

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FREDERICK BOYLE, :

Plaintiff, :

- against - : No. 05 Civ. 4995 (CBM)

ROBERT W. WERNER, Director of :

Foreign Assets Control of the United States :

Department of the Treasury, in his official :

capacity, JOHN W. SNOW, Secretary, :

United States Department of the Treasury, :

in his official capacity, UNITED STATES :

TREASURY DEPARTMENT, OFFICE :

OF FOREIGN ASSETS CONTROL, and :

ALBERTO R. GONZALES, Attorney :

General, United States Department of :

Justice, in his official capacity, :

Defendants. :

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**SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF
DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Pursuant to the Court's directive at the telephonic pretrial conference held on September 12, 2007, the Government submits this supplemental memorandum in further support of its motion to dismiss, or in the alternative for summary judgment, and in opposition to plaintiff's cross-motion for judgment on the pleadings, or in the alternative, for partial summary judgment.

As the Court recognized at the last pretrial conference, the Second Circuit's decision in Karpova v. Snow, 497 F.3d 262 (2d Cir. 2007) ("Karpova"), disposes of most of plaintiff's claims in this action. In particular, the Karpova court considered and explicitly rejected many of the same claims asserted by plaintiff in this action, including plaintiff's claims that the penalty imposed on him violated the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. ("APA"); that the Iraqi Sanctions Regulations exceeded statutory authority; that plaintiff was not afforded procedural due process under the Iraqi Sanctions Regulations, 31 C.F.R. pt. 575; that the Iraqi Sanctions Regulations violated plaintiff's right to international travel; and that the penalty imposed on plaintiff violated his First Amendment free speech rights. Karpova therefore requires dismissal of these claims.¹

At the last pretrial conference, the Court asked the Government to address which, if any, of plaintiff's other claims survived Karpova and whether those claims could be dismissed on the record before the Court. Specifically, the Court asked the Government to address plaintiff's First Amendment claim of "viewpoint discrimination"; his claim under the Fifth Amendment privilege against self-incrimination; and his claim under the Religious Freedom

¹ The Government addressed Karpova's holding and effect on plaintiff's claims in a letter to the Court, dated August 24, 2007. Plaintiff did not respond to this letter.

Restoration Act, 42 U.S.C. § 2000bb-1 (“RFRA”), and the Free Exercise Clause of the First Amendment. It is absolutely clear that the Court should dismiss all of these claims.

First, as to plaintiff’s First Amendment viewpoint discrimination claim, that claim is foreclosed by Karpova. In Karpova, the Second Circuit held that the Office of Foreign Assets Control (“OFAC”) had fined Karpova for her travel-related transactions in Iraq, and not her speech or expressive conduct, and the First Amendment therefore had no application to her claims. Likewise, because OFAC also fined plaintiff for travel-related transactions in Iraq and not his speech or expressive conduct, plaintiff also cannot maintain any First Amendment claim, including a claim of viewpoint discrimination, which is merely a particularized First Amendment claim. Indeed, the Second Circuit has held that, where, as here, a law does not regulate speech and thus implicate the First Amendment, a plaintiff may not maintain a claim that a government agency improperly burdened his viewpoint in violation of the First Amendment in enforcing that law.

Furthermore, plaintiff’s selective enforcement claim (which, as plaintiff acknowledges, is a claim arising under equal protection principles, and not the First Amendment), also is foreclosed by Karpova, and can be dismissed on the factual record before the Court. Because this case is a challenge to an agency action arising under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., the Court looks to the Administrative Record in assessing plaintiff’s various claims, and determines only whether OFAC acted reasonably given that Record. As set forth in defendants’ motion papers, that Record clearly indicates that OFAC sanctioned plaintiff because he violated the Iraqi Sanctions Regulations. By contrast, plaintiff has submitted no evidence indicating that OFAC selectively enforced the regulations against him,

and not other similarly situated individuals, because of his anti-war views, and therefore cannot maintain a selective enforcement claim -- which is exactly what this Court held in Karpova (McMahon, J.), and the Second Circuit affirmed. Moreover, because plaintiff has submitted no evidence to support his selective enforcement claim, he also cannot meet the rigorous standard for discovery established by the Supreme Court for such claims.

