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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, et al., Plaintiffs, v. JANET RENO, etc., et al., Defendants.	)	CV 87-2107 SVW (Kx) ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AS TO HAMIDE AND SHEHADEH AND DENYING DEFENDANTS' MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION AS TO THE SIX

After the Ninth Circuit reversed this Court's holding, that it lacked jurisdiction to enter a preliminary injunction as to plaintiffs Hamide and Shehadeh ("the Two"), American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995) ("AAADC"), the Two filed a renewed motion for a preliminary injunction. Shortly thereafter, the government filed a motion to dissolve the preliminary injunction that is currently in force as to plaintiffs Mungai, Amer, Barakat, Sharif, Ayman Obeid, and Amjad Obeid ("the Six"). The two motions were briefed together and were heard on April 8, 1996. For the reasons that follow, the Court grants plaintiffs' motion and denies the government's motion.

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

I. BACKGROUND

Plaintiffs' motion should be granted if the Two establish a prima facie case (or colorable showing) that the filing of the McCarran-Walter ideological deportation charges against them in April 1987 (or the addition in 1991 of new ideological charges under the Immigration Act of 1990) constituted selective enforcement in that (1) the motivation for the charges was the Two's constitutionally protected association with the PFLP; and (2) similarly situated others were not charged. See AAADC, 70 F.3d at 1062.

The government's motion should be granted if it shows that changed circumstances (from the time the preliminary injunction was entered) render the Six unlikely to prevail on their claims that the filing of non-ideological deportation charges against them in January 1987 constituted selective enforcement. See, e.g., Favia v. Indiana Univ. of Pennsylvania, 7 F.3d 332, 337 (3d Cir. 1993) ("Modification of an injunction is proper only when there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable") (citation omitted); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 810 (9th Cir.), cert. denied, 375 U.S. 821 (1963).

A. The Government's Change in Strategy

Until now, the government's position has been that plaintiffs, as aliens, did not have the same First Amendment associational rights as citizens, and thus that plaintiffs' association with the PFLP rendered them deportable even though

(as CIA Director William Webster admitted, Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987) ("Webster Testimony")) citizens could not be arrested for the same conduct. This Court and then the Ninth Circuit both rejected this argument, and held that plaintiffs enjoyed the same First Amendment rights as citizens. American-Arab Anti-Discrimination Committee v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989); AAADC, supra. Thus, if citizens could not have been arrested consistent with the First Amendment for the conduct engaged in by plaintiffs, then neither could plaintiffs.

Having lost its legal argument, the government now argues the facts. As the Ninth Circuit noted, 70 F.3d at 1063, the government never presented any evidence about what conduct plaintiffs had engaged in; now it must. In essence, the government now has no choice but to argue, in spite of Webster's testimony to the contrary, that plaintiffs in fact did engage in conduct that would have subjected citizens to arrest.

II. DISCUSSION

A. *Healy* is the Applicable First Amendment Standard

In its recent opinion, the Ninth Circuit set forth the standard the government must meet in order to prove that plaintiffs engaged in unprotected conduct: "knowing affiliation" with an organization that engages in some unlawful activities and the "specific intent to further those illegal aims." 70 F.3d at 1063 (quoting Healy v. James, 408 U.S. 169, 186, 92 S. Ct. 2338,

2348 (1972)). This standard appears to be the equivalent (in the association context) of the Brandenburg standard, which limits the punishment of advocacy to where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829 (1969). See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 n.56, 102 S. Ct. 3409, 3429 n.56 (1982).[1]

1. The PFLP Does Engage in Lawful Activities

Underlying the application of this standard is the determination that while the PFLP engages in unlawful activities, it also engages in lawful activities. Therefore, association simpliciter with the PFLP is protected by the First Amendment. This Court has held explicitly that:

> The PFLP is not solely a criminal organization. It does more than conduct terrorist operations. Thus, support of the PFLP or association with the PFLP would not be a permissible basis for the government to use in determining whom to prosecute.

Jan. 11, 1994 Order Re: Discovery on Sel. Pros. at 7.

The government's own evidence submitted on the instant motions shows that the PFLP engages in lawful activities. Among many other examples of such evidence, the Palestine Youth

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[1] At the April 8, 1996 hearing, the Court questioned the parties with respect to the relationship between the standards enunciated in Healy and Brandenburg. David Cole, plaintiffs' counsel, stated that there was no authority on the question whether a person may be punished for specifically intending to further future, non-imminent, unlawful activity, or in other words, whether Brandenburg offers broader protection to advocacy than Healy extends to association. See Apr. 8, 1996 Tr. at 65-66.

Organization, which the government claims is a front for the PFLP, sponsors sports, games, cultural events, and political demonstrations. Markardt Dec., Exh. 11A, p. 1027-32; 11B, p. 1036-48. The government has also submitted papers seized from Evelyn Zakhary which show that the PFLP distributes literature, sponsors educational, cultural, recreational, and political events. Id., Exh. E, p. 252-78. In addition, evidence submitted years ago in this action showed that the PFLP devotes significant resources to lawful activities, such as providing social services like education, day care, health care, and social security, as well as cultural activities, publications, and political organizing. See Pl. Reply at 19.

Nowhere in the government's papers does it state that it is seeking reconsideration of this Court's express holding that the PFLP engages in lawful activities. But the vast majority of the government's submission is intelligible only in the context of such an argument, for it relates only to the PFLP generally, rather than to plaintiffs as individuals. The government has submitted book-length tracts published by the PFLP explaining its interpretation of Marxist-Leninist ideology. It has submitted dozens of issues of Al-Hadaf, the PFLP's official newspaper, none of which mention any of the plaintiffs. It has also submitted extensive hearsay compilations of the acts of terrorism linked to the PFLP over the years, in none of which any of the plaintiffs are in any way implicated.

