

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

FREDERICK BOYLE,

Plaintiff,

-against-

ROBERT W. WERNER, Director, Office of  
Foreign Assets Control of the United States  
Department of the Treasury, et al.,

Defendants.

**Case No. 05 Civ. 4995 (DCP)**

**ECF CASE**

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**SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER OPPOSITION TO  
DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE  
ALTERNATIVE, FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFF'S  
CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS OR, IN THE  
ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT AND PROCEDURAL BACKGROUND

The procedural history is set forth in detail in Plaintiff's prior submissions. *See* Pl.'s Mem. of Law in Opp to Def.'s Mot to Dismiss 1-3. In brief, Plaintiff Frederick Boyle ("Reverend Boyle") commenced this action in April 2005 to invalidate and enjoin enforcement of a monetary penalty imposed by the Office of Foreign Assets Control ("OFAC") under the Iraqi Sanctions Regulations, 31 C.F.R. § 575 ("the Regulations"). Reverend Boyle claimed, *inter alia*, that the Regulations, on their face and as applied, violated his rights under the First and Fifth Amendments to the United States Constitution as well as under the Religious Freedom Restoration Act ("RFRA"), and exceeded statutory authority. The government, on behalf of all defendants, moved for judgment on the pleadings or, in the alternative, for summary judgment. Reverend Boyle opposed that motion, and cross-moved for partial judgment on the pleadings or, in the alternative, for partial summary judgment on his claims that the Regulations violated his Fifth Amendment rights to procedural due process and against self-incrimination, exceeded statutory authority, constituted an impermissibly broad delegation of power, and violated international law. In opposing the dismissal of his complaint, Reverend Boyle underscored that the Court could not, without discovery and possibly an evidentiary hearing, decide Reverend Boyle's well-pled allegation that OFAC had violated his rights under the First Amendment by enforcing the Regulations against him based upon his outspoken opposition to U.S. military action in Iraq.<sup>1</sup> The motion and cross-motion are still pending before this Court.

On August 14, 2007, the United States Court of Appeals for the Second Circuit issued its decision in *Karpova v. Snow*, 497 F.3d 262 (2d Cir. 2007), affirming the district court's dismissal

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<sup>1</sup> Reverend Boyle opposed dismissal of his right to travel claim under the Due Process Clause and right to equal protection claim under the Fifth and Fourteenth Amendments for similar reasons.

of a separate challenge to enforcement of a penalty issued under the Iraqi Sanctions Regulations. The Second Circuit ruled that OFAC's imposition of a penalty against the plaintiff there was not arbitrary or capricious, *Karpova*, 497 F.3d at 267-70, and that the Regulations did not exceed statutory authority, *id.* at 270. The Second Circuit also rejected the plaintiff's contention that OFAC's application of the Regulations violated her right to procedural due process under the Fifth Amendment. *Id.* at 270-71. Of note, the Court found that "there is no genuine issue of material fact with regard to whether adequate notice and an opportunity to be heard were provided to plaintiff" in that case. *Id.* at 271. In addition, the Second Circuit affirmed the district court's dismissal of plaintiff's claims that OFAC's application of its Regulation's violated her right to travel under the Fifth Amendment and right to freedom of speech under the First Amendment. *Id.* at 271-72. The plaintiff in *Karpova*, however, did not raise, and the Second Circuit did not address, the different First Amendment claim here: that OFAC impermissibly enforced the Regulations based on Reverend Boyle's viewpoint rather than on his alleged travel to Iraq. The plaintiff in *Karpova* also did not raise, and the Second Circuit therefore did not consider, Reverend Boyle's claim here that the Regulations violate his Fifth Amendment privilege against self-incrimination and his right to religious freedom under RFRA.

On September 12, 2007, this Court directed the parties to submit supplemental briefs addressing the impact of *Karpova* on this case. Specifically, the Court requested that the parties address Reverend Boyle's claim that the Regulations violated his Fifth Amendment privilege against self-incrimination; his right to religious freedom under RFRA; and his First Amendment right to be free of viewpoint discrimination. Counsel for Reverend Boyle also indicated he would address the procedural due process claim as, in plaintiff's view, the Second Circuit's analysis of that claim in *Karpova* does not control but instead requires a different result here.

For the reasons set forth below, and those contained in Reverend Boyle's prior submissions, this Court should grant Reverend Boyle's cross-motion for judgment on his claims that OFAC's enforcement of the Iraqi Sanctions Regulations violate his Fifth Amendment privilege against self-incrimination, his right to religious freedom under RFRA, and his Fifth Amendment right to procedural due process. In addition, the Court should deny the government's motion for dismissal of Reverend Boyle's well-pled claim that OFAC's enforcement of the Regulations violates his First Amendment right against viewpoint discrimination.

## ARGUMENT

### **I. OFAC's Enforcement Proceedings Violate the Fifth Amendment Privilege Against Self-Incrimination.**

"[T]here is no question that an individual is entitled to invoke the [Fifth Amendment] privilege against self-incrimination during a civil proceeding." *United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave.*, 55 F.3d 78, 82 (2d Cir. 1995) (citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). While it is not necessarily unlawful to force an individual to choose between asserting the privilege against self-incrimination and defending himself in a civil proceeding, *United States v. Kordel*, 397 U.S. 1, 11 (1970), the Fifth Amendment, in addition to prohibiting the overt compulsion of incriminating testimony, prohibits "any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" *Spevack v. Klein*, 385 U.S. 511, 515 (1967). Here, Reverend Boyle's assertion of his privilege against self-incrimination resulted in an automatic judgment against him, a penalty that made exercise of his constitutional right impermissibly "costly" under the Fifth Amendment.