Second, plaintiff also cannot maintain any claim that OFAC's actions violated any Fifth Amendment privilege against self-incrimination. As the Court recognized at the last pretrial conference, such a claim is very weak, and, as set forth in the Government's motion papers, is completely foreclosed by applicable Supreme Court and Second Circuit precedent.

Third, plaintiff's claims under RFRA and the First Amendment's Free Exercise Clause should be dismissed. Plaintiff cannot make the threshold showing required for a RFRA claim because he does not demonstrate how the Iraqi Sanctions Regulations interfered with other legal means by which he could have expressed his opposition to the war based upon his religious beliefs without engaging in travel-related transactions in Iraq. Moreover, because plaintiff did not otherwise apply for or seek a license from OFAC permitting him to engage in such transactions -- a fact which is in the Administrative Record and which plaintiff does not dispute -- he cannot claim those Regulations substantially burdened the free exercise of his religion. And even if plaintiff could make this threshold showing, which he cannot, Karpova forecloses plaintiff's free exercise claims; in Karpova, the Second Circuit upheld the Iraqi Sanctions Regulations as being in furtherance of important foreign policy concerns, and those Regulations therefore do not violate RFRA.

ARGUMENT

I. Karpova Requires Dismissal of Plaintiff's Claims Under the First Amendment, Including His Claim of Viewpoint Discrimination

Contrary to plaintiff's counsel's assertion at the last pretrial conference, plaintiff's "viewpoint discrimination" claim -- a First Amendment claim contained in the Fifth Cause of Action in the Complaint -- does not survive Karpova. The Karpova court held that Karpova could not maintain a First Amendment claim challenging the travel-related restrictions in the Iraqi Sanctions Regulations because those regulations burden conduct, and not free expression, and thus did not implicate the First Amendment. Karpova thus precludes plaintiff's First Amendment challenge to these regulations, including plaintiff's First Amendment viewpoint discrimination claim.

The conduct for which plaintiff was penalized in the instant case is, in all material respects, identical to the conduct that provided the basis for the civil penalty imposed on Karpova. In Karpova, as here, the plaintiff traveled to Iraq in early 2003 to serve as a "human shield," and, as here, OFAC subsequently imposed a civil monetary penalty against the plaintiff for engaging in travel-related transactions with Iraq and for exporting services to Iraq by serving as a human shield, in violation of the Iraqi Sanctions Regulations. Compare Karpova, 497 F.3d at 264 with Administrative Record ("AR") 0069, 0074-75; see also Clancy v. Office of Foreign Assets Control of U.S. Dept. of Treasury, No. 05-C-580 (RTR), 2007 WL 1051767 (E.D. Wis. March 31, 2007) (same).

The Second Circuit summarily rejected Karpova's claim that the civil penalty imposed on her for violating the Iraqi Sanctions Regulations violated her First Amendment

rights, finding that those Regulations had no impact on her freedom of expression:

Under the First Amendment, a restriction against traveling to a specified country is ‘an inhibition of action,’ not speech. Zemel v. Rusk, 381 U.S. 1, 16 (1965). As the Zemel Court explained, many restrictions on action could ‘be clothed by ingenious argument in the garb of decreased data flow.’ Id. at 16-17. Yet such arguments are to no avail since the First Amendment guarantees a citizen the right to speak and publish, but does not guarantee an unrestrained right to gather information. Id. at 17. Karpova was fined because of her actions in violating the [Iraq] travel regulations, not for her speech. Consequently, her First Amendment rights were not violated.

Id. at 272 (emphasis added); (see also Def. Mem. of Law, pp. 19-20). Moreover, the Second Circuit rejected Karpova’s First Amendment claim despite the fact that Karpova -- unlike plaintiff here -- alleged that at least part of her purpose in traveling to Iraq was to gather information for reports that she was writing for an American newspaper. See Karpova, 497 F.3d at 265.