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2. The Government's Inappropriate Attempt to Relitigate the First Amendment Issue

In other words, the government has devoted most of its efforts to painting the PFLP as a terrorist organization, rather than painting plaintiffs as terrorists. But, put simply, the nefarious nature of the PFLP is irrelevant under the Healy specific intent standard. The government's confusion (or worse) is exemplified by the fact that its opening brief did not even mention the Healy standard, even though barely three months had passed since the Ninth Circuit had expressly held that it governed this case.

Instead, the government attempts to relitigate the question of the applicable First Amendment standard. It devotes much of its opening brief to arguing for the application of a deferential "immigration context" standard based on Kleindeinst v. Mandel, 408 U.S. 753 (1972), and Fiallo v. Bell, 430 U.S. 787 (1977), cases which this Court and the Ninth Circuit distinguished as involving exclusion rather than deportation. See 714 F. Supp. at 1075-77; 70 F.3d at 1064-65. The government contends that since the Ninth Circuit's holding was made in the context of an appeal of a preliminary injunction rather than a final judgment, it is not the law of the case. Whatever the merit of this contention, it ignores the seemingly obvious fact that this Court is bound to follow every decision of the Ninth Circuit. The government's law of the case argument is an irrelevant distraction.

In summary, then, in order to defeat plaintiffs' motion as to the Two and to prevail on its own motion, the government must show that plaintiffs had the specific intent to further the

PFLP's unlawful aims. If plaintiffs had such specific intent, the government's discriminatory selection of them for deportation would be based on a permissible reason, rather than the impermissible reason of their association with the PFLP.[2] Since plaintiffs cannot prevail on the discriminatory motive prong of their selective enforcement claims unless the basis for the discrimination is impermissible, plaintiffs would thus be unlikely to prevail on such claims. If the government does not make such a showing, the Court should (1) reaffirm its preliminary conclusion as to the Six that the government's basis for selecting them was their First Amendment-protected association with the PFLP, and thus deny the government's motion; and (2) make the same preliminary conclusion as to the Two (for the same reasons as the Court relied upon for the Six), and thus grant plaintiffs' motion.[3]

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[2] Technically, plaintiffs bear the burden of persuasion on their claim for a preliminary injunction. However, the Two rely on the same evidence regarding discriminatory intent and disparate impact as the Court found justified a preliminary injunction as to the Six. The Court therefore finds that, like the Six, the Two are likely to prevail on their selective enforcement claims unless the government can show that its selection of them was based on a permissible reason. Thus, the issues for the two instant motions converge.

[3] The government makes one additional argument as to why plaintiffs are unlikely to prevail. It contends that the decision to deport plaintiffs was made by Elizabeth Hacker, INS District Counsel in Los Angeles, and that no other INS offices or other federal agencies were involved in the decision. If this were true, it would mean that the control group would have to be limited to the Los Angeles INS office, and the government says that there is no evidence that similarly situated others were not deported by that office. Plaintiffs would thus be unlikely to prevail on the disparate impact prong of their selective enforcement claims.

The Court rejects this argument. Abundant evidence shows that higher-up national and regional INS officials, as well as representatives of the FBI, were involved in the decisionmaking

1 B. The Government's Showing

2 The government faces several obstacles in its attempt to
3 make the required showing. First, plaintiffs make a strong
4 argument that the Court should refuse even to consider some 8500
5 pages of the government's approximately 10,000-page submission,
6 at least as to the Six. Second, even if the Court were to
7 consider the whole submission, most of it is irrelevant because
8 it relates only to the PFLP, rather than to the decision to
9 deport plaintiffs, and much of the submission is otherwise
10 inadmissible. Finally, and most fundamentally, what "evidence"
11 the government does have regarding plaintiffs does not show that
12 any of the plaintiffs had the specific intent to further the
13 PFLP's unlawful activities.

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15 process. The two memoranda the Court recently held not privileged are two of many examples of such evidence. See Order to Compel, March 6, 1996. Neither of the two memos was
16 written to or by anyone in the Los Angeles INS office, and one reveals the involvement of the INS commissioner himself. While
17 it may be technically true that an official from the Los Angeles office signed off on the orders to show cause, it is
18 disingenuous to suggest that this means the decision to deport plaintiffs was made exclusively in the Los Angeles office.

19 United States v. Gomez-Lopez, 62 F.3d 304 (9th Cir. 1995), on which the government relies, is not to the contrary. In
20 that case, the Ninth Circuit held that circuit-wide discovery was improper in a criminal case where the defendant had been
21 charged pursuant to guidelines developed solely by the local United States Attorney's Office, "without consultation with any
22 other USAO or with Department of Justice officials in Washington, D.C." Id. at 305. While in Gomez-Lopez there was
23 "no evidence indicating that there is communication or coordination among the USAOs within the circuit that could have
24 affected the decision to prosecute," id. at 307 (emphasis in original), in the instant case there is plentiful evidence of
25 high-level, national coordination between INS, FBI, and DOJ officials that demonstrates quite clearly that "the decision to
26 prosecute" plaintiffs was "affected" by events far beyond the confines of the INS Los Angeles office. The "scope of the
27 discovery" ordered by this Court thus "bear[s] a reasonable relationship to the decision" to deport plaintiffs. Id. at
28 306.

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1. Should the Court Consider the Newly Submitted Evidence?

The government has submitted approximately 10,000 pages of documents on the instant motions. The government produced approximately 1500 pages of documents in discovery, most of which it included in its 10,000-page submission. Plaintiffs argue that the remaining 8500 pages should not be considered.

