It is not clear whether the payment of such litigation expenses would disable a CFC participant from signing the required certification.

87. The plaintiffs never have and never would hire anyone or contribute funds to any individual or organization with the specific intent of furthering or aiding terrorism.

Current Status of the Plaintiffs and the Certification

88. On July 31, 2004, plaintiff ACLU Foundation formally objected to the certification, refused to sign it, and withdrew from the program as a result of its objection.

89. Plaintiff AIUSA has also withdrawn from the CFC in furtherance of its belief that the certification requirement places a burden on fundamental human and civil rights, including those of association, expression, due process, and non-discrimination guaranteed by the United States Constitution and by international human rights treaties to which the United States is a signatory.

90. As of November 5, 2004, plaintiff Brennan Center has withdrawn from the CFC. The Brennan Center objects to the employee certification requirement as an intrusion on the rights of both the Center itself and its employees that is wholly unnecessary to the government's efforts to combat terrorism and that threatens to set a dangerous precedent for future application of the government's terrorism watch lists.

91. As of August 11, 2004, plaintiff EFF has withdrawn from the CFC program, because EFF believes that the government's blacklists are improper as well as inaccurate. As a civil liberties organization, EFF is unwilling to violate the privacy rights of current

and future employees by complying with the employee certification requirement. EFF considers the watch-list requirement to be an unlawful and unnecessary condition on participation in the CFC program.

92. Our Bodies Ourselves is withdrawing from the CFC program in November, 2004. Our Bodies Ourselves objects to CFC's employee certification requirement because it requires the organization either to screen its employees against possibly unreliable government lists, or to reject the generous donations of government employees.

93. Plaintiff UUSC has withdrawn from the CFC program effective October 1, 2004, because of ethical and legal concerns raised by the requirement that all participating agencies sign the certification statement and by the compliance expectation articulated by the Office of Personnel Management.

94. Plaintiff AALDEF would like to continue its participation in the CFC but has not signed the certification for the 2005 campaign. AALDEF objects to the certification, because it believes that watchlists are often inaccurate and can lead to improper racial and ethnic targeting of persons in the South Asian and Muslim communities whom AALDEF represents.

95. The remaining plaintiffs strenuously object to the certification requirement. However, pending this challenge they have signed the certification and remained in the CFC program.

96. Plaintiff Advocacy Institute is deeply concerned about the implications of the new CFC certification requirement. It is opposed to being compelled to choose between

accepting problematic regulations and refusing potential contributors the opportunity to support its work through CFC.

97. Plaintiff NAACP opposes the CFC certification requirement because such requirement contradicts the NAACP's mission.

98. Plaintiff LDF objects to the CFC's employee certification requirement, because its language is so vague that the certification cannot intelligibly be executed, and because the criteria for inclusion on the lists are susceptible to arbitrary application and may penalize individuals and organizations for statements and activities that LDF believes are protected by the First Amendment.

99. NRDC believes it is unlawful for OPM to condition participation in the CFC on compliance with the certification requirement. The requirement is vague, difficult if not impossible to comply with, utterly unlikely to further government efforts to identify terrorists, and completely unrelated to the good purposes for which the CFC was established and is maintained. NRDC wishes to continue to participate in the CFC, in part to afford federal employees the opportunity the program provides to contribute funds to NRDC, and in part to expend contributed funds toward NRDC's nonprofit purposes. NRDC has not withdrawn from the CFC program.

100. OMB WATCH opposes the policy as a misguided, unduly burdensome process that is vulnerable to abuse for political purposes. It leaves the door wide open for politicians and bureaucrats to misuse the lists to retaliate against political opponents, since there is no accountability or oversight regarding who is put on the blacklists. OMB Watch also does not believe charities should be turned into law enforcement agents through the list checking process, which does nothing demonstrable to prevent terrorism.

OMB Watch wishes to continue participating in CFC and has sought clarification on the list checking policy in a Sept. 7 letter to Ms. Paternoster. To date OMB Watch has received no response.

101. PETA objects to the employee certification requirement because it forces PETA and other CFC-participating charities to choose between two equally repugnant and un-American options: Forego the donations of thousands of caring government workers who contribute greatly to its charitable programs by refusing to make the certification, or check the lists to make sure no one doing good works is being smeared by inclusion.

102. Plaintiff organizations object to the certification requirement because it restricts their ability to exercise their freedoms of speech, association, and petition and to advance other rights-related aims without serving any legitimate governmental interest.

103. Plaintiffs have no adequate remedy at law.

CAUSES OF ACTION

104. The certification requirement is prohibited by P.L. 100-202. That statute mandated that eligibility standards remain identical to those in place in 1984 and that accountability standards remain similar to those in place from 1984 to 1987. The certification requirement is a new standard that was imposed in contravention of P.L. 100-102. The defendants thus acted in violation of the Administrative Procedure Act, 5 U.S.C. §706(2)(A) and (C).

105. The certification requirement was adopted in violation of the notice and comment and publication provisions of the Administrative Procedure Act, 5 U.S.C. §553(b)-(c); 552(a)(1).

106. The certification requirement is arbitrary and capricious and contrary to law in violation of 5 U.S.C. §706(2)(A), (B) and (C).

107. The certification requirement violates plaintiffs' rights under the First and Fifth Amendments because it is, *inter alia*, a vague, unreasonable, and unconstitutional burden on plaintiffs' expressive and associational activities, disqualifies plaintiffs from participation in the CFC absent any evidence of actual wrongdoing, and purports to regulate the expenditure of funds that were not received through the CFC.

RELIEF

Based upon the foregoing, plaintiffs respectfully ask this Court to:

- A. Declare that the certification required by the defendant is unlawful and unconstitutional,
- B. Enjoin defendant from enforcing the certification requirement or any similar requirement,
- C. Grant plaintiffs costs and attorneys' fees, and
- D. Grant such other and further relief as is necessary.

Arthur B. Spitzer
D.C. Bar No. 235960
American Civil Liberties Union of the National
Capitol Area
1400 20th Street NW, Suite 119
Washington DC 20036
(202) 457-0800

Christopher A. Hansen
Steven R. Shapiro
Ben Wizner

Gabrielle Prisco
ACLU Foundation
125 Broad Street – 18th floor
New York, NY 10004
(212) 549-2606

Mitchell S. Bernard
Natural Resources Defense Council
40 West 20th Street
New York, NY 10011
(212) 727-4469

Marjorie Heins
Brennan Center for Justice at New York University
School of Law
161 Avenue of the Americas, 12th Flr.
New York, NY 10013
(212) 992-8847

Kathleen M. Guinane
D.C. Bar No. 456729
1749 Connecticut Ave. NW
Washington, D.C. 20009
(202) 234-8494

Theodore M. Shaw
Jacqueline A. Berrien
Norman J. Chachkin
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 965-2200