Karpova thus requires rejection of plaintiff’s First Amendment free speech claim here; just as OFAC fined Karpova for her actions, and not her speech, in violating the Iraqi Sanctions Regulations, OFAC fined plaintiff here for his actions, and not his speech, in violating the Regulations.² (See AR 0002); see also Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 209 (2d Cir. 2004) (“Because ‘every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities,’ a conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment.”) (quoting Arcara v. Cloud Books, Inc., 478 U.S. 697,

² Because, under Karpova, the regulations do not burden freedom of expression, this Court need not evaluate the regulations under the test of United States v. O’Brien, 391 U.S. 367, 377 (1968). See Karpova, 497 F.3d at 272 (declining to apply O’Brien test); (see also Def. Mem. of Law, pp. 19-21; Def. Rep. Mem. of Law, pp. 19-20) (explaining why, under the O’Brien test, plaintiff’s First Amendment claim is meritless).

706 (1986)). Therefore, since the Iraqi Sanctions Regulations regulate conduct, not speech, plaintiff's free speech rights are not implicated, and his claims under the First Amendment must be dismissed. See Karpova, 497 F.3d at 272.

Moreover, because plaintiff cannot maintain a First Amendment claim, he necessarily cannot maintain a First Amendment viewpoint discrimination claim, which is merely a particularized type of First Amendment claim. The "First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); see also Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (viewpoint discrimination occurs when speech is regulated where "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction"). Here, plaintiff alleges that his First Amendment rights were violated because OFAC applied the Iraqi Sanctions Regulations against him because of his viewpoint, i.e., his opposition to United States military action in Iraq. (See Complaint, ¶ 63).

However, where, as here, regulations only burden action and therefore do not implicate the First Amendment, a plaintiff may not maintain a First Amendment viewpoint discrimination claim based on those regulations. In Church of the Am. Knights, 356 F.3d at 199, the Second Circuit rejected First Amendment claims by the American Knights after New York City denied the group a parade permit on the grounds that their plan to wear masks during a parade would violate New York's "anti-mask law," which prohibited the wearing of masks during public demonstrations. The Second Circuit first found that the anti-mask law did not burden the plaintiffs' rights to pure or symbolic speech, id. at 205-07, concluding that "the First

Amendment is not implicated, and a balancing of interests under United States v. O'Brien 391 U.S. 367, 377 (1968), is unnecessary.” Id. at 208. Based on this conclusion, the court then rejected the plaintiff’s claim that the City had engaged in unlawful viewpoint discrimination in violation of the First Amendment by enforcing the anti-mask statute against the plaintiff:

“Because we have held above that the anti-mask law as applied to the American Knights does not burden pure speech or expressive conduct, we see no basis for arguing that the statute burdens the ‘viewpoint’ of the American Knights at all, much less does so in a discriminatory fashion.”

Id. at 210. Similarly, because the Iraqi Sanctions Regulations do not burden speech or expressive conduct and plaintiff cannot maintain a First Amendment claim, see Karpova, 497 F.3d at 272, he also cannot maintain a claim that those regulations somehow burden his viewpoint in a discriminatory manner. Plaintiff’s viewpoint discrimination claim should therefore be dismissed.³

II. Plaintiff Cannot Maintain a Selective Enforcement Claim And Does Not Satisfy the Heavy Burden Needed to Obtain Discovery

As discussed in defendants’ moving papers, see Def. Mem. of Law, pp. 28-30; Rep. Mem. of Law, pp. 11-16, plaintiff cannot maintain a claim that OFAC selectively enforced

For these reasons, plaintiff’s counsel’s citation at the last pretrial conference to R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992), is completely inapposite. In that case, the Supreme Court held facially unconstitutional a statute which banned certain symbolic expression when done with the knowledge that such conduct would “‘arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.’” Id. at 380. The Supreme Court found that the statute violated the First Amendment’s prohibition on viewpoint discrimination because it “‘impose[d] special prohibitions on those speakers who express views on disfavored subjects.” Id. at 391. Plaintiff has not argued -- nor could he -- that the Iraqi Sanctions Regulations are facially unconstitutional for specifying that penalties should only be imposed on violators who express a certain viewpoint. Moreover, under Karpova, plaintiff cannot maintain a First Amendment viewpoint discrimination claim.