At the hearing held on August 16, 1995 on the motion to compel filed by the Six, one issue was plaintiffs' request for production of documents reflecting upon the INS's decision to file the deportation charges that were in the possession of the FBI or DOJ rather than the INS itself. The government had produced approximately 1500 pages of documents in discovery up to that point.[4] Plaintiffs thought other documents existed that might be relevant to the question of the government's motivation in deciding to deport plaintiffs, and they thought that some of these might be in the possession of the FBI or DOJ. Plaintiffs therefore asked that the INS be required to produce all relevant documents, not just those in its possession.

At the August 16 hearing, the government's attorney, Michael Lindemann, said: "We have produced all of the materials that INS had at hand when it made that decision. Things that the INS never saw could have no bearing on the INS' decision to

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[4] Defendants produced the following: a four-volume FBI report by SA Frank Knight, attached to Knight's Declaration as Exh. 45; a videotape of the St. Nicholas dinner, attached as Exh. 16A to Knight's Declaration; plaintiffs' immigration files (which plaintiffs say appear to be irrelevant to the instant motions and which the government did not include in its 10,000 page submission); various FBI and INS memos regarding the investigation of plaintiffs. See Pl. Appendix of Materials Produced by Def. (March 20, 1996).

prosecute." Tr. at 7. The Court was not immediately satisfied, and pressed the government on the question of discussions between INS and other agencies: "Are you telling me that there are no documents in the possession of the FBI or Justice Department which reflect upon the decision to deport these people?" Lindemann answered, "Your Honor, you have them all." The Court asked again, "So you're saying there are no others?" Lindemann replied, "To our knowledge, there are no others, Your Honor." Tr. at 8.

Thus, at the August hearing, the government insisted, upon repeated questioning, that the 1500 or so pages of documents which it had already produced were all of the documents that reflected upon the INS's decision to file deportation charges against the Six. The government insisted that any other materials "could have no bearing on the INS' decision to prosecute." Now, the government is attempting to introduce some 8500 additional pages of documents which, by its own admission, played no role in the decision to file deportation charges against the Six. The central question before the Court on the instant motions is whether there is prima facie evidence that the INS made that decision for an impermissible reason. This is the exact same question that the discovery at issue at the August hearing was intended to illuminate. Documents of which the INS was unaware at the time it made that decision cannot possibly be relevant to the question of its motivation in making the

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decision.[5]

Therefore, the government would seem to be caught in a catch-22: either (1) the government was telling the truth at the August 16, 1995 hearing, and all of the 8500 pages of newly-submitted documents are irrelevant to the question of the INS's motivation in making the decision to deport the Six; or (2) the government was not telling the truth at the August 16 hearing, and some or all of the new 8500 pages might be relevant as to the Six.

In its papers, the government responds, albeit indirectly, by saying that it "previously declined to submit this factual record because a variety of jurisdictional and other precedents convinced them that these aliens' claims in this Court should have been dismissed as a matter of law. Having failed to persuade this Court and the Ninth Circuit Court of Appeals on that point, defendants now comply with the Ninth Circuit's opinion in AAADC v. Reno, and, consistent with this Court's Amended Order of January 1994, address these aliens' claims of selective prosecution using a complete factual record." Def. Opp. at 3. In its reply, the government repeats this argument,

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[5] At the April 8, 1996 hearing, the government noted that the document requests at issue at the August 16, 1995 hearing related only to the Six, not to the Two, and that there is thus no inconsistency between the government's 1500-page discovery production and its 10,000-page submission on the instant motions as to the Two. But the flipside of this would be that the 8500 new pages relate only to the Two. However, at the April 8 hearing, when asked whether it was conceding that the 8500 new pages are irrelevant as to the Six, the government demurred. In light of that, and of the fact that the 10,000-page submission is not differentiated according to whether it relates to the Two or to the Six or to all plaintiffs, the Court finds the government's explanation less than completely persuasive.

contending that "[t]he new factual picture presented by the government's submission is the 'changed circumstances,' which, along with the effect these facts have on the applicable legal analysis, satisfy the legal requirements for dissolving the preliminary injunction granted earlier and for denying the additional injunction now sought by plaintiffs." Def. Reply at 9.[6]

Like the government's argument that the Ninth Circuit's holding that Healy applies is not the law of the case, this argument is an irrelevant distraction. If the government thought it could successfully oppose plaintiffs' motion for a preliminary injunction on purely legal grounds, it was certainly entitled to

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[6] It should be noted that this argument does not justify the government's filing of the instant motion to dissolve. "Changed circumstances" refers to matters outside a party's control, not changes in the party's litigation strategy. The latter is an improper reason to bring a motion to dissolve or modify an injunction. United States v. Swift & Co., 286 U.S. 106, 119, 52 S. Ct. 460, 464 (1932) ("The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making"). "A motion to modify a preliminary injunction is meant only to relieve inequities that arise after the original order." Favia, 7 F.3d at 338. See also Building and Constr. Trades Council v. NLRB, 64 F.3d 880 (3d Cir. 1995). The substance of the government's new 10,000-page submission was available to the government at the time the preliminary injunction was entered; the government simply chose not to litigate the facts at that time. There have been no "(1) changes in operative facts, (2) changes in the relevant decisional law, [or] (3) changes in any applicable statutory law." 11A Wright, Miller & Kane, Fed. Prac. & Proc.: Civil 2d § 2961, at 402-03. The Court could thus deny the government's motion on the ground that it is "merely an untimely Rule 59(e) motion for reconsideration disguised as a motion to modify." Id. at 337. Accord Transgo, Inc. v. Ajac Transmission Parts Corp., 911 F.2d 363, 365 (9th Cir. 1990) (party seeking modification of injunction must "show clearly a substantial change in circumstances or law since the orders were entered [and] extreme and unexpected hardship in compliance with the injunction's terms"); Merrell-Nat'l Lab., Inc. v. Zenith Lab., Inc., 579 F.2d 786, 791-92 (3d Cir. 1978).

rely on those grounds. But once the government lost on that motion, and the Court ordered it to produce to the Six all documents reflecting upon the decision to file the deportation charges, "purely legal" arguments about the applicable First Amendment standard had nothing to do with anything.