Courts have consistently recognized that civil forfeiture proceedings create a special dilemma for an individual who is choosing whether to assert his Fifth Amendment protection

against self-incrimination. See, e.g., *4003-4005 5th Ave.*, 55 F.3d at 83; *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 901 (1st Cir. 1987); *United States v. United States Currency*, 626 F.2d 11, 15 (6th Cir. 1980). In forfeiture suits, “[i]f the Government establishes probable cause to believe that the property is subject to forfeiture,” the burden of proof is shifted to the claimants, who “can either present a defense to forfeiture or lose their property.” *United States v. Leasehold Interest in 121 Nostrand Ave., Apt. 1-C, Brooklyn, N.Y.*, 760 F. Supp. 1015, 1034 (E.D.N.Y. 1991). The claimant, however, is also “often subject to criminal prosecution based on the same alleged illegal behavior that supports the confiscation.” *4003-4005 5th Ave.*, 55 F.3d at 83. Thus, “[b]ecause civil forfeiture actions are closely intertwined with potential criminal proceedings, a claimant may be faced with a harsh dilemma: ‘remain silent and allow the forfeiture or testify against the forfeitability of his property and expose himself to incriminating admissions’” that may later be used against him in criminal proceedings. *United States v. Approx. 1,170 Carats of Rough Diamonds Seized at John F. Kenn. Int’l Airport on Jan. 13, 2004*, No. CV 2005-5816 (ARR) (MDG), 2007 WL 2071863, at \*2 (E.D.N.Y. 2007) (quoting *4003-4005 5th Ave.*, 55 F.3d at 83). See also *121 Nostrand Ave.*, 760 F. Supp at 1034 (dilemma “substantially impinges on a claimant’s Fifth Amendment privilege against self-incrimination”); *Jones v. B. C. Christopher & Co.*, 466 F. Supp. 213, 225 (D. Kan. 1979) (noting that this dilemma, in the similar tax refund context, involves “an element of governmental taking of property without compensation or due process which is absent in the typical civil case”).<sup>2</sup> Further, unlike most other civil suits, the government has created this Fifth

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<sup>2</sup> Other courts have similarly identified this tension in tax refund cases, which force individuals to expose themselves to criminal prosecution if they seek to challenge the correctness of the government’s tax assessment. See, e.g., *United States v. Besase*, 623 F.2d 463 (6th Cir. 1980); *Shaffer v. United States*, 528 F.2d 920 (4th Cir. 1975); *Iannelli v. Long*, 487 F.2d 317 (3d Cir. 1973).

Amendment dilemma, by choosing to bring a forfeiture action while reserving the ability to later file criminal charges for the same underlying activity. *See 4003-4005 5th Ave.*, 55 F.3d at 83 (“[C]ourts should not disregard the fact that the plaintiff in forfeiture actions is the Government, which controls parallel criminal proceedings in federal court.”); *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 193-94 (3rd Cir. 1994) (“Courts must bear in mind that when the government is a party in a civil case and also controls the decision as to whether criminal proceedings will be initiated, special consideration must be given to the plight of the party asserting the Fifth Amendment.”).

Recognizing the “especially acute” tension in the choice between defending one’s liberty as well as one’s property in the civil forfeiture context, “appellate courts have held that...district courts should make special efforts to ‘accommodate both the constitutional [privilege] against self-incrimination as well as the legislative intent behind the forfeiture provision.’” *4003-4005 5th Ave.*, 55 F.3d at 83 (quoting *United States v. United States Currency*, 626 F.2d at 15). *See also United States v. Payment Processing Center, LLC*, 443 F. Supp. 2d 728, 735 (E.D. Pa. 2006) (stating that in forfeiture cases, the assertion of the Fifth Amendment privilege will “preclude defendants from meeting a statutory burden,” thereby warranting “judicial intervention to accommodate...Fifth Amendment concerns”); Sandra Guerra, *Between a Rock and a Hard Place: Accommodating the Fifth Amendment Privilege in Civil Forfeiture Cases*, 15 GA. ST. U. L. REV. 555, 583-84 (1999) (“[T]he unfairness of non-accommodation is greater in civil forfeiture cases than other civil cases because claimants bear a heavier burden of proof and because the Government controls both the civil and potential criminal proceedings—the Government creates the dilemma every time it arises.”).

The Second Circuit has identified several mechanisms to accommodate the Fifth Amendment right in these circumstances: the issuance of protective orders; staying discovery in the civil matter until completion of the criminal proceedings; and attempting to arrange for immunity. *4003-4005 5th Ave.*, 55 F.3d at 84 n.6; *United States v. \$557,933.89, More or Less, in United States Funds*, 287 F.3d 66, 74-75 (2d Cir. 2002) (recognizing that the district court had granted “a stay of proceedings...to allow for the running of the five-year limitations period” to accommodate the “tensions inherent in civil forfeiture proceedings between the normal civil discovery process and...concerns about self-incrimination in possible criminal proceedings”).<sup>3</sup> The district court has discretionary power to determine how best to accommodate the Fifth Amendment interest. *Id.* at 73-74; *see also, e.g., United States v. Parcels of Land*, 903 F.2d 36, 44 (1st Cir. 1990). Further, when balancing the individual’s Fifth Amendment interest and the government’s interest in civil forfeiture cases, courts are instructed to remember that the government, the plaintiff in these actions, also controls the parallel criminal proceedings and possesses the power to grant some form of immunity. *See 4003-4005 5th Ave.*, 55 F.3d at 83; *Shaffer v. United States*, 528 F.2d 920, 922 (4th Cir. 1975).

OFAC’s procedure at issue here created a harsh dilemma similar to the one that exists in the civil forfeiture context by forcing Reverend Boyle either to defend himself against the monetary penalty and expose himself to criminal prosecution or to exercise his right against self-incrimination and accept the penalty. But, unlike in civil forfeiture proceedings, there was no

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<sup>3</sup> Other courts have similarly taken various measures to accommodate these Fifth Amendment concerns. *See, e.g., Shaffer v. United States*, 528 F.2d at 922 (directing the government to “obtain use immunity for [the taxpayer] as to any criminal proceedings other than one relating to perjury” prior to deposing the taxpayer in a tax refund case); *United States v. Besase*, 623 F.2d at 465 (upholding the district court’s effort to accommodate taxpayer’s Fifth Amendment privilege against self-incrimination by apportioning the burden of proof in a tax collection suit); Shannon Noya, *Hoisted by Their Own Petard: Adverse Inferences in Civil Forfeiture*, 86 J. CRIM. L. & CRIMINOLOGY 493, 516-22 (1996) (discussing measures at accommodation).

structure or attempt to provide meaningful accommodation of this right. OFAC's Prepenalty Notice dated June 22, 2004, informed Reverend Boyle that the agency "intend[ed] to issue a claim against [him] for a monetary penalty in the amount of \$10,000." (Administrative Record ("A.R.") 60). OFAC notified Reverend Boyle that he had an opportunity to respond. But it also notified him that if he failed to respond, "OFAC will conclude that you have decided not to submit any new facts or explanations for our consideration ...[and] will issue a Penalty Notice...finding a violation and assessing a monetary penalty." (A.R. 61.). In other words, Reverend Boyle was told that if he did not answer, he would be fined. As in civil forfeiture proceedings, Reverend Boyle had to disprove OFAC's allegations to avoid the monetary penalty.

Reverend Boyle thus reasonably feared that he risked exposure to criminal prosecution by defending himself against OFAC's allegations. As OFAC had warned him, Reverend Boyle could face criminal penalties of "up to 12 years in prison and \$1 million in fines" for the *same alleged violations* of the Iraqi Sanctions Regulations at issue in the civil proceeding. (A.R. 77). The choice to respond, then, posed a grave dilemma. *See 4003-4005 5th Ave.*, 55 F.3d at 83. And, for purposes of the Fifth Amendment, there was no real choice at all – either way, Reverend Boyle risked a significant penalty.<sup>4</sup>

Significantly, OFAC failed to pursue either of the alternatives Reverend Boyle proposed to accommodate his Fifth Amendment privilege against self-incrimination and OFAC's own interest in the civil proceeding. Specifically, Reverend Boyle made an explicit and timely request that OFAC accommodate his Fifth Amendment privilege, asking either that the

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<sup>4</sup> The government's assertion (Defs.' Mem. in Supp. of Mot. to Dismiss at 25; Defs.' Reply Mem. at 22) that OFAC did not violate Reverend Boyle's Fifth Amendment right because it reduced the amount of the fine in response to his assertion of this right is beside the point. Reverend Boyle had to accept OFAC's civil penalty, subject only to the limitation that it "not to exceed \$250,000 per violation" (A.R. 60), in order to maintain his Fifth Amendment privilege against self-incrimination, or give up that privilege by challenging the allegations. And, while the fine may have been reduced, it was still a substantial penalty.

government grant him immunity from criminal prosecution based on the allegations contained in the June 22, 2004 Prepenalty Notice, or, alternatively, that OFAC stay its enforcement proceeding until the statute of limitations for a criminal prosecution had run. (A.R. 52-53). Although OFAC had the power to pursue either of these reasonable courses, it made no attempt to do so. Instead, OFAC refused to stay its own pending case against Reverend Boyle. (A.R. 51.). And, even though OFAC may not have had independent authority to bind the Department of Justice with respect to granting Reverend Boyle immunity from criminal prosecution, OFAC failed even to inquire about the possibility of providing such immunity, which was certainly within its power to do. Compl. ¶ 36; *cf. Shaffer*, 528 F.2d at 922 (directing, in a tax refund case, that the government seek use immunity for a taxpayer or risk a stay of proceedings and possibly outright dismissal).

In fact, the very structure of OFAC's enforcement proceedings left no real room for meaningful accommodation of Reverend Boyle's Fifth Amendment right. OFAC's Iraqi Sanctions Regulations provide that where the Director has reasonable cause to believe that the regulations were violated, the Director issues to the person concerned a Prepenalty Notice stating his intent to issue a monetary penalty. 31 C.F.R. § 575.702; *Karpova*, 497 F.3d at 266 ("The Prepenalty Notice informs the alleged violator that a monetary penalty will be imposed unless he or she responds in writing explaining why a penalty is inappropriate."). Thus, the officer who institutes the civil enforcement proceedings, *i.e.*, OFAC's Director, is the same officer who makes the final determination of whether the regulations were violated, taking into consideration whatever written presentations the person concerned has made. 31 C.F.R. § 575.704. Under this structure, therefore, the person responsible for initiating and prosecuting the enforcement proceeding is the same person who makes the decision whether to accommodate an individual's

Fifth Amendment rights. By contrast, in civil forfeiture proceedings, the decision whether to provide meaningful accommodation of an individual's Fifth Amendment privilege is made by a federal judge who is entirely outside of and independent from the forfeiture proceeding. *See 4003-4005 5th Ave.*, 55 F.3d at 83 (describing district court's obligation to seek meaningful accommodation of claimant's Fifth Amendment privilege); *\$250,000 in United States Currency*, 808 F.2d at 901 (same).

The dilemma that Reverend Boyle faced under OFAC's procedures was also more acute than that faced by defendants in civil forfeiture proceedings because OFAC's procedures lack comparable safeguards. The Iraqi Sanctions Regulations deny the person subject to civil – and potentially criminal – penalties any opportunity for discovery. By contrast, claimants in civil forfeiture proceedings have a right to discovery under the Federal Rules of Civil Procedure. *See* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1020, at 92 (2d ed. 1995) (“The Federal Rules of Civil Procedure are...applicable to actions for forfeiture of property for violation of a statute of the United States.”). *See also United States v. \$557, 933.89*, 287 F.3d at 73 (noting that the normal “civil discovery process” exists in “civil forfeiture proceedings”); *United States v. United States Currency in the Amount of \$600,341*, 240 F.R.D. 59, 61-62 (E.D.N.Y. 2007) (describing the “active” discovery process in civil forfeiture proceedings, including “the exchange of interrogatories and the scheduling of depositions”). This right at least mitigates the Fifth Amendment dilemma posed by the forfeiture proceeding by enabling a claimant to “use all of the civil discovery devices to learn the basis of the government's position in the civil forfeiture action *and* a parallel criminal action.” Joel Kornfeld & Anthony A. De Corso, *Uncivil Forfeitures*, 26-Oct L.A.LAW 39, 44 (2003) (emphasis in original). Thus, unlike a claimant in a civil forfeiture case, Reverend Boyle remained completely in the dark about the

government's potential criminal case against him, depriving him of the ability to make an informed choice about the potential costs and risks of defending himself against OFAC's accusations. Further, as previously noted, the absence of any discovery deprived Reverend Boyle of the opportunity to rebut or explain the facts upon which OFAC was relying, and also from developing affirmative defenses to OFAC's allegations, including that OFAC was enforcing the regulations against him based upon his viewpoint, not his alleged travel to Iraq. *See* Pl.'s Memo at 5, 29 n.8, 35; Pl.'s Reply at 4-5.

The Fifth Amendment problems in civil forfeiture proceedings are also moderated by other procedural safeguards absent from the Iraqi Sanctions Regulations. The Supreme Court has held that when the government seeks to seize an individual's property, the Due Process Clause requires that it provide notice and an adversarial hearing *prior* to seizing the property subject to forfeiture. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993). Even in the rare circumstance (not present here) where immediate seizure is "directly necessary to secure an important governmental or general public interest," making a pre-seizure hearing infeasible, a post-seizure adversarial hearing must still be provided. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974). At the forfeiture hearing, moreover, the government bears the burden of proving the property is subject to forfeiture and must do so through the presentation of admissible evidence. *See, e.g., United States v. 4 Meadowbrook Lake Condominium, Unit 308, Condominium #8, Located at 314 SE 10th Street, Dania, Florida 33004*, No. 06-60079-CIV-COHN/SNOW, 2007 WL 809681, at \*3 (S.D. Fla. Mar. 15, 2007); Stefan Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 108-09 (2001) (discussing civil forfeiture proceedings). The absence of corresponding procedures under the

Iraqi Sanctions Regulations heightens the Fifth Amendment concerns inherent in forcing an individual to defend himself against seizure of his property with the specter of a criminal indictment in the background.

Notably, the Iraqi Sanctions Regulations also contrast sharply with OFAC's procedures under the closely analogous Cuban Assets Control Regulations, 31 C.F.R. § 515, whose structure offers the possibility of meaningful accommodation of an individual's Fifth Amendment privilege against self-incrimination. An individual accused by OFAC of violating the Cuban Assets Control Regulations may request a hearing before an Administrative Law Judge ("ALJ") upon issuance of a Penalty Notice by OFAC's director. 31 C.F.R. § 501.709. That hearing must be conducted in accordance with the Administrative Procedures Act, and includes the opportunity to appear personally before an ALJ vested with the power to administer oaths, require the production of documents and records, rule on the admissibility of evidence, authorize depositions, and conduct motion practice. *Id.* §§ 501.711, 501.715, 501.721. Moreover, like claimants in civil forfeiture proceedings, those facing sanctions under the Cuban Assets Control Regulations may access a broad range of discovery mechanisms, including written or oral depositions, written interrogatories, document production, and requests for admissions. *Id.* § 501.730. Further, the Cuba regulations specifically provide that "[a]ny officer or employee engaged in the performance of investigative or prosecutorial functions for the Department in a proceeding...may not...participate or advise in the decision," *id.* § 501.720 – the very opposite of the Iraqi Sanctions Regulations where the official performing "the investigative and prosecutorial functions" is the same official making the decisions about whether the regulations were violated and, if so, what the penalty should be. Thus, like the civil forfeiture procedures, the Cuban Assets Control Regulations highlight the potential mechanisms for meaningful

accommodation of an individual's Fifth Amendment privilege against self-incrimination that the Second Circuit requires but that the Iraqi Sanctions Regulations fail to provide. If such mechanisms are available under those other regulations, then there is no reason why they should not be available here as well.

In determining whether to stay a civil forfeiture action in the face of parallel criminal proceedings, courts must consider: (a) the extent to which the defendant's privilege against self-incrimination is implicated; (b) the interest of the government in proceeding expeditiously with the civil action and the potential prejudice of a delay; (c) the burden which any particular aspect of the proceedings may impose on the defendant; (d) the convenience of the court in managing its caseload and the efficient use of judicial resources; (e) the interests of nonparties; and (f) the interest of the public in the pending civil and criminal litigation. *See, e.g., Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-25 (9th Cir. 1995); *see also Brock v. Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y. 1985) ("A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter...and is even more appropriate when both actions are brought by the government.").

These same factors are relevant here in determining whether alternative accommodations were required. And, consideration of these factors can lead to only one conclusion: Reverend Boyle was entitled to some form of accommodation, or at the very least, to meaningful consideration of his request. Since Reverend Boyle was subject to criminal prosecution for the same alleged violations underlying OFAC's assessed monetary penalty, his privilege against self-incrimination was substantially implicated: he could either exercise his Fifth Amendment right, remain silent, and be subject to a fine, or give up his privilege and expose himself to criminal prosecution in refuting OFAC's allegations. OFAC, in contrast, did not have a

significant interest in proceeding expeditiously with the civil action: there was no risk of ongoing harm, no reason to believe that Reverend Boyle was planning to return to Iraq, and no evidence that might have been lost in the interim. Indeed, OFAC's own behavior reveals that it was not concerned with expeditious enforcement of the Iraqi Sanctions Regulations: OFAC waited over fifteen months after Reverend Boyle's alleged trip to Iraq to issue a Prepenalty Notice and an additional seven months to issue any penalty against him. OFAC's failure to provide any meaningful accommodation violated Reverend Boyle's Fifth Amendment privilege against self-incrimination.

## **II. OFAC's Penalty Violates Reverend Boyle's Right to the Free Exercise of Religion under the Religious Freedom Restoration Act.**

OFAC violated Reverend Boyle's right to the free exercise of his religion under the RFRA by fining him for his alleged travel to Iraq. RFRA prohibits the federal government from "substantially burdening a person's exercise of religion" unless the government can demonstrate that the burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that...interest." 42 U.S.C. § 2000bb-1(a)-(b).<sup>5</sup> To "guarantee its application in all cases where free exercise of religion is substantially burdened," *id.* § 2000bb(b)(1), Congress made RFRA applicable "to all Federal law, and the implementation of that law, whether statutory or otherwise," including regulations such as the Iraqi Sanctions Regulations. *Id.* § 2000bb-3(a). A substantial burden upon religious exercise exists whenever the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

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<sup>5</sup> Although RFRA was declared unconstitutional under the Fourteenth Amendment as applied to states and localities, *City of Boerne v. Flores*, 521 U.S. 507 (1997), it remains applicable to the federal government and extends to every "branch, agency, instrumentality, and official...of the United States." 42 U.S.C. § 2000bb-2(1). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

The information upon which OFAC relied to impose its penalty clearly demonstrated that Reverend Boyle's alleged travel to Iraq was based upon "beliefs rooted in religion," not upon "purely secular views," and therefore should have been accorded free exercise protection. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833 (1989). Reverend Boyle's opposition to the military intervention of the United States in Iraq, as well as any actions taken in respect thereof, is "firmly rooted" in his religious beliefs and "inseparable" from his "mission of faith" as a Methodist leader. (Compl. ¶¶ 16-19; A.R. 87). Reverend Boyle was supported in these alleged actions by his superiors within the United Methodist Church, including the leader of his faith in New Jersey. (A.R. 83). By sanctioning Reverend Boyle for his faith-based actions, OFAC's Regulations placed impermissible pressure upon him to violate his religious beliefs.

The government asserts (Defs.' Mem. in Supp. of Mot. to Dismiss at 22) that Reverend Boyle's free exercise rights are not substantially burdened "if [his] religious exercise does not require travel to Iraq." But RFRA's protections extend beyond religiously required behavior to "any exercise of religion, whether or not compelled, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5. *See also Navajo Nation v. United States Forest Service*, 479 F.3d 1024 (9th Cir. 2007) (recognizing that Congress expanded RFRA's definition of "exercise of religion" through the enactment of the Religious Land Use and Institutionalized Person Act ("RLUIPA"), and that Congress rejected the pre-RLUIPA requirement that a belief must be "central" to or "mandated" by plaintiff's religion to be protected by RFRA). "[D]emonstrating a substantial burden is not an onerous task for the plaintiff." *Singh v. Goord*, \_\_\_ F. Supp. 2d \_\_\_, No. 05 Civ. 9680 (SCR), 2007 WL 2982249, at \*5 (S.D.N.Y. Oct. 9, 2007). Rather, it requires only that the plaintiff "demonstrate that the beliefs professed are sincerely held and in the individual's own

scheme of things, religious.” *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) (internal quotation marks omitted). *See also Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (“Our scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.”), *overruled on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997).

While the government argues that Reverend Boyle could have exercised his religious beliefs through alternative means (Defs.’ Reply Mem. at 23-24), it is not for this Court or for the government to decide what particular practices are central to an adherent’s religion and what practices can be permissibly foregone. *See Thomas v. Review Board*, 450 U.S. at 716 (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or [another devotee] more correctly perceived the commands of their common faith.”); *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”); *Singh*, 2007 WL 2982249, at \*5 (“[T]he centrality of a practice to a religion is not subject to judicial inquiry.”). Instead, it is the government’s burden to prove that OFAC’s encroachment upon Reverend Boyle’s free exercise right “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that...interest.” 42 U.S.C. § 2000bb-1(b). While the government argues that a uniform sanction is necessary to protect national security:

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government’s categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’ – the particular claimant whose sincere exercise of religion is being substantially burdened.

*Gonzales v. O Centro*, 546 U.S. at 430-31. See also *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (in applying the test that was later explicitly adopted in RFRA, the Supreme Court required the government “to show with more particularity how its admittedly strong interest...would be adversely affected by granting an exemption to the Amish”); *Jolly*, 76 F.3d at 478 (“Under RFRA, the defendants bear the burden of demonstrating that the decision to continue *the plaintiff’s* confinement to keeplock furthers a compelling state interest.”) (emphasis in original). “If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest.” *Callahan v. Woods*, 736 F.2d 1269, 1272-73 (9th Cir. 1984). The government, therefore, cannot meet its burden by generally asserting, as it does here (Defs.’ Mem. Supp. Mot. Dismiss at 23), that “a less restrictive process is difficult to conceive” to achieve its interests. Rather, it must specifically show that the application of Iraqi Sanctions Regulations to *Reverend Boyle* furthers a compelling governmental interest. See *Gonzales v. O Centro*, 546 U.S. at 436 (“RFRA operates by mandating consideration, under the compelling interest test, of exceptions to ‘rules of general applicability’” through a “case-by-case consideration of religious exemptions to generally applicable rules.”).<sup>6</sup>

Moreover, the existence of other exceptions in the Iraqi Sanctions Regulations undermines the government’s argument (Def.’s Reply Mem. at 24) that the need for “uniform travel-related regulations” precludes the recognition of a religious exception. See *Gonzales v. O Centro*, 546 U.S. at 430-438; see also *Ragland v. Angelone*, 420 F. Supp. 2d 507, 514 (W.D. Va.

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<sup>6</sup> Nor can the government meet its burden by suggesting (Def.s’ Reply Memo at 24) that providing an exemption for religion in this situation would require granting an exemption to all religious groups. See *Gonzales v. O Centro*, 546 U.S. at 436-37 (rejecting, under RFRA, the “classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”).

2006) (in applying the strict scrutiny standard under RFRA and RLUIPA, “a reviewing court must examine any existing exceptions to the policy” being challenged). The Iraqi Sanctions Regulations already contain several exceptions to their prohibition on transactions relating to travel to or within Iraq, including an exception for transactions associated with “journalistic activity.” 31 C.F.R. § 575.207.<sup>7</sup> In the face of these exceptions, the government therefore cannot plausibly argue that OFAC’s regulations are in fact uniform. *See Gonzales v. O Centro*, 546 U.S. at 434 (an existing exception “fatally undermines the Government’s broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions”). Further, the government cannot plausibly argue that allowing *any* exception to its regulations would be highly dangerous to national security interests because it already allows for some exceptions. *See id.* at 433 (“It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation marks omitted)). Finally, the government also cannot argue that *any* exception to Iraqi Sanctions Regulations would compromise OFAC’s ability to administer the regulations, as there is no evidence the exceptions in place have created any serious administrative burden. *See Gonzales v. O Centro*, 546 U.S. at

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<sup>7</sup> The Iraqi Sanctions Regulations provide three exceptions to the general prohibition on transactions related to travel to Iraq. These exceptions are transactions:

- a) Necessary to effect the departure of a U.S. citizen or permanent resident alien from Kuwait or Iraq;
- b) Relating to travel and activities for the conduct of the official business of the United States Government or the United Nations; or
- c) Relating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization.

31 C.F.R. § 575.207. Reverend Boyle plainly falls outside any of these exceptions, and it therefore would have been futile for him to apply for a permit. *See, e.g., United States v. Hardman*, 297 F.3d 1116, 1121 (10th Cir. 2002); *United States v. Antoine*, 318 F.3d 919, 922 n.4 (9th Cir. 2003).

434-37. Instead, OFAC's enforcement of a monetary penalty against Reverend Boyle under the Iraqi Sanctions Regulations specifically and impermissibly burdened his right to religious freedom under RFRA.

### **III. OFAC's Enforcement of the Iraqi Sanctions Regulations Against Reverend Boyle Constitutes Impermissible Viewpoint Discrimination under the First Amendment.**

By sanctioning only Reverend Boyle and others critical of American military action in Iraq, OFAC discriminatorily enforced the Iraqi Sanctions Regulations based upon viewpoint in violation of the First Amendment.<sup>8</sup> "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. While the First Amendment generally protects "the right to engage not only in 'pure speech,' but 'expressive conduct,' as well," *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)), there are certain types of speech or expressive conduct, such as fighting words, that "can be used to convey an idea...but [do not have], in and of [themselves], a claim upon the First Amendment" and to which it is said "the protection of the First Amendment does not extend." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383-86 (1992) (internal quotations omitted). However, as the Supreme Court observed in *R.A.V.*, even "unprotected speech" is not

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<sup>8</sup> As previously noted (Pl.'s Reply at 9 n.5), Reverend Boyle has separately alleged that OFAC's sanction violates the Fifth and Fourteenth Amendments' guarantee of equal protection because he was treated differently than those who also allegedly traveled to Iraq but who did not publicly oppose the war. (Compl. ¶¶ 70-71). That claim is distinct from Reverend Boyle's allegation of viewpoint discrimination in violation of the First Amendment's free speech protection. (Compl. ¶ 63). See *Church of the Amer. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 210 (2d Cir. 2004) (criticizing lower court's analysis of a First Amendment viewpoint discrimination claim that seemed to apply the standards of Fifth Amendment selective enforcement).

“entirely invisible to the Constitution.” *Id.* at 384. Even as to such “unprotected” speech, “[t]he government may not regulate use based on hostility – or favoritism – towards the underlying message expressed.” *Id.* at 386. Thus, even assuming that Reverend Boyle’s alleged travel to Iraq does not constitute speech protected by the First Amendment, *cf. Karpova*, 497 F.3d at 272, the government still cannot impose penalties upon him out of hostility to the ideas that he has expressed.

“[T]he application of a viewpoint neutral rule in a viewpoint discriminatory manner violates the First Amendment” even where a law on its face may not appear to suppress particular viewpoints and allow others. *Boy Scouts of America v. Wyman*, 335 F.3d 80, 95 n.9 (2d Cir. 2003). *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) (neutral justifications “will not save a regulation that is in reality a façade for viewpoint-based discrimination”). As the Second Circuit has explained, the question is whether “the defendants in fact applied [the law] in a viewpoint discriminatory manner.” *Wyman*, 335 F.3d at 95. Moreover, “[s]uspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government, because there is a strong risk that the government will act to censor ideas that oppose its own.” *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004) (citing *Texas v. Johnson*, 491 U.S. 397, 411-17 (1989)). *See also Gen. Media Comm., Inc. v. Cohen*, 131 F.3d 273, 281 n.10 (2d Cir. 1997) (noting that the Supreme Court jurisprudence on viewpoint discrimination demonstrates “particular hostility to restrictions specifically intended to suppress the circulation of the arguments on one side of a particular debate”).

Reverend Boyle has alleged that OFAC has penalized only individuals who both traveled to Iraq and who publicly expressed their opposition to the United States’ military actions there.

*See* Compl. ¶¶ 47-48; Pl.’s Mem. at 28. Because OFAC has enforced its Iraqi Sanctions Regulations in a manner that restricts only the side of public debate critical of U.S. military policy in Iraq, this Court should be particularly sensitive to the possibility of viewpoint discrimination. Further, the fact that these regulations have not been enforced against violators in a viewpoint-neutral manner, by foregoing sanctions against those who traveled to Iraq but who were in favor of United States policy in Iraq, while consistently penalizing those who travelled to Iraq and publicly opposed American policy regarding that country, *see id.*, undermines the government’s assertion (Def.’s Mem. at 21) that enforcement of the travel ban is only meant to “ensure that United States dollars did not end up supporting Iraq.” *See Ridley*, 390 F.3d at 87 (“[W]here the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive.”).

Because Reverend Boyle has not been given a reasonable opportunity for discovery, the government’s motion must be treated as a motion for dismissal under Rule 12 of the Federal Rules of Civil Procedure, not as a motion for summary judgment under Rule 56. *See, e.g., Gay v. Wall*, 761 F.2d 175, 178 (4th Cir. 1985); *Winters v. Meyer*, 442 F. Supp. 2d 82, 86 (S.D.N.Y. 2006).<sup>9</sup> In a recent case in which the plaintiffs asserted an as-applied viewpoint discrimination claim, the Second Circuit overturned a district court’s grant of summary judgment to the defendants where the district court had treated a motion under Rule 12(b)(6) as one for summary judgment. As the Second Circuit found, the conversion “deprived the [plaintiffs] of the

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<sup>9</sup> Motions for judgment on the pleadings under Rule 12(c) are evaluated under the same legal standard as motions to dismiss under Rule 12(b)(6). *See, e.g., Nicholas v. Goord*, 430 F.3d 652, 657-58 n.8 (2d Cir. 2005).

opportunity to take discovery and present evidence on several key disputed facts.” *Peck v. Baldwinsville Cent. Sch.. Dist.*, 426 F.3d 617, 624 (2d Cir. 2005) (discussing previous decision, while overturning district court’s second grant of summary judgment to the defendants after allowing discovery). The Second Circuit also noted that “further discovery might uncover a) evidence of animus or hostility” by the defendants toward the suppressed viewpoint, “and b) indications as to the accuracy of” the defendants’ purported reason for restricting the speech. *Id.*; *see also Hellstrom v. U.S. Dep’t of Veteran Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) (summary judgment should only be granted “[i]f after discovery, the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof”) (internal quotation marks omitted and emphasis in original). It would similarly be inappropriate to treat the government’s motion as one for summary judgment in this case, without providing Reverend Boyle an opportunity to engage in discovery and uncover further evidence on key disputed facts, such as possible animus or hostility by OFAC toward Reverend Boyle’s critical view of American policy in Iraq.

This Court should accordingly deny the government’s motion to dismiss under Rule 12. The complaint here plainly alleges a legally cognizable claim for relief for violation of Reverend Boyle’s First Amendment right against viewpoint discrimination. *See In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007); *Iqbal v. Hasty*, 490 F.3d 143, 157-59 (2d Cir. 2007); *see also Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir.1998) (“The issue [for the Court] is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.”) (internal quotations omitted); *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985) (The Court’s function on a motion to dismiss is “not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is

legally sufficient.”). Reverend Boyle has alleged that OFAC enforced the Iraqi Sanctions Regulations against him based upon his viewpoint – viz, his public opposition to United States military involvement in Iraq – and not for his alleged travel. He has also alleged that at least three other individuals sanctioned by OFAC for traveling to Iraq all publicly opposed U.S. military involvement there, and were impermissibly fined by OFAC on that basis. Compl. ¶¶ 47-48.<sup>10</sup> There is clearly a set of facts that Reverend Boyle could plausibly prove in support of his viewpoint discrimination claim, given a reasonable opportunity for discovery, that would entitle him to relief: that the government had engaged in a pattern of unlawful favoritism by only sanctioning those who had both traveled to Iraq and had spoken out publicly against the military actions of the United States in that country, while not sanctioning those who had similarly traveled to Iraq but who had not spoken out publicly against American military intervention there.

Even assuming that the government’s motion may be considered under the summary judgment standard, it should be denied, because there is a genuine issue of material fact with respect to whether OFAC engaged in viewpoint discrimination against Reverend Boyle. *See* Fed. R. Civ. P. 56(c). The government has produced no evidence to rebut Reverend Boyle’s allegation that OFAC enforced the regulations in a discriminatory manner based upon his viewpoint, or to rebut the evidence that Reverend Boyle produced, even without discovery, to demonstrate this viewpoint-discriminatory enforcement. As the party moving for summary judgment, the government bears “the burden of showing the absence of a genuine issue as to any material fact.” *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The underlying facts

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<sup>10</sup> Further, Reverend Boyle has identified one individual who traveled to Iraq, but who did not publicly oppose U.S. military involvement there, and who was not fined as a result. Pl.’s Mem. at 28.

“must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Here, there is a genuine issue of material fact as to whether OFAC engaged in viewpoint discrimination in its enforcement of the Iraqi Sanctions Regulations. Further, when the court “converts the motion [to dismiss] into one for summary judgment,” there is “an attendant obligation to allow the parties reasonable discovery on the merits.” *Shehadeh v. Chesapeake & Potomac Tel. Co. of Md.*, 595 F.2d 711, 719 n. 41 (D.C. Cir. 1978). Notably, in as-applied viewpoint discrimination claims, courts have taken great care not to rule upon motions for summary judgment until after allowing a reasonable period for discovery to allow the plaintiffs to develop the record. *See, e.g., McGuire v. Reilly*, 386 F.3d 45, 55 (1st Cir. 2004) (only after providing “an additional discovery period of six months” to the plaintiffs “to develop a factual record on the as-applied claim” did the court grant summary judgment); *Peck*, 426 F.3d at 624 (reviewing viewpoint discrimination claim on summary judgment only after discovery); *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 21 (D.D.C. 1999) (granting government’s renewed motion for summary judgment “after extensive discovery” that resulted from the court’s initial denial of summary judgment and granting of the plaintiffs’ motion to compel discovery). This Court should, similarly, deny the government’s motion for summary judgment here, where Reverend Boyle’s well-pled allegations of viewpoint discrimination remain un rebutted and where Reverend Boyle has had no opportunity to conduct discovery.<sup>11</sup>

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<sup>11</sup> The mere existence of OFAC’s administrative proceeding does not alter the analysis. Courts must allow discovery when reviewing administrative proceedings where it “provides the only possibility for effective judicial review and when there have been no contemporaneous administrative findings.” *Comm. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990). *See also Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 458 (D.C. Cir. 1994) (reiterating that discovery is appropriate where “without discovery the administrative record is inadequate for review”). Here, Reverend Boyle had no opportunity to conduct discovery or

**IV. OFAC's Application of the Regulations to Reverend Boyle Violates His Fifth Amendment Right to Procedural Due Process.**

In *Karpova*, the Second Circuit rejected the plaintiff's claim that the Iraqi Sanctions Regulations violated *her* Fifth Amendment right to procedural due process, as applied in that case. *See Karpova*, 497 F.3d at 270-72; *see also id.* at 271 (underscoring *Karpova's* failure to identify how additional safeguards "would have benefited her"). OFAC's application of its Regulations to Reverend Boyle requires a different result here.

*First*, unlike Reverend Boyle, the plaintiff in *Karpova* did not assert a Fifth Amendment privilege against self-incrimination. For the reasons set forth above, and for those provided in Reverend Boyle's prior submissions, Reverend Boyle's assertion of his Fifth Amendment right fundamentally alters the Fifth Amendment due process analysis. Specifically, Reverend Boyle was forced to defend himself against OFAC's hearsay allegations without any opportunity to see or confront the agency's evidence, without discovery, and without a live hearing in a proceeding which potentially exposed him to grave criminal consequences and in which he had asserted his Fifth Amendment privilege against self-incrimination. While OFAC's procedures might be sufficient for someone, like *Karpova*, who was not asserting a Fifth Amendment privilege against self-incrimination, they were insufficient for an individual, like Reverend Boyle, who was asserting that privilege.

*Second*, OFAC's application of the Regulations to Reverend Boyle violated his right to due process by denying him a meaningful opportunity to be heard. Specifically, the Regulations denied Reverend Boyle the various procedural safeguards – safeguards provided by OFAC under its Cuban Assets Control Regulations – which could have enabled him to prove his affirmative

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otherwise develop the record during the administrative stage because OFAC's regulations precluded it.

defense that OFAC was impermissibly sanctioning him based upon his viewpoint, and not his alleged travel to Iraq. In particular, the Regulations denied Reverend Boyle any opportunity to conduct discovery or to present and cross-examine witnesses at a hearing on his First Amendment viewpoint discrimination claim – a claim, unlike those claims in *Karpova*, where there was a “genuine issue of material fact.” *Karpova*, 497 F.3d at 271. Due process requires more.

*Third*, Reverend Boyle was provided inadequate information. Specifically, OFAC alleged that Reverend Boyle had traveled to Iraq in February and March of 2003, but it did not disclose the basis for those allegations – *i.e.*, several newspaper articles in which Reverend Boyle purportedly acknowledged traveling to Iraq – until *after* the fine had been imposed and in response to the instant lawsuit. Thus, unlike in *Karpova*, where the plaintiff had admitted soliciting funds to travel to Iraq, 497 F.3d at 267-68, OFAC denied Reverend Boyle due process here by failing to provide him with adequate information, including the specific information on which its allegations were based.

### CONCLUSION

For the foregoing reasons, Defendants’ motion for judgment on the pleadings, or, in the alternative, for summary judgment, should be denied, and Plaintiff’s motion for judgment on the pleadings, or, in the alternative, for summary judgment, should be granted.

Respectfully submitted,

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