the Iraqi Sanctions Regulations against him. This Court in Karpova v. Snow, 402 F. Supp. 2d 459, 472 (S.D.N.Y. 2005) (McMahon, J.), aff'd 497 F.3d 262 (2d Cir. 2007), rejected an identical claim by Karpova, and the Second Circuit affirmed that decision. Karpova thus forecloses plaintiff's selective enforcement claim. Moreover, this Court should also reject plaintiff's request for discovery, as plaintiff cannot meet the stringent standard established by the Supreme Court for such requests.

A. Plaintiff Does Not State A Claim for Selective Enforcement

As plaintiff acknowledges, unlike a claim of viewpoint discrimination, which is based on the First Amendment, a claim of selective enforcement arises under the equal protection guarantees of the Fifth Amendment. (See Pl. Rep. Mem. of Law, p. 9 n.5); see Church of the Am. Knights, 356 F.3d at 210; Giordano v. City of New York, 274 F.3d 740, 750-51 (2d Cir. 2001); see generally McGuire v. Reilly, 386 F.3d 45, 62-63 (1st Cir. 2004) (explaining the difference between claims of viewpoint discrimination and selective enforcement). The Complaint alleges that the Iraqi Sanctions Regulations were selectively enforced against plaintiff because of his opposition to United States military action in Iraq, in violation of equal protection principles. (See Complaint (Eighth Cause of Action), ¶ 71).

As set forth in defendants' motion papers, even assuming that selective enforcement claims apply in civil cases,⁴ the law simply does not allow plaintiff to engage in a classic fishing expedition in order to meet his heavy burden of establishing such a claim. As the Supreme Court has noted:

⁴ As noted in the Government's motion, it is far from clear that selective enforcement claims apply in civil enforcement cases. (See Def. Mem. of Law, p. 31).

Even in the criminal-law field, a selective prosecution claim is a rara avis. Because such claims invade a special province of the Executive -- its prosecutorial discretion -- we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce "clear evidence" displacing the presumption that a prosecutor has acted lawfully.

Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) (emphases added); (see Def. Rep. Mem. of Law, pp.11-12). In the Second Circuit, a selective enforcement claim must allege that (1) the plaintiff was treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. See Cobb v. Pozzi, 363 F.3d 89, 110 (2d Cir. 2004). Thus, a "selective enforcement claim requires, as a threshold matter, a showing that the plaintiff was treated differently compared to others similarly situated." Church of the Am. Knights, 356 F.3d at 210 (emphasis added); see United States v. Armstrong, 517 U.S. 456, 465 (1996); United States v. Bass, 536 U.S. 862, 863-64 (2002). The Second Circuit takes a stringent view of whether two individuals are "similarly situated." See Church of the Am. Knights, 356 F.3d at 210-11; Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2d Cir. 1997) ("To be 'similarly situated,' the individuals with whom [plaintiff] attempts to compare herself must be similarly situated in all material respects.").

As demonstrated in defendants' motion papers, see Def. Mem. of Law, pp. 29-30, the Administrative Record contains a host of evidence that plaintiff is subject to the Iraqi Sanctions Regulations, that plaintiff violated the Iraq Travel-Related Ban, and that OFAC became aware of plaintiff's violations. (See, e.g., Joint Appendix ("JA") 69, 74-75). By

contrast, although plaintiff baldly asserts that the Iraqi Sanctions Regulations were only enforced against individuals such as himself who “actively and publicly opposed U.S. military action in Iraq” (Compl. ¶ 47), the Complaint fails to make a colorable claim or even allege that the Iraqi Sanctions Regulations were not enforced against others who violated the Regulations in the same manner, but did not oppose the United States military action in Iraq. Moreover, the hearsay article referenced by plaintiff in his brief (but not submitted to the Court), see Pl. Mem. of Law, pp. 28, fails even to establish that the individual identified in the article (Ken Joseph, Jr.) violated the Iraqi Sanctions Regulations, that Mr. Joseph is a proper comparator, that Mr. Joseph was subject to the Iraqi Sanctions Regulations, or that OFAC was aware of Mr. Joseph. Plaintiff’s reliance on allegations regarding one individual, who may not even be a U.S. person subject to or who violated the Iraqi Sanctions Regulations, fails to satisfy the requisite demanding standard or provide clear evidence in support of his claim. (See Def. Rep. Mem. of Law, pp. 12-13).