The government's implication in the above-quoted statement that it submitted this "complete factual record" because the Ninth Circuit ordered it to is also misleading. Nothing in AAADC v. Reno directed the government to submit documents which it had represented to this Court were irrelevant. Based on the discussion in the papers and the statements of Michael Lindemann at the April 8 hearing, the Court concludes that what the government means, but for obvious reasons is reluctant to say outright, is that the Ninth Circuit's rejection of its legal arguments forced it to change its litigation strategy. While this is understandable, it does not extricate the government from the catch-22 in which it currently finds itself mired.

The Court finds the government's conduct in this regard extremely troubling, but in view of the importance of the issue, the Court has considered the entire 10,000-page submission.

2. Most of the Government's Submission is Inadmissible or Irrelevant

Since the sheer volume of the submission precludes a document-by-document analysis, the Court will discuss a few of the recurring evidentiary problems plaguing the government's submission. The government states that it "submitted approximately 10,000 pages of factual material, substantial

portions of which were at one time classified," Def. Reply at 1, but it continues to rely on unattributed hearsay from confidential sources. Much of what Knight and Markardt say in their declarations is based on information allegedly obtained from unidentified sources. See Pl. Reply at 14 & nn.19-20. Even if the sources were identified by name, Knight's and Markdardt's accounts of what the sources told them would be inadmissible as hearsay. Where the sources are not identified, as plaintiffs point out, reliance on this "evidence" poses the same due process problems as prohibit the INS from relying on undisclosed classified information in a legalization proceeding. See AAADC, 70 F.3d at 1067-70.

The government's translations are extremely problematic. Most of the documents submitted, as well as the speeches recorded on the tapes of the fundraising dinners, are in Arabic. The government has not submitted a single declaration from any of its translators (often it does not even identify the translator), so there is no foundation for any of the translations. See Fed. R. Evid. 604. In addition, plaintiffs say that the government has not submitted the original Arabic materials for some of the translations it has submitted. This does not affect the Court's ability to evaluate the evidence, but plaintiffs ought to be able to see the original Arabic documents in order to check the accuracy of the translations. See Pl. Reply at 16 & n.22.

Moreover, many of the government's translations are undated, so it is unclear whether they could have been made available to the INS in 1987 when it made the decision to deport plaintiffs. See, e.g., Knight Exh. 30B. The government bears the burden of

establishing the relevancy of its proffered evidence, so the Court should not admit any of the undated translations. Many of the translations that are dated were not prepared until 1990 or 1991, well after the decision to deport plaintiffs was made, so these translations could not have affected that decision and are thus clearly irrelevant. See, e.g., Knight Exh. 26B.

Similarly, the transcript of the immigration proceedings involving plaintiffs (which consumes more than half of the 10,000-page submission) is irrelevant because it did not exist at the time the decision to deport plaintiffs was made and thus could not have been relied upon by the INS. The same is true of the declarations of Burleigh, Wilcox, and Bremer, government counter-terrorism officials who prepared declarations describing the history of the PFLP.[7]

The government offered no response whatever either in its papers or at the April 8, 1996 hearing to plaintiffs' arguments regarding the translations.

The government's only response to plaintiffs' hearsay charges is that since the Federal Rules of Evidence do not apply in a deportation proceeding, and hearsay is admissible in a deportation proceeding if it is probative and its use is not fundamentally unfair, the government should be able to rely on

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[7] At the April 8 hearing, the government conceded that the immigration transcript is irrelevant because it was not provided to the INS at the time it made the decision to deport plaintiffs. Apr. 8, 1996 Tr. at 23. The counter-terrorism officials' declarations are irrelevant for the additional reason that they relate only to the PFLP generally, rather than plaintiffs as individuals. Similarly, the Markardt declaration is irrelevant because it relates only to activities of the PLFP in New York, and has nothing to do with any of the plaintiffs.

hearsay in this action to prove that it acted properly in instituting deportation proceedings against plaintiffs. The use of what would otherwise be hearsay information regarding the activities of plaintiffs would be permissible under Fed. R. Evid. 801(c) if such information were offered to establish the state of mind of the decisionmakers rather than the truth of the matter asserted, i.e., that plaintiffs in fact did what is alleged. But the government does not assert that the information it seeks to introduce is offered for this purpose. It merely argues that because this case involves a deportation proceeding and hearsay is admissible in a deportation proceeding, that hearsay should be admissible here. Def. Reply at 9.

At the April 8 hearing, the government analogized the question whether the decision to deport plaintiffs violated their First Amendment rights to a determination whether probable cause existed for an arrest. In the latter context, because probable cause may be based on hearsay, hearsay is admissible to show the existence of probable cause. The Court need not resolve this issue, because as explained below, the proffered evidence does not show that any of the plaintiffs had the specific intent to further the unlawful aims of the PFLP.

3. The Government's Submission Does Not Show that Plaintiffs Had the Specific Intent to Further the PFLP's Unlawful Aims

Even if the Court gives the government the benefit of the doubt as to the discrepancy between its 1500-page document production and its 10,000-page submission (despite the weakness

of the government's explanation), and even if the Court disregards the grave evidentiary problems afflicting much of the government's submission, the government faces a more fundamental problem: its submission does not show that any of the plaintiffs had the specific intent to further the illegal aims of the PFLP.

The government's case is based on information gathered from the surveillance of plaintiffs (principally Hamide), in particular as regards three fundraising dinners held in the Los Angeles area in 1985 and 1986. Nearly all of the rest of the government's submission relates only to the PFLP, not to plaintiffs. The first of the three dinners was held at St. Nicholas Cathedral in Los Angeles in February 1985. The second was held at the VFW Hall in San Bernardino in June 1985. The third was held at the Glendale Civic Auditorium in February 1986.

The government sums up what it apparently considers to be its strongest evidence at pages 30-31 of its opening brief: plaintiffs "(1) distributed Al Hadaf on a commercial scale, collected subscriptions, presumably reimbursed the PFLP in Damascus for the cost of those subscriptions, and transported these shipments from the airport cargo facilities to Hamide's residence; (2) rented facilities for fundraising events; (3) arranged and provided security for PFLP events; (4) decorated, organized, catered, conducted, and cleaned up after such events; (5) held leadership positions in the organization; (5) [sic] [6] furnished transportation to other PFLP leaders; (6) [sic] [7] attended high level PFLP meetings abroad; (7) [sic] [8] ordered and arranged the attendance of other members at PFLP meetings

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abroad; and (8) [sic] [9] engaged in regular communications with other PFLP leaders in the United States." Def. Opp. at 30-31.

Notwithstanding the government's characterization of this conduct as "the concerted acts of an international terrorist conspiracy," id. at 31, none of the nine items constitutes evidence of any plaintiff's "specific intent to further the unlawful aims" of the PFLP.

a. The Glendale Dinner

The closest the government comes to the required evidence is in its recounting of the 1986 Glendale dinner. During the fundraising portion of that dinner, Hamide (who was acting as the MC) said: "Here the collection of contributions is mainly for the nation, for the combatants in Lebanon and on the West Bank." Knight Decl. at 47; Exh. 30B at 6. Hamide also said: "The oversight committee will take over now and will announce the total [unclear] and will see to that. They will supervise the sending of the donation to the homeland. I think that on the tables there is also information about last year's donations, that it was received in the homeland and this was confirmed by Al Hadaf magazine." Knight Decl. at 48; Exh. 30B at 6. Finally, after an interlude of dancing and singing, Hamide said: "People, the revolution will not continue and the march to Palestine will not go with words alone. The revolution requires support. Those who cannot offer their lives, as do those who sacrifice their lives daily, can at least offer support here to the heroes, the heroes who teach the enemy lesson after lesson." Knight Exh. 30B at 8. During this time, Ayman Obeid and Sharif walked around the

room collecting checks from attendees and passing them up to the stage, and Shehadeh was on stage with Hamide.

Plaintiffs point out several problems with this evidence and provide additional evidence which puts the government's evidence into context. First, the above quotes are purported translations of remarks made in Arabic, which agents Knight and Gappert do not speak or understand. They taped the event, and had it translated later. But the tape was unclear at many parts during the fundraising portion, so the translation submitted is admittedly incomplete (only three minutes including inaudible parts, according to plaintiffs).[8] Plaintiffs say that one part of the event not captured on the government's tape is the fact that "the solicitations were introduced with a call for assistance to those suffering in the refugee camps in Lebanon and the West Bank," and they submit supporting declarations from people in attendance at the event. See Decl. of Ibrahim, Alwan.

In addition, the government omits in its brief the fact recorded in its exhibits that in between the first two of Hamide's statements quoted above, Pierre Alwan, the president of US OMEN (an IRS-certified charitable organization that the

[8] Moreover, it should be noted that it is far from clear that this translation was provided to the INS before it made the decision to deport plaintiffs. The translation is undated (as well as unsigned), and it was not included in the FBI report which was provided to the INS despite the fact that the FBI report discussed the Glendale dinner at great length. See Knight Dec., Exh. 45. Knight's declaration does not say anything about who made the translation, when it was made, or whether it was provided to the INS. See id. at 43-52. At the April 8 hearing, the government was unable to offer any evidence that the FBI presented this translation to the INS before the INS decided to deport plaintiffs. The government has thus not met its burden of establishing the relevancy of this translation.

government contends, with no evidence at all, is in reality a front for the PFLP's military operations), solicited in English contributions of furniture and other items to a thrift store run by US OMEN. Knight Exh. 30B at 6.

In the same regard, the government's own evidence shows that at the St. Nicholas event in 1985, the fundraising was expressly for the benefit of US OMEN. Hamide told attendees to make checks payable to US OMEN. Knight Decl. at ¶56. The declarations of Nasir, Ibrahim, Ajjawi, and Alwan corroborate this, and state that the donations solicited at the dinners were understood to be for humanitarian purposes only. The government has no evidence of what actually transpired at the San Bernardino VFW dinner in June 1985 (which Amer, not Hamide, ran), but it says that in advance of that dinner, the FBI received information that the fundraising to be conducted would be represented to the audience as for the benefit of "mothers and orphans of Palestinians in the Middle East." Knight Decl. at ¶83(d).

b. <u>The *Healy* "Specific Intent" Standard</u>

None of these statements proves that Hamide (much less any of the other seven plaintiffs) had the specific intent to further the unlawful aims of the PFLP. The reference to "combatants" is unimpressive, because as the government argues in a different context, all PFLP members are referred to as "combatants" and supposedly bound by PFLP doctrine to be "combatants." <u>See</u> p. 26-27, <u>infra</u>. Obviously, most are not "combatants" in the sense the government is trying to pin on Hamide's statement. As plaintiffs point out, "combatants" could refer to all those who opposed or spoke out against the West Bank occupation, all those who opposed

the peace process, or all those who participated in strikes in protest of the occupation. The same is true for "heroes who teach the enemy lesson after lesson."