_____ Moreover, this Court in Karpova (McMahon, J.) explicitly rejected this same claim. Karpova claimed, as here, that she had been selectively prosecuted by OFAC because of her anti-war views. See Karpova, 402 F. Supp. 2d at 472. The court rejected this claim on the pleadings, reasoning that Karpova had failed to identify any individuals who were “pro-war journalists” who had violated the Regulations but were not sanctioned by OFAC. Id. Although the Second Circuit did not specifically discuss the selective enforcement issue, it affirmed the entire district court opinion. See Karpova, 497 F.3d at 272. Here, plaintiff also has presented no evidence in support of his claim, and Karpova therefore forecloses that claim. See also Clancy, 2007 WL 1051767, at *13 (rejecting a selective enforcement claim based on the same article that plaintiff relies on in this case, because the article was inadmissible hearsay, and that “even if the

internet news article was considered, it does not contain any facts indicating that Joseph could have been sanctioned under the [Iraqi Sanctions] Regulations”).

_____ Finally, although the Court need not reach the issue, plaintiff also cannot meet the second prong of a selective enforcement claim, which requires him to demonstrate that he was treated differently based upon an impermissible consideration. (See Def. Rep. Mem. of Law, p. 14); Armstrong, 517 U.S. at 465; Cobb, 363 F.3d at 110. The newspaper article referenced in plaintiff’s brief does not provide any evidence that OFAC imposed a civil penalty upon plaintiff “because of” his public opposition to U.S. military action in Iraq, as opposed to his having engaged in prohibited travel-related transactions. Indeed, the article does not even mention plaintiff. Moreover, the article does not demonstrate that OFAC was even aware of Mr. Joseph’s actions, let alone that OFAC purposely did not select Mr. Joseph for enforcement or had any discriminatory motive in its enforcement of the Iraqi Sanctions Regulations. Even assuming arguendo that there was evidence that Mr. Joseph engaged in travel-related transactions comparable to plaintiff’s and that Mr. Joseph was subject to the Iraqi Sanctions Regulations, there is no evidence that OFAC was aware of such a violation and failed to pursue him. See LaTrieste Restaurant v. Village of Port Chester, 188 F.3d 65, 70 (2d Cir. 1999). For all of these reasons, plaintiff’s selective enforcement claim should be dismissed.⁵

B. Plaintiff Is Not Entitled to Discovery

This Court should also reject plaintiff’s request for discovery in this matter.

⁵ Because plaintiff cannot maintain a selective enforcement claim under the equal protection guarantees of the Fifth Amendment, he also cannot maintain that same claim under the Fifth Amendment’s protection of the right to international travel. (See Compl., ¶ 60); Karpova, 402 F. Supp. 2d at 472.

Because plaintiff seeks to set aside OFAC's imposition of the civil monetary penalty on him, this case is governed by the the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. ("APA").⁶ See 5 U.S.C. § 706(2)(A) (authorizing a court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). In an APA case, "[g]enerally, a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision." Nat'l Audubon Soc. v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985)); see Camp v. Pitts, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); Karpova, 402 F. Supp. 2d at 465 (finding that "the parties have no right to add to the Administrative Record" and that review is "limited to examining the administrative record"); Nat'l Law Center on Homelessness & Poverty v. United States Dep't of Veterans Affairs, 736 F. Supp. 1148, 1152 (D.D.C. 1990) ("[T]he general rule is that discovery is not permitted prior to a court's review of the legality of agency action under § 706(2)(A) of the APA."). Discovery is even less likely in cases, such as the present one, "involving sensitive issues of national security and foreign policy." Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003).