In context, there is no reason to believe that these statements evince a specific intent to raise money for terrorism. Rather, the PFLP employed terms such as "combat" and "hero" broadly, as rhetorical flourishes, consistent with the Supreme Court's recognition that militant rhetoric goes with the territory of political speech by political minorities. See, e.g., Watts v. United States, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401 (1969) ("The language of the political arena . . . is often vituperative, abusive, and inexact"). Indeed, the Supreme Court has extended the protection of the First Amendment to speech far more militant than what Hamide is alleged to have said. See id. at 706, 89 S. Ct. at 1400 ("if they ever make me carry a rifle the first man I want to get in my sights is L.B.J."); Noto v. United States, 367 U.S. 290, 298, 81 S. Ct. 1517, 1521 (1961) ("certain individuals hostile to the Party would one day be shot"). The government makes much of Hamide's statement that the money being collected was destined for "the homeland," but that statement in no way shows that the money would support illegal activities in "the homeland." The money could as easily have been destined for the refugee camps mentioned above, or for any of the numerous other lawful activities engaged in by the PFLP.[9]

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[9] As plaintiffs stated at the April 8 hearing, it would not demonstrate a specific intent to further any unlawful activities to prove that the funds raised would be devoted exclusively to the PFLP's military activities. This is because the PFLP engages in legal military activities, such as defending refugee camps, as well as illegal military

The Court's conclusion is confirmed by an examination of the Supreme Court's opinion in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409 (1982), its most recent treatment of these issues. That case involved a widespread and long-lasting boycott of white-owned stores in Port Gibson, Mississippi. One of the principal ways the boycott organizers achieved broad compliance with the boycott was by stationing "store watchers" and "Black Hats" outside the white-owned businesses to record the names of blacks that patronized them. In addition to the use of the lawful sanction of social ostracism to dissuade blacks from breaking the boycott, the Court expressly noted that "some members of each of these groups engaged in violence or threats of violence." Id. at 926, 102 S. Ct. at 3432. Relying on this unlawful activity, the plaintiffs sought to impose liability on all individuals who were either store watchers or members of the Black Hats. The Court held that while the individuals who engaged in the unlawful activities could be liable, the individuals who associated with these two groups but did not personally engage in the unlawful activities carried out by some of their number could not be liable "absent a specific intent to further an unlawful aim embraced by that group." Id. at 925, 102 S. Ct. at 3432.

Just as "[t]here is nothing unlawful in standing outside a store and recording names" or "in wearing black hats, although such apparel may cause apprehension in others," id., there is nothing unlawful in distributing literature, recruiting new

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activities.

members, collecting money, or organizing dinner events, even if others find such literature or events alarming. And just as the Supreme Court in Claiborne Hardware refused to allow liability to attach by virtue of association with groups that engaged in unlawful activity, plaintiffs in the instant case cannot be deported for associating with an organization that engages in unlawful activity.

Because a "'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired,'" id. at 919, 102 S. Ct. at 3428 (quoting Scales v. United States, 367 U.S. 203, 229, 81 S. Ct. 1469, 1486 (1961)), the First Amendment requires "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" Scales, 367 U.S. at 229, 81 S. Ct. at 1486 (quoting Noto, 367 U.S. at 299, 81 S. Ct. at 1522)).

The Claiborne Hardware Court noted that the Court in Noto had "emphasized that this intent must be judged 'according to the strictest law,' for 'otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.'" Claiborne Hardware, 458 U.S. at 919, 102 S. Ct. at 3429 (quoting Noto, 367 U.S. at 299-300, 81 S. Ct. at 1521)). Here the government has simply not presented "clear proof" that any of the

plaintiffs "specifically intend[ed] to accomplish [the unlawful aims of the PFLP] by resort to violence."

The government's response in this regard is, unfortunately, typical of its approach to this case: claiming the moral high ground while making misleading arguments. "The PFLP cannot remotely be compared to the NAACP. The NAACP never kidnaped and murdered an American Ambassador; it did not slaughter innocent American citizens at the Lod Airport . . . ." Def. Reply at 11. The entire point of freedom of association is that it doesn't matter whether the PFLP can be compared to the NAACP, and it doesn't matter whether the PFLP has done all these bad things and more. The point is that there is no evidence that any of the plaintiffs ever kidnaped, murdered, or slaughtered anyone, so "precision of regulation" is required to ensure they are not punished for their constitutionally protected activities. Claiborne Hardware, 458 U.S. at 916, 102 S. Ct. at 3427 (quoting NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 340 (1963)).

c. The Government's Other Evidence is Unpersuasive

As the Court has stated above, the evidence regarding the Glendale dinner is the government's strongest. For the sake of completeness, the Court will describe certain other evidence relied upon by the government as well. When one considers this additional evidence, the overall weakness of the government's showing--despite the sheer enormity of its submission--becomes apparent.

A recurring feature of the government's submission is the making of conclusory assertions without any supporting evidence.

For example, Knight's narration of the Glendale dinner includes statements such as: "It is obvious that this fund raiser has nothing to do with building hospitals or schools, it is solely for raising money for terrorist activities by the PFLP." Knight Exh. 30B at 1. Knight doesn't say exactly why he thinks this, but it appears to be because "[t]here are posters with people carrying AK 47s and standing behind anti tank howitzers." Id. Knight also says that "[t]he males are wearing fatigue shirts and camouflage fatigue pants, this would not be a normal attire for obtaining cash for orphans, it is one to get cash for guns." Id. Thus, instead of following the trail of the money collected at the Glendale dinner, the government simply advances the bald assertion that because the event had a militant tone, it must have been intended to support exclusively the PFLP's terrorist activities. There is no basis in logic or in the proffered evidence for this assertion.

Indicative of the government's scattershot, guilt by association approach is its statement of facts in its opening brief, which begins with the following: "Sisters and brothers we all know the revolution wants to transform dollars into bullets, the dollar into bombs, the dollar into a loaf of bread for a family in a hungry camp . . . . Therefore, I suggest putting this chain on auction. This way we change this chain to dollars. From dollars then we can transform it to bullets, and the bullets to kill Zionists in the occupied land. Let us start auctioning on this chain." Def. Opp. at 3. Unfortunately for the government, this alleged statement was made by an unidentified New York PFLP leader, not any of the plaintiffs. It is thus

hardly probative of plaintiffs' specific intent.[10]

The government is much exercised about the speech given by Jaber El-Wanni at the Glendale dinner. El-Wanni allegedly (the problems with the government's translations that the Court detailed above are present here as well) threatened Arabs who supported the Amman Accord, and named some names. One of those named was Nablus Mayor Zaphir Al-Masri, who was assassinated a few weeks later. The PFLP, among other groups, claimed responsibility for the killing. See Knight Decl. at 45-46. The government argues that this gave it the right to prosecute plaintiffs for conspiracy or making threats.

As plaintiffs explain, "[t]here is no evidence that plaintiffs directed Mr. El-Wanni to make that statement, conspired with him, nor even that they were aware that he would make it. The only theory left for holding plaintiffs responsible for Mr. El-Wanni's statement is guilt by association, a theory forbidden by the First Amendment." Pl. Resp. at 2. The fact (if it is a fact) that El-Wanni threatened Al-Masri with plaintiffs present in no way proves that plaintiffs had the specific intent to further any unlawful activities.

Perhaps the most dubious of the government's many unpersuasive arguments is its claim that "PFLP doctrine mandates that every PFLP member be a combatant and binds all members to the positions taken by PFLP leaders. PFLP doctrine also holds that all PFLP activities are subordinate to the 'battle.' Knight

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[10] Similarly, the entire Markardt declaration relates to activities of the PFLP in New York, and has nothing to do with plaintiffs.

Decl. at 13. To the committed PFLP member, pulling a trigger is no different than selling a subscription to Al Hadaf, and soliciting money for the cause is the same as killing Zionists. Every act has a political message. Every utterance carries a terrorist purpose." Def. Opp. at 4.[11] Putting aside for the moment the sheer incredibility of this claim, the real issue, as plaintiffs point out, "is not whether these things are indistinguishable 'to the committed PFLP member,' but to the United States Constitution." Pl. Reply at 26. As the Supreme Court has observed, "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." Aptheker v. Sec. of State, 378 U.S. 500, 510, 84 S. Ct. 1659, 1666 (citation omitted).

It should also be noted that most of the evidence discussed in this Order relates mainly to Hamide, to a somewhat lesser extent to Shehadeh, and only indirectly to the Six. Plaintiffs' helpful summary of the evidence with respect to each of the Six (helpful because the government nowhere particularizes its evidence among the various plaintiffs) reveals that most of it is based on their association with Hamide. See Pl. Reply at 32-33 n.36. Thus, the Court's conclusion that the government has not

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[11] This presumably is the reason for the government's submission of many hundreds of pages of PFLP publications, such as "The Political and Organizational Strategy," published by the PFLP's Central Information Committee. The government quotes and underscores, as if it is somehow meaningful, the statement in this work that the "dialectical link between the battle and the political activity is a sound guide for our action" and that "[a]ll organization, political, informational, and financial efforts must be linked to the interests of the battle and not be at its expense." Def. Opp. at 4-5 n.4.

demonstrated that Hamide or Shehadeh had the specific intent to further the unlawful aims of the PFLP applies a fortiori to the Six.

d. The Government's Strict Scrutiny Argument

The government argues that "[e]ven assuming that the conduct engaged in by these aliens is characterized as pure political 'advocacy' and the government action or regulation here is an infringement of these aliens' freedom of association . . . the Supreme Court has declared that 'it is clear that 'neither the right to associate nor the right to participate in political activities is absolute.''" Def. Opp. at 36 (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976). In other words, selecting plaintiffs for deportation on the basis of First Amendment-protected conduct does not automatically violate the First Amendment; it is subject to strict scrutiny as a content-based regulation of speech and association. The government thus argues that its action was narrowly tailored to further a compelling governmental interest.

At the April 8, 1996 hearing, plaintiffs argued that the considerations underlying the strict scrutiny standard are already incorporated into the Healy standard. More specifically, the argument goes, the Supreme Court held that the compelling governmental interest in stopping groups' unlawful activities may, in light of the protection to which associational conduct is entitled under the First Amendment, be furthered only by targeting those associators who have the specific intent to further the group's unlawful activities; targeting associators

1 who lack this specific intent would be an insufficiently narrowly
2 tailored method of regulation. The Healy rule would thus
3 constitute a context-specific application of strict scrutiny.

4 The Court agrees with plaintiffs. In Claiborne Hardware,
5 the Supreme Court set forth the Healy standard and for support,
6 then stated that "[i]n this sensitive field, the State may not
7 employ 'means that broadly stifle fundamental personal liberties
8 when the end can be more narrowly achieved.'" 458 U.S. at 920,
9 102 S. Ct. at 3429 (quoting Carroll v. Princess Anne, 393 U.S.
10 175, 183-84, 89 S. Ct. 347, 353 (1968)). This indicates that
11 Healy in effect is the strict scrutiny standard in the particular
12 context of association with groups that engage in both lawful and
13 unlawful activities. In addition, the Court has discovered no
14 case in which the court has analyzed the issue as the government
15 suggests: first find that a government regulation of
16 associational activity is unjustified under Healy and then apply
17 strict scrutiny to determine whether it can nonetheless be
18 upheld. The absence of an explicit levels-of-scrutiny analyis is
19 not worrisome or unusual, since (as the government argues in a
20 different context, see Def. Opp. at 23-25), the Supreme Court
21 often speaks without reference to levels of scrutiny in First
22 Amendment cases. See, e.g., City of Ladue v. Gilleo, 114 S. Ct.
23 2038 (1994).