The Second Circuit has held that discovery in an APA case is limited to very narrow circumstances:

⁶ Courts consistently have applied APA analysis to challenges to agency actions of OFAC. See, e.g., Karpova, 497 F.3d at 262; Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34, 44 (D.D.C. 2005); IPT Co., Inc. v. U.S. Dep't of the Treas., No. 92 Civ. 5542 (JFK), 1992 WL 373480, at *1 (S.D.N.Y. Dec. 3, 1992).

[A]n extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice.

Hoffman, 132 F.3d at 14 (emphasis added) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977)); see Tummino v. Von Eschenbach, 427 F. Supp. 2d 212, 230 (E.D.N.Y. 2006) (“where a ‘strong preliminary showing’ of bad faith or improper behavior is made, agency officials can be required to give testimony to explain the reasons for their actions”) (citing Nat'l Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1145 (2d Cir. 1974)); see also Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988), as amended, 867 F.2d 1244 (1989).

Under these principles, the Court should look to the Administrative Record in evaluating plaintiff's remaining claims.⁷ As discussed above, the Administrative Record contains a host of evidence that plaintiff is subject to the Iraqi Sanctions Regulations, that plaintiff violated those Regulations, and that OFAC became aware of plaintiff's violations, clearly indicating that OFAC's decision to impose a civil penalty on him was reasonable. See

⁷ Moreover, when examining the record in an APA case, a court's task is “narrow, limited to examining the administrative record to determine whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” NRDC v. Muszynski, 268 F.3d 91, 97 (2d Cir. 2001) (internal quotations omitted). In making this determination, the “court is not empowered to substitute its judgment for that of the agency.” Citizens to Preserve Overton Park, Inc., 401 U.S. at 416. “If the agency's reasons and policy choices . . . conform to certain minimal standards of rationality . . . the rule is reasonable and must be upheld, . . . even though the Court itself might have made different choices.” Holy Land Found. for Relief and Dev. v. Ashcroft, 219 F. Supp. 2d 57, 67 (D.D.C. 2002) (citation and internal quotations omitted). Moreover, “the Court does not undertake its own fact-finding. Instead, the Court must review the administrative record assembled by the agency to determine whether its decision was supported by a rational basis.” Id. at 67 (citing Camp, 411 U.S. at 142); see also 5 U.S.C. § 706.

Karpova, 497 F.3d at 267-70. By contrast, plaintiff has failed to introduce any evidence supporting his selective enforcement claim, let alone demonstrating the “strong showing” of bad faith or improper behavior by OFAC that would justify extra-record discovery. See Citizens to Preserve Overton Park, Inc., 401 U.S. at 420 (“[I]nquiry into the mental processes of administrative decisionmakers is usually to be avoided. . . . [T]here must be a strong showing of bad faith or improper behavior before such inquiry may be made.”).

Aside from failing to make the strong showing of bad faith or improper behavior required by APA case law, plaintiff is not entitled to discovery for several independent reasons. First, the Supreme Court has established a “rigorous standard for discovery” on selective prosecution claims. Armstrong, 517 U.S. at 468. To satisfy this rigorous standard for discovery, plaintiff must produce some evidence that similarly situated violators of the Iraqi Sanctions Regulations who did not oppose U.S. military action in Iraq were not penalized. See id. at 469-70. Moreover, plaintiff must show “some evidence of both discriminatory effect and discriminatory intent.” Bass, 536 U.S. at 863. As discussed above, plaintiff has failed to produce any such evidence and therefore is not entitled to discovery. See Armstrong, 517 U.S. at 470 (finding the claimant failed to provide requisite “credible showing of different treatment of similarly situated persons”); (see also Def. Rep. Mem. of Law, pp. 3-5, 11 n.6, 15-16).

Second, under Rule 56(f) of the Federal Rules of Civil Procedure, “a party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing (1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was

unsuccessful in those efforts.” Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999) (citing cases) (internal quotations omitted). Plaintiff failed to submit any affidavit establishing what discovery he needs, what information could be unearthed by discovery, and why he has been unable to obtain that information. Plaintiff’s failure to comply with Rule 56(f) is itself sufficient grounds to deny his request for discovery. See id. at 43-44; Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994). Finally, plaintiff’s general request for unspecified discovery is tantamount to a fishing expedition to discover additional facts to support his speculative belief that defendants imposed the penalty against him based upon his opposition to the war, and cannot justify denial of defendants’ motion for summary judgment. See Nat’l Union Fire Ins. Co. v. Stroh Co., 265 F.3d 97, 117 (2d Cir. 2001) (“Even where a Rule 56(f) motion is properly supported, a district court may refuse to allow additional discovery if it deems the request to be based on speculation as to what potentially could be discovered.”) (internal quotations omitted). Accordingly, plaintiff’s request in his brief for discovery should be denied.⁸

III. Plaintiff Was Not Deprived of the Fifth Amendment Privilege Against Self-Incrimination

Although not raised in Karpova, plaintiff’s claim in this case that he was deprived of the Fifth Amendment privilege against self-incrimination, see Compl., Second Cause of Action, is meritless and should be rejected. As the Court recognized at the last pretrial conference, this claim is “very weak,” and, as set forth in defendants’ moving papers, is

⁸ Similarly, plaintiff’s request, also made in his brief, to amend the Complaint should be denied; as set forth in defendants’ motion, see Def. Rep. Mem. of Law, pp. 15-16, plaintiff did not file a separate motion for such relief or annex a copy of the proposed amended complaint to his papers, as required, and in any event any such amendment should be denied as futile.

completely unsupported by applicable Supreme Court and Second Circuit case law. (See Def. Mem. of Law, pp. 25-28; Rep. Mem. of Law, p. 23). Indeed, as set forth more fully in defendants' memoranda of law, the choice plaintiff faced, whether or not to assert his Fifth Amendment privilege in the OFAC proceedings, did not amount to unconstitutional coercion. Id. Moreover, the Supreme Court and Second Circuit have made it clear that, particularly where, as here, a defendant has not been indicted and is not even the subject of a criminal investigation, the government need not stay its civil proceedings until the criminal statute of limitations expires. Id. And, even if OFAC had authority to grant plaintiff immunity from criminal prosecution, which it did not, the Fifth Amendment does not require any such grant of immunity in these circumstances. Id.; see also Clancy, 2007 WL 1051767, at *9-10 (rejecting identical self-incrimination claim). Plaintiff's claim concerning a Fifth Amendment privilege against self-incrimination should therefore be dismissed.

IV. The Travel-Related Ban Violates Neither the Free Exercise of Religion Under the Religious Freedom Restoration Act Nor the First Amendment

Although Karpova also did not address plaintiff's claims under RFRA, (see Compl., Sixth Cause of Action), or the Free Exercise Clause of the First Amendment to the United States Constitution (see Compl., Seventh Cause of Action), those claims should be dismissed for the reasons set forth in defendants' motion. (See Def. Mem. of Law, pp. 21-25; Rep. Mem. of Law, pp. 23-25).

In order to state a claim under RFRA, plaintiff must make a threshold showing that "his right to the free exercise of religion has been substantially burdened." Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996). "Supreme Court precedents teach that a substantial

burden on religious exercise exists when an individual is required to ‘choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.’” Westchester Day Sch. v. Village of Mamaroneck, __ F.3d __, 2007 WL 3011061, at *5 (2d Cir. October 17, 2007) (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)); see also id. at *6 (“[A] substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.”) (citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005)). But “the Supreme Court has held that generally applicable burdens, neutrally imposed, are not ‘substantial.’” Westchester Day Sch., 2007 WL 3011061, at *7 (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389-91 (1990)).

As demonstrated in Defendants’ motion, see Def. Mem., pp. 21-25; Rep. Mem., pp. 23-25, plaintiff fails to demonstrate how the Iraqi Sanctions Regulations substantially burdened the free exercise of his religion; plaintiff has not alleged that the free exercise of his religion requires him to travel to Iraq, has not demonstrated that the Regulations interfered with other legal means by which he could have expressed his opposition to the war based upon his religious beliefs without engaging in travel-related transactions in Iraq, and has not explained why he did not otherwise apply for or seek a license from OFAC permitting him to engage in such transactions.⁹ Accordingly, plaintiff fails to sustain his threshold burden under RFRA. See

⁹ At the last pretrial conference, the Court inquired about the “license issue.” The Administrative Record in this case is clear that plaintiff did not apply for a license authorizing him to engage in travel-related transactions in Iraq. (See AR 0060, 0077); see 31 C.F.R. § 501.801 (setting forth procedure for applying for a license). Plaintiff does not dispute the fact that he never applied for or sought such a license. Thus, plaintiff cannot make the threshold

also Jenkins v. Comm’r of Internal Revenue, 483 F.3d 90, 92 (2d Cir. 2007) (holding that individuals whose religious beliefs are offended by paying taxes for military expenditures do not have a free exercise or RFRA right to avoid such payment); U.S. v. Amer, 110 F.3d 873, 879 n.1 (2d Cir. 1997) (rejecting argument of parent who claimed that law prohibiting him from sending his children to Egypt for religious instruction violated his free exercise rights because the parent “fail[ed] to meet the threshold requirement of an RFRA claim. He cannot show that the [law] ‘substantially burden[s]’ a religious practice. . . . [T]here is nothing in the record to suggest that the children could not receive proper training in the tenets of Islam in the United States, or that they must go to Egypt to become religiously educated Muslims.”).

Even if plaintiff could sustain this threshold burden, Karpova clearly indicates that the Iraqi Sanctions Regulations are justified by the government’s unparalleled interest in national security, and are sufficiently tailored to further that interest. (See Def. Mem. at 23.). In Karpova, 497 F.3d at 272, the Second Circuit held that the Iraqi Sanctions Regulations were “based on . . . concerns of foreign policy” because they were enacted following the President’s finding that “the Government of Iraq constitute[d] an unusual and extraordinary threat to the national security and foreign policy of the United States.” See also Farrakhan v. Reagan, 669 F. Supp. 506, 511 (D.D.C. 1987) (finding no less restrictive means were available to effectuate the government’s compelling interest in national security than an outright ban on all contributions to Libya: “[a]n accommodation toward all religious groups exempting them from the limitations of the sanctions would intolerably limit the President’s power to deal with international emergencies.”). Karpova

showing that the Iraqi Sanctions Regulations substantially burdened the free exercise of his religion, because he never even attempted to utilize the procedures set forth in the Regulations to obtain authorization from OFAC to engage in travel-related transactions in Iraq.

thus forecloses plaintiff's RFRA and First Amendment Free Exercise Clause claims, because the Iraqi Sanctions Regulations are in furtherance of the government's national security interests.¹⁰

¹⁰ As set forth in defendants' motion, see Def. Mem. of Law, pp. 24-25, because plaintiff may not maintain a RFRA claim (which imposes a higher standard than the First Amendment), a fortiori his free exercise claim under the First Amendment must fail. In addition, plaintiff's claim that the Iraqi Sanctions Regulations are an "impermissibly broad delegation of congressional power in violation of the separation of powers guaranteed by the Constitution of the United States," Compl., ¶ 73, should be dismissed. Although not addressed specifically in Karpova, the Second Circuit "swiftly rejected" the related argument "that the regulations themselves exceeded the authority Congress gave to the President," Karpova, 497 F.3d at 270, holding that "in deciding to impose sanctions the President was acting in the area of foreign policy pursuant to congressional authorization" and that such executive branch determinations are reviewed by courts "with great deference." Id.; see also Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 775-77 (9th Cir. 2006). This claim should therefore be dismissed. (See also Def. Mem. of Law, pp. 30-32). Finally, for the reasons set forth in defendants' motion papers, see Def. Mem. of Law, pp. 32-35, this Court should also dismiss plaintiff's claim that the Iraqi Sanctions Regulations violate the International Covenant on Civil and Political Rights and customary international law. (See Compl., ¶ 75); see also Karpova, 497 F.3d at 270.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss, or, in the alternative, for summary judgment should be granted, and the Complaint in this action should be dismissed in its entirety.

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New York, New York

Respectfully submitted,

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