24 In any event, if strict scrutiny applies independent of the
25 Healy test, the Court holds that the government's action in
26 deporting plaintiffs for their protected association with the
27 PFLP fails such scrutiny. The government asserts that it has a
28 compelling interest in stopping terrorism. It surely does. But

if the government cannot prove that plaintiffs had the specific intent to further any terrorist activities, it cannot demonstrate that its deportation of plaintiffs was a narrowly tailored action in furtherance of that interest.[12]

When questioned in this regard at the April 8 hearing, Lindemann, the government's attorney, advanced the eye-opening contention that when the government has a compelling interest, it "can do pretty much what it wants to do." Apr. 8, 1996 Tr. at 67. Not only is this contention utterly without a basis in law, but it is also quite disturbing to hear coming from the government as a justification for its conduct in a case where the plaintiffs have made a preliminary showing that the government in effect treated them as if it could do whatever it wanted.

Lindemann's statement could be dismissed with the recognition that extemporaneous oral remarks tend naturally to suffer from imprecision and are not always intended to mean what they appear to say. But off-the-cuff oral remarks also often mean just what they say, even (or especially) if they weren't intended to be said. The Court is more inclined to view Lindemann's statement as an unintended but sincere product of the extemporaneous setting--a Freudian slip--given his argument to the same effect in his reply brief, in which he contended that because of the difficulty of this case, "the interests of the sovereign must weigh heavily." Def. Reply at 8. It should not need to be said that in this as in every case, "the interests of

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[12] It would thus appear that the government could never pass strict scrutiny when it fails Healy, which is another reason to believe that strict scrutiny is embodied in the Healy standard and need not be separately analyzed in this case.

the sovereign" are entitled only to so much deference as the law affords them. A democratic government is constituted of, controlled by, and exists for, the people; it is their equal before the law.[13]

III. CONCLUSION

In light of all the foregoing, the Court holds that the government has failed to show that any of the plaintiffs had the specific intent to further the unlawful aims of the PFLP. This is what William Webster admitted years ago, and the government's 10,000-page submission confirms it. Therefore, plaintiffs' association with the PFLP was protected by the First Amendment. The Court has already found preliminarily that the Six have made out a prima facie case that this protected association was the government's motivation in selecting them for deportation and that others similarly situated were not so selected. The Court hereby reaffirms that finding, and denies the government's motion to dissolve the preliminary injunction as to the Six. For the same reasons as the Court found the Six had made out a prima facie case of discriminatory motive and disparate impact, the Court finds that the Two have done so as well. The Court therefore grants their renewed motion for a preliminary injunction.[14]

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[13] The Court recognizes that plaintiffs are not citizens of the United States, but as stated above, under AAADC v. Reno, they are entitled to the same First Amendment rights as citizens.

[14] In its reply, the government argues that it need not prove beyond a reasonable doubt that plaintiffs had the specific intent to further the PFLP's unlawful aims, but only

On April 5, 1996, the government filed a motion for reconsideration of the Court's Order issued March 6, 1996 granting in part plaintiffs' motion to compel production of two memos which the government had claimed were privileged. Under Fed. R. Civ. P. 59(e), the government's motion is nearly three weeks late, and under Local Rule 7.16, it is improper because it does not set forth a ground for reconsideration. At the April 8, 1996 hearing, the government stated that its motion was filed late because it spent three weeks deciding whether to seek an interlocutory appeal, to comply with the March 6 Order and seek

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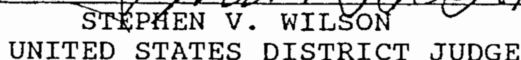
meet the "evidentiary burden" "which would justify initiating a civil deportation proceeding." Def. Reply at 1. It is probably true, as the government argues, that to institute a deportation proceeding, the government need only have a prima facie case of deportability. But that is not the issue here. Plaintiffs do not contend that they are not deportable; the government clearly had evidence that various of the plaintiffs advocated "world communism," 8 U.S.C. § 1251(a)(6)(D), or were out of status, 8 U.S.C. § 1251(a)(2). What plaintiffs contend is that the government decided to act on this evidence of deportability to deport them, while not acting on similar evidence to deport similarly situated others, because of plaintiffs' association with the PFLP. If this is true, it would constitute selective enforcement in violation of the First Amendment regardless of plaintiffs' statutory deportability. To prevail on the instant motions, the government must show that the conduct by plaintiffs that motivated it to deport them was not protected by the First Amendment. The Court has concluded that the conduct which plaintiffs have preliminarily shown to have motivated the government was protected by the First Amendment. The Court need not address the question at what level of proof the government must demonstrate specific intent under Healy or its own motivation, because there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims. Moreover, this is not what the government believed at the time; it believed instead that it could deport plaintiffs merely for associating with the PFLP, even though if plaintiffs "had been United States citizens, there would not have been a basis for their arrest." Webster Testimony, supra, at 95. Indeed, the government continued to adhere to this position until the Ninth Circuit rejected it in AAADC v. Reno.

to redact parts of the two memos, to seek reconsideration, or to take other action. Needless to say, this is not a valid excuse for failing to comply with the time limit of Rule 59(e), and is no excuse whatever for simply ignoring this Court's March 6 Order, which directed the government either to produce the two memos to plaintiffs or to submit its proposed redactions by March 25, 1996. The Court believes the government's blatant disobedience of the March 6 Order to be sanctionable. Nevertheless, as stated at the April 8 hearing, in view of the importance of the privilege issue, the Court will consider the government's motion. However, the Court wishes to make it clear to the parties that it will tolerate no such conduct in the future. In addition, plaintiffs filed on April 8, 1996 a request for reconsideration of the Court's Order issued March 25, 1996 denying plaintiffs' motion for attorney's fees. This request was thus also untimely. While the Court will consider plaintiffs' request as well, the Court hereby warns the parties that such indulgence will not continue indefinitely.

IT IS SO ORDERED.

DATED: 4/25/96



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE