

ORAL ARGUMENT NOT YET SCHEDULED

No. 03-1392

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

KAHANE CHAI, et al.,

Petitioners,

v.

**UNITED STATES DEPARTMENT OF STATE and
HONORABLE CONDOLEEZZA RICE, SECRETARY OF STATE,**

Respondents.

On Petition for Review of Final Orders of the Secretary of State

BRIEF FOR RESPONDENTS

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Certificate as to Parties, Rulings and Related Cases

Parties

The Brief for Petitioners correctly lists (at i) the following parties before the Court: petitioners Kahane Chai, Kach, and Kahane.org, and respondents the United States Department of State and Secretary of State Condoleezza Rice.

Rulings Under Review

The Brief for Petitioners lists the following agency rulings under review: the Secretary's October 2, 2003, redesignation of Kahane Chai, also known as ("a.k.a.") Kach, Kahane.org, and many other aliases, as a Foreign Terrorist Organization (68 Fed. Reg. 56860), and the Secretary's October 10, 2003, determination that prior notice to certain aliases was not required (68 Fed. Reg. 58738). As we explain further below, the redesignation decision was reaffirmed on December 22, 2004, when, based on a de novo review of the administrative record, the Secretary decided to maintain the October 2003 redesignation of Kahane Chai (a.k.a. Kach, Kahane.org and many other aliases), as a Foreign Terrorist Organization.

Related Cases

This Court has not previously considered the Foreign Terrorist Organization designation of Kahane Chai (a.k.a. Kach, Kahane.org and many other aliases).

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BRIEF FOR RESPONDENTS

Glossary

“Analysis” refers to the Summary and Analysis of Materials Submitted by Counsel to Kahane Chai, Kach, and Kahane.org prepared by the United States Department of State in connection with the redesignation of petitioners.

“The Antiterrorism Act” or AEDPA refers to the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132, 110 Stat. 1214 (1996)).

“AR” refers to the unclassified Administrative Record developed by the United States Department of State in connection with the redesignation of petitioners.

“AR (Classified)” refers to the classified Administrative Record (filed under seal with the Court) developed by the United States Department of State in connection with the redesignation of petitioners.

“FBI” refers to the Federal Bureau of Investigation.

“FBI Declaration” refers to a declaration of the Acting Section Chief of the Counterterrorism Division’s International Terrorism Operations Section II at FBI Headquarters prepared in connection with the designation of petitioners.

“Secretary” refers to the respondent United States Secretary of State.

“Summary” refers to the Summary of the 2003 Administrative Record for Redesignation prepared by the United States Department of State in connection with the designation of petitioners.

Introduction

The 1994 massacre of twenty nine Arab worshipers at a mosque in Hebron and the 1995 assassination of Prime Minister Yitzhak Rabin brought the danger of domestic Israeli terrorism to the forefront. Not only private tragedies, these atrocities were intended to disrupt the accelerating Middle East peace process and

thereby threaten the national security of the United States. The Israeli government's 2003 acceptance of the "road map" to achieve a two-state solution again raised concerns about the potential for violence by extremist groups opposed to the peace plan.

In October 2003, the Secretary of State determined that Kahane Chai, a group operating under more than thirty different names, including the names Kach and Kahane.org, continued to be a Foreign Terrorist Organization. As support for that redesignation, the Secretary observed that the Israeli government had recently closed the Jerusalem office of Kach because the office was a base for terrorist activity. The Secretary also noted that Kahane Chai sought to initiate a campaign against then-Prime Minister Sharon that was akin to the campaign that culminated in the assassination of Rabin, and that Kahane Chai had repeatedly and recently endorsed Baruch Goldstein's killings of twenty nine Arab worshipers.

The Secretary's decision to redesignate Kahane Chai as a Foreign Terrorist Organization easily survives this Court's limited review. Among other things, the administrative record contains a detailed affidavit signed by the Acting Section Chief of the Counterterrorism Division's International Terrorism Operations Section II at the Federal Bureau of Investigation ("FBI"). That affidavit, based both on FBI investigation and FBI expert review of publicly available and

classified materials, concludes that Kahane Chai operates under numerous aliases, and that Kahane Chai retains the capacity to engage in terrorist activities and has engaged in such activities. This Court's review of the Secretary's designation decisions is limited, and the FBI declaration, and other materials discussed below, provide the necessary information to support the Secretary's decision here.

Jurisdictional Statement

On October 2, 2003, the Secretary, acting under 8 U.S.C. § 1189(a), redesignated petitioner Kahane Chai, also known as Kach and Kahane.org (and more than thirty other names), as a Foreign Terrorist Organization. 68 Fed. Reg. 56860. An organization so designated has thirty days to seek judicial review in this Court. See 8 U.S.C. § 1189(c). On October 31, 2003, Kahane Chai, Kach and Kahane.org timely filed their petition for review.

Statement of the Issues Presented for Review

1. Whether the Secretary reasonably redesignated Kahane Chai (a.k.a. Kach, Kahane.org and many other aliases) as a Foreign Terrorist Organization.
2. Whether the Secretary complied with the procedures for such designation set out by this Court in *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001).

Statement of the Case

A. Nature of the Case

This case is an original action filed directly in this Court under Section 302 of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law No. 104-132, 110 Stat. 1214) (“the Antiterrorism Act” or “AEDPA”). Under that statute, the Secretary of State may designate as a “Foreign Terrorist Organization” a foreign organization that engages in terrorism or terrorist activity threatening the security of United States nationals or the national security of the United States. 8 U.S.C. § 1189(a). On October 2, 2003, the Secretary redesignated Kahane Chai (a.k.a. Kach, Kahane.org and other aliases¹) as a Foreign Terrorist Organization. 68 Fed. Reg. 56860. See Administrative Record (Unclassified Version) (cited as “AR”) 531-545 (Summary of the 2003 Administrative Record for Redesignation

¹ The Secretary listed thirty seven aliases for Kahane Chai. They are: Kach, Kahane Lives, Kfar Tapuah Fund, The Judean Voice, The Judean Legion, The Way of the Torah, The Yeshiva of the Jewish Idea, The Repression of Traitors, Dikuy Bogdim, DOV, the State of Judea, the Committee for the Safety of the Roads, the Sword of David, Judea Police, Forefront of the Idea, the Qomemiyut Movement, KOACH, New Kach Movement, newkach.org, Kahane, Yeshivat HaRav Meir, International Kahane Movement, Kahane.org, Kahane.net, Kahanetzadok.com, Kahane Tzadok, Hatikva Jewish Identity Center, Rabbi Meir David Kahane Memorial Fund, Friends of the Jewish Idea Yeshiva, Judean Congress, Jewish Legion, The Voice of Judea, No’ar Meir, Meir’s Youth, American Friends of Yeshivat Rav Meir, American Friends of the United Yeshiva Movement, and The Committee Against Racism and Discrimination (CARD).

(“Summary”)).² Kahane Chai petitioned for review in this Court. See 8 U.S.C. § 1189(b).

Thereafter, the Secretary agreed to review the redesignation in light of material submitted by Kahane Chai. AR 558. Kahane Chai submitted a response to the proposed redesignation (AR 604-620) and an additional response (AR 621-654). The State Department then prepared a Summary and Analysis of Materials Submitted by Counsel to Kahane Chai, Kach, and Kahane.org. AR 656-665 (“Analysis”). On December 22, 2004, based on a *de novo* review of the administrative record, the Secretary decided to maintain the October 2003 redesignation of Kahane Chai (a.k.a. Kach, Kahane.org and many other aliases) as a Foreign Terrorist Organization. AR 667.

B. Statement of Facts

1. Statutory and Procedural Background

Section 302 of the Antiterrorism Act authorized the Secretary of State – in consultation with the Secretary of the Treasury and the Attorney General, and after specified prior notification to Congress – to designate an entity as a “Foreign

² Pursuant to an April 8, 2004 order from the Court, the Government previously filed the unclassified version of the Administrative Record. Although the filed Administrative Record is denoted as “Volume 2,” Volume 1 was relevant only to Appeal No. 03-1387 (L), a case which is no longer consolidated with this one. In addition, as required by the same order, we are today filing the classified portions of the administrative record. Where relevant, this unclassified brief provides detailed citations to the classified record. The Government is not filing a classified brief in this matter.

Terrorist Organization” if the Secretary found that: “(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title) or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism; and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.” 8 U.S.C. § 1189(a)(1).

Congress has broadly defined the term “terrorist activity.” 8 U.S.C. §1182(a)(3)(B)(iii). “Terrorist activity” “means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State),” and which includes, among other things, the “threat, attempt, or conspiracy” to carry out “assassination[s].” *Id.* at (IV) & (VI). “Terrorist activity” also includes the “threat, attempt, or conspiracy” to “use” “any” “explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” *Id.* at (V) & (VI).³

³ The definition of terrorism referenced in the designation provision (section 2656f(d)(2) of title 22) states: “the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”

Congress has also broadly defined “engage in terrorist activity.” 8 U.S.C. § 1182(a)(3)(B)(iv). To “engage in terrorist activity” includes to “commit an act that the actor knows, or reasonably should know, affords material support” to “a terrorist organization.” *Id.* at (VI)(cc). To “engage in terrorist activity” also includes “to solicit any individual” “for membership” in a “terrorist organization.” *Id.* at (V)(bb). A “terrorist organization” includes an entity designated as a Foreign Terrorist Organization by the Secretary of State. *Id.* at (II).

Designation of a group as a Foreign Terrorist Organization carries three main legal consequences. First, United States financial institutions possessing or controlling any funds in which a designated Foreign Terrorist Organization or its agent has an interest are required to block all financial transactions involving those funds. 8 U.S.C. § 1189(a)(2)(C). Second, individuals having certain associations with designated organizations are inadmissible to this country under the Immigration and Nationality Act, and are ineligible for visas. 8 U.S.C. § 1182. Third, persons within the United States or subject to its jurisdiction are prohibited by law from providing “material support or resources” to any designated Foreign Terrorist Organization. 18 U.S.C. § 2339B(a)(1).

Prior to recent legislative changes, designations under the Antiterrorism Act lasted only for two years, and then could be renewed by the Secretary. 8 U.S.C. § 1189(a)(4). In December 2004, however, the Intelligence Reform and Terrorism Prevention Act of 2004 removed the two year limitation on Foreign Terrorist

Organization designations, and created certain periodic administrative review procedures for such designations. 8 U.S.C. § 1189(a)(4). See AR 668 n.1.

The Antiterrorism Act has a specific judicial review scheme for designations: “Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a Foreign Terrorist Organization” by the Secretary of State “may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit.” 8 U.S.C. § 1189(c)(1). On judicial review, this Court may set aside a designation if it is arbitrary or capricious, or otherwise not in accordance with law, unconstitutional, or lacking substantial support in the administrative record (including classified information). *Ibid.* The judicial review provisions were not altered by the Intelligence Reform and Terrorism Prevention Act of 2004.

As this Court has explained, judicial review of the Secretary’s Foreign Terrorist Organization designations is “quite limited.” *National Council of Resistance of Iran v. Department of State*, 373 F.3d 152, 154 (D.C. Cir. 2004) (Roberts, J.) (quoting *People’s Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17, 19 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000)). “[N]othing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet, or other hearsay regarding the organization’s activities * * *.” *People’s Mojahedin Organization of Iran*, 182 F.3d at 19. In light of the statutory scheme, the Court’s “only function is to decide if the Secretary, on the face of things, had enough information before her to come

to the conclusion that the organizations were foreign and engaged in terrorism.” *Id.* at 25. “Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received – something we have no way of judging.” *Ibid.*

In *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001), this Court held that a Foreign Terrorist Organization designation had not comported with due process. According to the Court, the designated entity had a sufficient presence in the United States to be entitled to the protections of the United States Constitution. *Id.* at 201-03. The Court held that the designated entity had been entitled to due process in connection with the designation, including access to the unclassified material in the administrative record and an opportunity to present written evidence to the Secretary relevant to the question of whether it was a Foreign Terrorist Organization. *Id.* at 208-09.

This Court therefore remanded that matter to the Secretary of State “with instructions that the petitioners be afforded the opportunity to file responses to the nonclassified evidence against them, to file evidence in support of their allegations that they are not terrorist organizations, and that they be afforded an opportunity to be meaningfully heard by the Secretary upon the relevant findings.” 251 F.3d at 209. The Court directed that the Secretary must give notice of “the action sought, but need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute.” *Id.* at 208-09. On remand, the designated entities were given an opportunity to respond to the unclassified material in the

administrative record. Both organizations submitted material to the State Department, arguing against designation. The Secretary then redesignated the entities, and this Court upheld that action. *People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238 (D.C. Cir. 2003).

2. Prior Proceedings

In 1996, shortly after enactment of the Antiterrorism Act, the Secretary of State designated Kahane Chai and Kach as separate Foreign Terrorist Organizations. *Designation of Foreign Terrorist Organizations*, 62 Fed. Reg. 52650 (Oct. 8, 1997). Two years later, the Secretary redesignated both entities. 64 Fed. Reg. 55112. And, in October 2001, the Secretary of State redesignated Kahane Chai, and designated Kach as an alias of Kahane Chai. 66 Fed. Reg. 51088. Neither Kahane Chai nor Kach sought review in this Court of the 1997, 1999, or 2001 designations.

Under the then-existing version of the Antiterrorism Act, the 2001 Kahane Chai (a.k.a. Kach) designation would have lapsed two years later on October 5, 2003, unless the Secretary redesignated the organization again. On September 3, 2003, the Coordinator for Counter-Terrorism at the United States Department of State wrote to five individuals who “might represent” “Kahane Chai (also known as Kach and other aliases)” stating the Secretary’s intent to consider Kahane Chai for redesignation as a Foreign Terrorist Organization. AR 548. The Secretary offered to provide them, as representatives of Kahane Chai, with the unclassified portions of the administrative record developed to that date, and an opportunity for

the organization to submit relevant material to the Secretary. AR 548. On October 2, 2003, believing that no timely response had been received from any legitimate representative of Kahane Chai, the Secretary redesignated the entity as a Foreign Terrorist Organization. AR 554-555. See 68 Fed. Reg. 56860 (2003).

This redesignation was based on an Administrative Record that was summarized by the State Department. See AR 531-545 (“Summary of the 2003 Administrative Record for Redesignation”) (“Summary”). As background, the Summary described both classified and unclassified material demonstrating that Kahane Chai is the successor to the original Kach organization, which was founded by militant Israeli-American Rabbi Meir Kahane. AR 531. The purpose of these organizations is to “oppos[e] the Middle East peace process,” “to restore the biblical state of Israel,” and “to bring about the expulsion of all Arabs from Israel.” AR 531.⁴ Rabbi Kahane was assassinated in 1990. AR 531. Although the Kach organization continued, Rabbi Kahane’s son, Binyamin Kahane, established another organization called Kahane Chai (“Kahane Lives” in Hebrew). AR 531. Both organizations promote Kahane’s policies. Pet. Br., at 6. The Summary also noted that in 1994, the Israeli government outlawed both Kahane Chai and Kach after the groups publicly expressed approval of Baruch Goldstein’s killing of

⁴ As an affidavit attached to petitioners’ brief explains, Kahane advocated a “militant Jewish resistance” that included forcing “Arab residents” of Israel to be “relocated to their own state, Jordan.” Pet. Br., Affidavit of Mr. Abady, at 1, 4.

twenty nine Arab worshipers at the al-Ibrahimi Mosque/Tomb of the Patriarchs in Hebron. AR 503, 532.

Again reviewing both classified and unclassified material, the Summary emphasized that Kahane Chai and Kach are now a “combined organization” that operates under a host of different names. “Since being outlawed in Israel in 1994, Kach and Kahane Chai have attempted to operate under a variety of different names.” AR 532. In December 2000, Binyamin Kahane was killed. AR 398. Thereafter, the Summary noted, in 2001, the Secretary designated Kahane Chai and Kach as a “single organization.” AR 532. The Summary relied on “media reporting, intelligence and law enforcement information” to identify the numerous aliases under which the “combined organization” has operated. AR 532.

Turning to the legal criteria for designating Kahane Chai as a Foreign Terrorist Organization, the Summary noted that the State Department Coordinator for Counterterrorism had concluded on March 5, 2003 that Kahane Chai continues to be a “foreign” organization. AR 534. See AR 404. The Summary noted that “most of the group’s terrorist activity or terrorism has taken place outside the United States,” “mainly in Israel and the West Bank.” AR 534-535. “Furthermore,” the Summary noted, “Kahane Chai’s leaders, as well as a large number of its supporters, reside in Israel or the occupied territories.” AR 535.

Next, the Summary described record materials demonstrating that Kahane Chai retains the capability and intent to engage in terrorist activity and has engaged in terrorist activity. AR 535. The Summary was based on “a wide variety of

sources, including counterterrorism experts in the Department of State, the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and numerous press reports.” AR 535. The administrative record includes a declaration signed by the Acting Section Chief of the Counterterrorism Division’s International Terrorism Operations Section II at the FBI. AR 497.

The Summary concluded that “Kahane Chai retains the capability and intent to engage in terrorist activity or terrorism.” AR 539. As evidence of this conclusion, the Summary noted, among other things, that in August 2002, the Israeli police “closed the Kach office in the Shmu’el Hanavi neighborhood of Jerusalem.” AR 539. The closure was under the Israeli Prevention of Terrorism Act and was affirmed by the Israeli courts. AR 539.

The Summary also concluded that “Kahane Chai has engaged in terrorist activity by threatening and conspiring to carry out assassinations.” AR 536. As evidence of this conclusion, the Summary noted, among other things, that “Kahane Chai has threatened to harm Shin Bet (Israeli Security) officials involved in investigating Kahane Chai members suspected in the school bombing cases [discussed below] * * * .” AR 536.

The Summary also concluded that “Kahane Chai has solicited individuals for membership in a terrorist organization or to engage in a terrorist activity.” AR 538. As evidence of this conclusion, the Summary noted Israeli press reports describing a Kach Movement summer camp that included a “pilgrimage to the grave of Baruch Goldstein, the Kach member who opened fire in a mosque in

Hebron in 1994 and killed 29 worshipers.” AR 538. Similarly, the Summary stated that “Kahane Chai has engaged in terrorist activity by soliciting material support for a terrorist organization.” AR 537. As evidence of this conclusion, the Summary noted, among other things, that “Kahane Chai has used its website <http://www.kahane.org>, ‘The Official Kahane Web Site,’ to solicit donations and to conduct other fundraising activity (sales of T-shirts, stickers, books, etc.)” AR 538.

The Summary also concluded that “Kahane Chai has engaged in terrorist activity by using explosives or firearms with intent to endanger directly or indirectly the safety of one or more individuals or to cause substantial damage to property.” AR 535. As evidence of this conclusion, the Summary noted, among other things, that “Kach leader Noam Federman was arrested in connection with his alleged involvement in the attempted placement of a car bomb on a street between an Arab girls’ school and a hospital in East Jerusalem on April 29, 2002.” AR 535.

Last, the Summary set forth how Kahane Chai threatens the national security of the United States. The Summary noted that the Antiterrorism and Effective Death Penalty Act of 1996 states that international terrorism “‘is a serious and deadly problem that threatens the vital interest of the United States.’” AR 540. The Summary also noted that President Clinton, through Executive Orders issued under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707, had prohibited United States persons from participating in transactions

with Kahane Chai and Kach. AR 540. See, *e.g.*, *Prohibiting Transactions with Terrorists Who Threaten To Disrupt the Middle East Peace Process*, Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995). In particular, President Clinton found that certain groups, including Kahane Chai and Kach, “have committed” or “pose a significant risk of committing” “acts of violence that have the purpose or effect of disrupting the Middle East peace process” or assisting such acts. 60 Fed. Reg., at 5079. The President prohibited transactions between United States persons and these groups, and prohibited transactions by these groups within the United States. 60 Fed. Reg., at 5079. The Summary noted that the President, including most recently President Bush, has renewed this emergency declaration each year. See, *e.g.*, *Continuation of the National Emergency With Respect To Terrorists Who Threaten To Disrupt the Middle East Peace Process*, 71 Fed. Reg. 3407 (Jan. 18, 2006).

After the Secretary’s October 2003 redesignation of Kahane Chai (a.k.a. Kach and many other aliases), Kahane Chai, Kach, and another alias, Kahane.org, submitted to the Secretary a response to the redesignation (AR 604-620) and an additional response (AR 621-654). The State Department then prepared a Summary and Analysis of Materials Submitted by Counsel to Kahane Chai, Kach, and Kahane.org. AR 656-665 (“Analysis”). The Analysis concluded that “[t]he documentary materials submitted by the petitioners do not support revocation of the 2003 redesignation of Kahane Chai and its aliases.” AR 656.

The Analysis first summarized the administrative record supporting the terrorism designation, including the classified material. AR (Classified) 658-660.

Next, the Analysis considered but rejected petitioners' claims that they are not aliases of each other. AR 663. The Analysis explained that "there is nothing inconsistent about the Secretary of State designating Kahane Chai and Kach separately in 1997 and 1999, but then consolidating them into one single designation in 2001 and 2003." AR 663. "Organizations evolve over time; separate groups with overlapping membership and similar goals may effectively merge and become one organization." AR 663. See also AR (Classified) 663-664.

The Analysis also responded to petitioners' claim that they had not been involved in Baruch Goldstein's killings. AR 660. The Analysis stated that the Summary "does not attribute this act to Kach or Kahane Chai." AR 660. Nevertheless, "Kahane Chai/Kach has consistently and repeatedly praised Goldstein's terrorism, to the point of advertising a summer camp for children in 2002 that was to include a 'pilgrimage' to the site of Goldstein's grave." AR 660. "Kahane Chai's endorsement of Goldstein's terrorism shows that the group believes in anti-Arab terrorism and terrorist activity, and is therefore fully consistent with other evidence in the record demonstrating that it has itself engaged in such conduct and possesses the capability and intent to engage in such conduct." AR 660.

The Analysis also addressed petitioners' claims that they were not involved in various other terrorist acts. As to the attempted bombing of a girls' school in East Jerusalem, the Analysis first engaged in a classified discussion of the evidence. See AR (Classified) 661. The Analysis further stated that the record "does not conclusively establish that" Kahane Chai "participated in the attack[]." AR 661. Nevertheless, "[e]ven assuming, arguendo, that Kahane Chai did not participate in this attack, the remaining evidence in the administrative record" "amply supports redesignation." AR 661. The Analysis remarked that "[t]he same holds true with regard to petitioners' claims that they were not involved in the March 2002 bombing of a Palestinian boys' school, in the planting of the three other bombs, or in the shooting deaths of Palestinians in the Ramallah and Hebron areas." AR 661. The "remaining evidence in the administrative record is more than sufficient to warrant redesignation." AR 661. But as to petitioners' claim to have no involvement in several murders of Palestinians in the West Bank in the early 1990s, the Analysis quoted "an independent think tank" whose report is in the administrative record: "[i]n 1993, the groups [Kach and Kahane Chai] claimed responsibility for several attacks in the West Bank, in which four Palestinians were killed and two wounded." AR 661-662.

The Analysis also considered and rejected petitioner's constitutional claims. The Analysis concluded that the First Amendment does not foreclose designation of a website used to support terrorism. AR 664. The Analysis also found no evidence to support Kahane Chai's claim of religious discrimination. AR 664.

On December 22, 2004, based on a de novo review of the administrative record, including both the Summary and the Analysis, the Secretary decided to maintain the October 2003 redesignation of Kahane Chai (a.k.a. Kach and other aliases) as a Foreign Terrorist Organization. AR 667.⁵

Relevant Statutory and Regulatory Provisions

The relevant portions of the Antiterrorism Act, as well as the Secretary's October 2003 redesignation decision, are included in an addendum to this brief.

Summary of Argument

I. The Secretary's decision to designate Kahane Chai (a.k.a. Kach and many other aliases) rests on a sufficient administrative record, a record that includes both classified and unclassified material.

First, the classified and unclassified administrative materials provide substantial support for the Secretary's conclusion that Kahane Chai uses many aliases, including Kach and Kahane.org. The record contains a declaration submitted by the Acting Section Chief of the Counterterrorism Division's International Terrorism Operations Section II at FBI Headquarters. (That declaration contains classified material that has been filed under seal with the Court. In this public brief, we cite, but do not discuss, the classified material filed

⁵ At the same time, the Secretary revoked the designation of one previously listed alias, "Kahane.net." "During the course" of the State Department's review of the 2004 Administrative Record, the agency concluded that Kahane.net "is no longer an alias of Kahane Chai." AR 669.

with the Court.) This FBI declaration establishes that there is no longer a meaningful difference between Kach and Kahane Chai. The record materials, including a separate FBI analysis, also support the Secretary's determination that Kahane Chai controls the Kahane.org web site.

Second, the classified and unclassified administrative materials provide substantial support for the conclusion that Kahane Chai retains the capability and intent to engage in terrorist activity. A Summary of the administrative materials prepared by the State Department noted that, in August 2002, "Israeli police closed the Kach office in the Shmu'el Hanavi neighborhood of Jerusalem." AR 539. "The 'Closure and Attachment Order' under the Israeli Prevention of Terrorism Act states that the Kach office serves as a base for the activities of a terrorist organization." AR 539.

The classified and unclassified administrative materials also provide substantial support for the conclusion that Kahane Chai has engaged in terrorist activity by threatening and conspiring to carry out assassinations. The State Department's Summary noted that Kahane Chai has threatened to harm Israeli Security officials involved in investigating Kahane Chai members. In addition, the Summary noted that, in May 2003, Kahane Chai leaders met to "launch a campaign against Prime Minister Sharon in reaction to his acceptance of the 'road map' for an Israel-Palestine peace settlement." AR 537. The campaign was to be "similar to one waged against the late prime minister Yitzhaq Rabin." AR 457.

Moreover, the classified and unclassified administrative materials provide substantial support for the conclusion that Kahane Chai has solicited individuals and funds for a terrorist organization. In particular, the State Department's Summary describes a Kach Movement summer camp that "included a pilgrimage to the grave of Baruch Goldstein, the Kach member who opened fire in a mosque in Hebron in 1994 and killed 29 worshipers." AR 538. The Summary also noted that Kahane Chai has used its website to solicit donations.

Third, the evidentiary arguments advanced by petitioners are entirely besides the point. In view of the other evidence in the record, the Secretary need not rely on any evidence that Kahane Chai has used explosives with intent to harm individuals and property. Indeed, on de novo review in 2004, the State Department analysis of the arguments submitted by Kahane Chai concluded that the Secretary need not rely on this evidence, yet still concluded that Kahane Chai was a terrorist organization.

II.1. The Secretary complied with the procedures this Court has established for implementation of the Antiterrorism Act. In advance of the October 2003 designation of Kahane Chai, the State Department's Coordinator for Counter-Terrorism wrote to five individuals who "might represent" Kahane Chai, stating the Secretary's intent to consider Kahane Chai (a.k.a. Kach and many other aliases) for redesignation as a Foreign Terrorist Organization. AR 548. Believing that no timely response had been received from a representative of Kahane Chai, the Secretary redesignated Kahane Chai as a Foreign Terrorist Organization. Contrary

to petitioner's argument, the Secretary reasonably believed that he had received no timely response from an "organization" that was proposed for redesignation.

2. In any event, any procedural miscue prior to the October 2003 designation was harmless. In 2004, at the State Department's invitation, Kahane Chai, Kach, and Kahane.org, submitted a response to the redesignation. The State Department then prepared a Summary and Analysis of Materials Submitted by Counsel to Kahane Chai, Kach, and Kahane.org. Based on a de novo review of the administrative record, the Secretary decided to maintain the October 2003 redesignation of Kahane Chai (a.k.a. Kach and many other aliases) as a Foreign Terrorist Organization. As the Analysis illustrates, and as the classified and unclassified administrative record submitted to the Court demonstrates, the Secretary would have reached the same decision even if Kahane Chai had filed its materials in October 2003.

III. Petitioners' brief raises several additional constitutional claims. We show below that each lacks merit.

Standard of Review

The standard of review is set out in 8 U.S.C. § 1189(c)(3). Once the Secretary has designated an entity a Foreign Terrorist Organization, the statute directs the Court to "hold unlawful and set aside a designation" only if the designation is:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court * * *

(E) not in accord with the procedures required by law.

As explained above, the Court has described this form of judicial review as “quite limited.” *National Council of Resistance of Iran*, 373 F.3d at 152

Petitioners’ constitutional claims are considered *de novo* by this Court.

Argument

I. The Secretary Reasonably Redesignated Kahane Chai (a.k.a. Kach and Many Other Aliases) As A Foreign Terrorist Organization

Petitioners do not dispute the Secretary’s conclusion that Kahane Chai (a.k.a. Kach and many other aliases) meets two of the three statutory criteria for Foreign Terrorist Organization designation. The Secretary may designate an entity as a “Foreign Terrorist Organization” if the Secretary finds (A) that the entity is a “foreign” organization; (B) that the entity “engages in terrorist activity” “or retains the capability and intent to engage in terrorist activity or terrorism”; and (C) that the terrorist activity or terrorism of the entity “threatens the security of United States nationals or the national security of the United States.” 8 U.S.C. § 1189(a)(1). There is no dispute that Kahane Chai is a “foreign” organization located mainly in Israel and the West Bank. AR 535. Similarly, there is no dispute that this Court cannot review the Secretary’s determination, based in part

on Presidential Executive Orders, that Kahane Chai’s terrorist activity threatens the national security of the United States. See AR 585A (petitioners’ counsel citing to *People’s Mojahedin Organization*, 182 F.3d at 23-24) (“we are not competent to pass upon the Secretary’s national security finding under § 1189(a)(1)(C)”).

Instead, the focus of the petition is whether the Secretary had “enough information” to conclude that Kahane Chai (a.k.a. Kach and many other aliases) either retains the capability and intent to engage in terrorist activity or engages in such activity. As we detail below, the “unclassified materials contained in the administrative record by themselves” provide sufficient support for the Secretary’s conclusion. *National Council of Resistance of Iran*, 373 F.3d at 158. In addition, the classified material – which we cite to (as AR (Classified)) when most relevant but do not describe in this public brief – further supports the Secretary’s decision.

A. The Administrative Record, Including The Classified Material Submitted Under Seal, Contains Substantial Information That Kahane Chai Operates Under Many Aliases

As this Court has recognized, the Secretary’s ability to designate not only an entity but all of the entity’s “aliases” is critical to achieving the objectives of the Antiterrorism Act. “It would simply make no sense for [the Court] to hold that Congress empowered the Secretary to designate a terrorist organization” “only for such periods of time at is took such organization to give itself a new name, and then let it happily resume the same status it would have enjoyed had it never been designated.” *National Council of Resistance of Iran*, 251 F.3d at 200. An entity

that is not “meaningfully independent” from another entity is an “alias” for purposes of the Antiterrorism Act. *National Council of Resistance of Iran*, 373 F.3d at 158.⁶

In this case, the Secretary concluded that Kahane Chai has many aliases, including Kach and Kahane.org. Here, therefore, the inquiry for the Court is whether the “Secretary, on the face of things, had enough information to come to the conclusion” (*People’s Mojahedin Organization of Iran*, 182 F.3d at 19) that Kach and Kahane.org are aliases of Kahane Chai.

The principal basis for the Secretary’s conclusion regarding the aliases of Kahane Chai is a declaration submitted by Kenneth Piernick (AR 662), the Acting Section Chief of the Counterterrorism Division’s International Terrorism Operations Section II at FBI Headquarters. AR 497 (“FBI Declaration”). This Section of the FBI is “responsible for managing the FBI’s international terrorism program throughout the United States and the world.” AR 497. The section “has a number of different operational and analytical units which have developed an expertise with respect to various individuals, organizations and governments which

⁶ The “alias” issue here is related to, but distinct from, the “alias issue” presented in *National Council of Resistance of Iran*, 373 F.3d at 157-158. There, all agreed that two entities were “not ‘one and the same,’” and this Court explained that an alias of an entity includes a separate entity that is nevertheless “dominated and controlled” by the principal entity. *Ibid.* Here, in contrast, the allegation is that there is only one entity operating under a host of different names, and the relevant question is whether the Secretary had sufficient evidence to conclude that one entity is not “meaningfully independent” from any other.

engage in, sponsor or aid and abet, acts of international terrorism.” AR 498. See also AR (Classified) 499-500. The FBI Declaration included in the administrative record “is based on extensive investigations of individuals associated with the Jewish Defense League (JDL), KACH and Kahane Chai organizations, * * * public source information, and information derived from FBI criminal investigations.” AR 500. See also AR (Classified) 500-501.

The FBI Declaration explains how for a time Kach and Kahane Chai were closely aligned but distinct groups. “Rabbi Meir Kahane founded the violent and militant Jewish Defense League (JDL) in New York City in 1968.” AR 501. “In 1974, Rabbi Kahane, accompanied by numerous members of the JDL, moved to Israel where they founded the KACH party.” AR 501. “After Rabbi Meir Kahane’s death, two groups emerged as successor organizations under the Kahane banner.” AR 501. “KACH continued to exist under the leadership of an Israeli citizen named Baruch Marzel,” while the “Kahane Chai organization” “was founded in December 1990, by Binyamin Ze’ev Kahane, the son of the late Rabbi Meir Kahane.” AR 501. Kahane Chai was founded at the urging of, among others, Michael Guzofsky. AR 502. The FBI Declaration states: “Michael Guzofsky has

represented the main US presence of Kahane Chai.” AR 505 (KAH03-30).⁷ See also AR (Classified) 523-524.

As the FBI Declaration further explains, since around 2000, there has been no meaningful difference between Kach and Kahane Chai. Most obviously, the December 2000 death of Binyamin Ze’ev Kahane eliminated the founder and leader of Kahane Chai. Furthermore, the FBI Declaration discusses a December 2000 *New York Times* article describing the designation of Kahane Chai and Kach as Foreign Terrorist Organizations. The article quotes Michael Guzofsky as follows: “if we can’t be KACH or Kahane Chai we will be simply Kahane.” AR 504. The FBI Declaration states: “FBI investigation has determined that Guzofsky simply changes the names of his groups, newsletters, or fundraising entities, after they have been designated as being aliases for Kahane Chai/Kach in the Secretary of State’s Foreign Terrorist Organization designation.” AR 504-505.

Further evidence that Kahane Chai and Kach are no longer distinct was found in an FBI-led January 3, 2001 search of the Hatikva Center in New York. According to the FBI Declaration, the seized items show that “the Hatikva Center acts as an *alter ego* for Kahane Chai/KACH, and that it also conducts Kahane

⁷ “During a 1995 visit [to Israel], [Guzovsky] told an Israeli interviewer, ‘I returned from the United States with the aim of unifying our ranks against Arab murderers. I declare that from now on, the machine gun, dynamite and the revolver will do all the talking * * * and we expect a great deal of bloodshed.’” AR 506.

Chai-related business through a number of different organizational names.” AR 507.

The classified material also includes information relevant to this point. See AR (Classified) 462-463, 507-508, 517-519.

The FBI Declaration concludes: “The principal US members of Kahane Chai/KACH have consistently attempted to evade legal responsibility for their illegal activities by using different names for the organizations. Evidence has demonstrated that, although the names of the organizations have changed, the principal members, addresses, and telephone numbers utilized for the ‘new’ organizations remain the same. The FBI considers all of the various names [] adopted * * * to be synonymous with [Kahane Chai] as there is overwhelming evidence of the continuity of the principals of the groups.” AR 517.

In addition to the FBI Declaration, two other items in the administrative record support the Secretary’s determination that Kach is an alias of Kahane Chai. The administrative record contains a Department of State publication, Patterns of Global Terrorism 2002, that discusses “Kahane Chai (Kach).” AR 398. Though describing Kahane Chai as an “offshoot” of Kach, the document discusses one “group.” AR 398. Similarly, the Center for Defense Information discusses “Khane Chai (Kach).” AR 401. The CDI explains that the “groups have an overlapping membership of several dozen core members, as well as an unknown number of unaffiliated followers and supporters.” AR 401.

The administrative record also provides substantial support for the Summary's conclusion that Kahane Chai controls the kahane.org web site. Most obviously, the "billing contact" for the Kahane.org website is Kahane Chai leader Michael Guzovsky. AR 420. The administrative record also contains an FBI analysis explaining that the Kahane.org website is "similar in content and design to Kach movement websites that were disrupted in early 2001 after the FBI seized their assets." AR 419 ("In another indication of the link between the old and the refurbished websites, Kahane.org features an e-petition to have the US Government lift the ban against Kahane Chai and Kach."). See also AR 419 ("[w]e the undersigned, demand an immediate cessation of the unfair and capricious designation of the Kahane Chai"). Furthermore, "[c]licking on the menu item 'Kahane Chai' at the New Kach website took the browser to Kahane.org." AR 419. The website is also replete with references to Binyamin Kahane, the founder of Kahane Chai. AR 417 ("Parsha Commentary by Binyamin Ze'ev Kahane" in English, Hebrew, and Russian). See also AR (Classified) 514, 515, 518.

Petitioners maintain that they are three different entities. In their view, "differences in origin, leadership, domicile, and philosophy" establish the groups are distinct. Pet. Br., at 23. As support, petitioners note that the Secretary initially separately designated Kahane Chai and Kach, and only now designated Kahane.org. But, as the Summary explained, "there is nothing inconsistent about the Secretary of State designating Kahane Chai and Kach separately in 1997 and

1999, but then consolidating them into one single designation in 2001 and 2003. Organizations evolve over time; separate groups with overlapping membership and similar goals may effectively merge and become one organization.” AR 663.

In any event, given the applicable standard of judicial review, the record, including the FBI Declaration, includes sufficient information for the Secretary to conclude that Kach and Kahane.org are aliases of Kahane Chai. “It may be true that the State Department relied very heavily on the conclusions of the counterterrorism experts of the FBI.” *National Council of Resistance of Iran*, 373 F.3d at 159. But, “under the narrow powers of judicial review Congress has accorded [the Court] under AEDPA, it is emphatically not [the Court’s] province to second-guess the Secretary’s judgment as to which affidavits to credit and upon whose conclusions to rely.” *Ibid.* The Court is to “judge only whether the ‘support’ marshaled for the Secretary’s designation was ‘substantial.’” *Ibid.*, citing 8 U.S.C. § 1189(b)(3)(D). Here, the FBI Declaration, as well as the other record material (including classified material) discussed above, provide sufficient record support for the Secretary’s conclusion that Kach and Kahane.org are aliases of Kahane Chai.

B. The Administrative Record, Including The Classified Material Submitted Under Seal, Contains Substantial Information That Kahane Chai Retains The Capability And Intent To Engage In Terrorist Activity And Engages In Terrorist Activity

1. A foreign organization that threatens the national security of the United States because it “retains the capability and intent to engage in terrorist activity or

terrorism” may be designated a Foreign Terrorist Organization. 8 U.S.C. § 1189(a)(1). The administrative record, including the classified material, supports the Summary’s conclusion that “Kahane Chai retains the capability and intent to engage in terrorist activity or terrorism.” AR 539.

The Summary noted that in August 2002, “Israeli police closed the Kach office in the Shmu’el Hanavi neighborhood of Jerusalem.” AR 539. “The ‘Closure and Attachment Order’ under the Israeli Prevention of Terrorism Act states that the Kach office serves as a base for the activities of a terrorist organization.” AR 539. Kach appealed the closure order, but the Israeli district court and then high court rejected the appeal. In so doing, the High Court judge “stated that Kach was continuing its activities despite having been declared a terror organization.” AR 539.

The Summary’s description of the Israeli closing of the Kach offices is supported in the administrative record by the agency summaries of press reports. The first report is a translation from an Israeli radio broadcast describing how “at this hour” the police are closing down the Kach offices. AR 481. In the second report, a lengthy Israeli newspaper profile of Kach is translated. AR 483-487B. The article, dated January 3, 2003, states: “It was, and still is, claimed that [Baruch] Marzel is at the head of the Kakh terror organization according to people in the State Attorney’s Office.” AR 486. The article describes what was found when the Kach offices were searched: “Among other things [the police] found two discs, one in Hebrew and one in English, aimed at bringing the movement’s

message to potential supporters and benefactors.” AR 486. The head of the three-judge High Court panel stated: “The seized material constituted incitement to racism * * *.” AR 486.

In responding to the administrative record, petitioners did not deny that the Israeli police closed Kahane Chai offices on the ground that it was a base for terrorism. Instead, petitioners pointed to a statement by a professor, repeated in the newspaper article, that Kach should not be outlawed because outlawing the group “tainted” Israeli democracy. AR 593, 612. This same professor, however, stated that Kach advocated a “racist and anti-democratic ideology.” AR 484. In any event, one professor’s opinion about the best way for the Israeli government to respond to a group promoting a racist and anti-democratic ideology does nothing to undermine the uncontroverted evidence that the Israeli government views Kahane Chai as a terrorist organization.

2. “Terrorist activity” includes the “threat, attempt, or conspiracy” to carry out “assassination[s].” 8 U.S.C. §1182(a)(3)(B)(iii)(IV)&(VI). The administrative record, including the classified material, provides sufficient support for the conclusion that Kahane Chai “has engaged in terrorist activity by threatening and conspiring to carry out assassinations.” AR 536.

The Summary concluded that “Kahane Chai has threatened to harm Shin Bet (Israeli Security) officials involved in investigating Kahane Chai members suspected in the school bombing cases” described further below. AR 536. A newspaper summary reports that “extreme right-wing activists identified with

Kach” have organized demonstrations against a Senior Shin Bet Officer, “abusive graffiti spelling out his full name – which is banned for publication – has been sprayed,” and “in some of the settlement’s households discussion groups have been convened for attacking the officer.” AR 467-468. A Kach spokesman promised to “step up” the demonstrations. AR 468. The Jerusalem Police reported receiving “dozens of threatening phone calls demanding that they drop the [school bombing] case.” AR 470.

In addition to the threats surrounding the school bombing investigation, the Summary notes press reports that in May 2003, Kahane Chai leaders met to “launch a campaign against Prime Minister Sharon in reaction to his acceptance of the ‘road map’ for an Israel-Palestine peace settlement.” AR 537. The campaign was to be “similar to the one waged against the late prime minister Yitzhaq Rabin.” AR 457. A summary of a newscast noted that the Shin Bet Director assessed that the threat to the life of Prime Minister Sharon “had grown” since the “road map” was accepted. AR 473. The assessment was based on “comments made by right-wing Jewish extremists and Palestinian terrorist organizations,” including “several dozen Kahanist extremists.” AR 473.

Petitioners claim that the reports do not specifically link Kahane Chai or Kach to these assassination threats. Pet. Br., at 17 - 19. As to the threats against the Shin Bet Director, that is wrong, as the press report specifically quotes a “Kach spokesman” as vowing to step up the pressure on the Director to drop the investigation. More important, however, there is no dispute that all these threats

were made by “Kahanist extremists.” AR 473. As Kahane Chai claims to represent Kahanist views, it is reasonable for the Summary to attribute actions by these “Kahanist[s]” to Kahane Chai.

Indeed, this Court hardly needs reminding that the assassination of Prime Minister Yitzhak Rabin in 1995 was carried out by a Jewish citizen of Israel associated with a violent terrorist group. “Citizens [of Israel] were shocked to discover that [Rabin’s] assassin was not a PLO supporter but a fellow Israeli Jew – Yigal Amir, a member of the violence-prone group Eyal (a.k.a. the Jewish Fighting Organization).” AR 401. As the independent Center for Defense Information states, Kahane Chai has an “amorphous membership” which “links” the group to a “number of smaller groups, including Eyal.” AR 401. The historical context provides yet further support for the Secretary to designate Kahane Chai as a Foreign Terrorist Organization.

The classified material also includes material relevant to Kahane Chai’s threats. See AR (Classified) 510-512, 662.

3. Under the Act, it is terrorist activity to “commit an act that the actor knows, or reasonably should know, affords material support” to “a terrorist organization.” 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc). Most relevant here are the prohibitions on soliciting an individual to join a Foreign Terrorist Organization (8 U.S.C. § 1182(a)(3)(B)(iv)(V)(bb)) and on soliciting funds for a Foreign Terrorist Organization (8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(bb)).

As we explained at the outset, the Secretary has long designated Kahane Chai and Kach as Foreign Terrorist Organizations. Indeed, the Foreign Terrorist Organization designation has applied to these groups since 1997. Under the express language of the statute, therefore, any effort to solicit membership or funds for Kahane Chai (a.k.a. Kach) constitutes engagement in terrorist activity. And where, as here, the solicitation efforts confirm that the organization remains enamored of violence, the engagement in terrorism activity is patent.

The Summary concluded that “Kahane Chai has solicited individuals for membership in a terrorist organization or to engage in a terrorist activity.” AR 538. The Summary describes Israeli press reports from July 2002, wherein the Israeli Attorney General, Elyaqim Rubinstein, ordered an investigation into the organizers of a Kach Movement summer camp. AR 538. “The camp program, for youths between the ages of 14-20, included a pilgrimage to the grave of Baruch Goldstein, the Kach member who opened fire in a mosque in Hebron in 1994 and killed 29 worshipers.” AR 538. “Advertisements for the camp offered a ‘mock trial of the Oslo criminals; * * * and Ahmad al-Tibi’s request for a last meal.” AR 538. The summary notes that “al-Tibi is an Arabic member of the Knesset” (AR 538); the Oslo accords, of course, were an effort to bring peace to the Middle East. The Summary of the Israeli investigation into the summer camp extolling the actions of Baruch Goldstein accurately describes the two translated press report summaries contained in the administrative record. AR 406; AR 408.

Petitioners spend a great deal of energy establishing that they were not directly involved in the Goldstein massacre. Pet. Br., at 9-10. But, as the Summary explained, “the administrative record does not attribute this act to Kach or Kahane Chai.” AR 660. Instead, the record focuses on Kahane Chai’s (a.k.a. Kach’s) “endorsement of Goldstein’s terrorism.” AR 660. “[P]etitioners do not contest the fact that Kahane Chai/Kach has consistently and repeatedly praised Goldstein’s terrorism, to the point of advertising a summer camp for children in 2002 that was to include a ‘pilgrimage’ to the site of Goldstein’s grave.” AR 660. Put simply, although petitioners are not criminally responsible for Goldstein’s actions, petitioners have nonetheless used his notorious and deadly actions to help recruit individuals to their group. As the Summary concluded: “Kahane Chai’s endorsement of Goldstein’s terrorism shows that the group believes in anti-Arab terrorism and terrorist activity, and is therefore fully consistent with other evidence in the record demonstrating that it has itself engaged in such conduct and possesses the capability and intent to engage in such conduct.” AR 660.⁸

The Summary also concluded that Kahane Chai “has engaged in terrorist activity by soliciting material support for a terrorist organization.” AR 537. The

⁸ Petitioners attempt to defend the summer camp advertisement by pointing to the “mock trial exercise” as a method of teaching the “democratic way of voicing discontent – through a trial, not violence.” Pet. Br., at 19-20. The advertised trial was a plainly a show trial, with no doubt as to the outcome. Indeed, one of the advertisements promised students they could discuss the Israeli Arab legislator’s “request for a last meal.” AR 408.

summary notes that “Kahane Chai has used its website <http://www.kahane.org>, “The Official Kahane Web Site,” to solicit donations and to conduct other fundraising activity (sales of T-shirts, stickers, books, etc.)” AR 538. Under the express language of the Act, any effort to solicit funds for a Foreign Terrorist Organization constitutes engagement in terrorist activity. Because Kahane Chai is a Foreign Terrorist Organization, its use of a web site to raise funds constitutes engagement in terrorist activity.

* * *

In view of the record evidence outlined above, there is no question that the Secretary’s designation of Kahane Chai passes this Court’s limited review. All that the Secretary must demonstrate is that “on the face of things, [he] had enough information before [him]” (*People’s Mojahedin Organization of Iran*) to conclude that Kahane Chai meets one of the statutory criteria for engaging in terrorist activity. The record material, including the classified material, supports the conclusions that Kahane Chai retains the capacity to engage in terrorism, has threatened assassinations, and affords material support to a terrorist organization.

C. The Secretary Need Not Rely On Evidence That Kahane Chai Has Used Explosives With Intent To Harm Individuals and Property

“Terrorist activity” includes, among other things, the “threat, attempt, or conspiracy” to “use” an “explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to

property.” 8 U.S.C. §1182(a)(3)(B)(iii)(V)&(VI). The Summary found that Kahane Chai has engaged in this sort of terrorist activity. AR 535. In particular, the Summary supported that conclusion by reviewing the administrative record and finding that in May 2002, Kach leader Noam Federman was arrested by Israeli police for his alleged involvement in the attempted placement of a car bomb on a street near an Arab girls school. AR 535. The Summary also noted that “[i]n the last two years, seven Palestinians have been killed and 19 wounded in shooting attacks in the Ramallah and Hebron areas believed to have been carried out by Jewish extremists.” AR 535. The Summary also noted that “several students from the Kach yeshiva, Hara’ayon Hayehudi, have reportedly been arrested over the last two years on suspicion of involvement in terrorist activity.” AR 536.

After considering material submitted by petitioners, the Analysis prepared for the Secretary did not rely on this evidence. The Analysis engaged in a discussion of the relevant classified information. AR (Classified) 660-661. See also AR (Classified) 478-479, 505, 513-515, 659. In any event, the Analysis stated that the record “does not conclusively establish that [] Kahane Chai participated in the attacks” on the girls’ school in East Jerusalem in April 2002. AR 660-661. And “the same holds true with regard to petitioners’ claims that they were not involved in the March 2002 bombing of a Palestinian boys’ school, in the planting of the three other bombs, or in the shooting deaths of Palestinians in the Ramallah and Hebron areas.” AR 661. But, as the Analysis stated, “the remaining

evidence in the administrative record is more than sufficient to warrant redesignation.” AR 661.

Accordingly, much of petitioners’ brief is simply besides the point. Petitioners emphasize that they “had no involvement with the April 2002 attempted bombing of a girls school and hospital in Jerusalem” (Pet. Br., 10-12); that they “had no involvement with the March 2002 detonation of a bomb at a boys school and planting of three other bombs” (Pet. Br., at 12-13); and that they “were not involved with shootings of Palestinians in the West Bank that left seven dead and nineteen injured” (Pet. Br., at 13-14). As just described, the Secretary does not rely on these events to support the Kahane Chai foreign terrorist designation. Yet, as demonstrated above, there is other record evidence sufficient to support the designation.

II. The Secretary Complied With *National Council of Resistance of Iran*

The Secretary’s actions prior to the October 2003 designation of Kahane Chai (a.k.a. Kach and many other aliases) complied with this Court’s decision in *National Council of Resistance of Iran*. Furthermore, any procedural miscue prior to the October 2003 designation was harmless.

1. In *National Council of Resistance of Iran*, 251 F.3d at 209, this Court set out the “constitutional baseline for fair process” (373 F.2.3d at 160) in “this sensitive matter of classified intelligence in the effort to combat foreign terrorism” (327 F.3d at 1243). For entities with a sufficient presence in the United States, “as

soon as the Secretary has reached a tentative determination that the designation is impending, the Secretary must provide notice of those unclassified items upon which he proposes to rely to the entity to be designated.” 251 F.3d at 209. Further, the Secretary must “afford to entities considered for imminent designation the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are Foreign Terrorist Organizations.” 251 F.3d at 209.

The Secretary’s actions prior to his October 2003 designation of Kahane Chai (a.k.a. Kach and Kahane.org) fully complied with *National Council of Resistance of Iran*. On September 3, 2003, the State Department Coordinator for Counter-Terrorism wrote to five individuals who “might represent” Kahane Chai (also known as Kach and other aliases) stating the Secretary’s intent to consider Kahane Chai and Kach (and other aliases) for redesignation as Foreign Terrorist Organizations. AR 548. The letter explained that this Court’s ruling in *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001), ordinarily entitled an entity with sufficient presence in the United States to notice that it was under consideration for designation and an opportunity to review and comment on the unclassified material supporting the designation. AR 548. The letter stated that a representative of Kahane Chai (or Kach or another alias) had ten days within receipt of the letter to request an unclassified version of the administrative record upon which the Secretary proposed to base the designations. AR 548. On October 2, 2003, believing that no timely response had been received

from a representative of Kahane Chai, the Secretary redesignated Kahane Chai, Kach and other aliases as Foreign Terrorist Organizations. AR 554-555. See 68 Fed. Reg. 56860 (2003).

Contrary to the view of petitioners, the Secretary reasonably believed that he had received no timely response from an “entity” that was proposed for designation. Petitioners (at 28) point to a September 16, 2003 letter from Mr. Abady. AR 569. Although that letter was timely, the letter was written on behalf of an individual – “I am counsel to Fern Sidman” – and nowhere suggests the attorney was a representative of the tentatively redesignated entities. AR 569. Under the express terms of the Antiterrorism Act, only an “organization” can challenge a designation. See 8 U.S.C. § 1189(a)(4)(B). Petitioners also point (at 28) to an October 1, 2003 letter from Mr. Klien. AR 571. In contrast to Mr. Abady’s letter, Mr. Klien’s letter is clearly written on behalf of an entity proposed for designation as a Foreign Terrorist Organization. AR 571 (“I am representing a United States citizen who is a representative of Kach.”). Mr. Klien’s October 1 letter, however, was too late in view of the statutorily required Congressional pre-notification period, which started to run on September 28, 2003.⁹

⁹ The 2001 Kahane Chai redesignation would have lapsed on October 5, 2003. See 8 U.S.C. § 1189 (a)(4)(A). In view of the required seven-day Congressional pre-notification period, the Secretary was required to inform Congress of the imminent redesignation by September 28, 2003.

In short, the Secretary's actions prior to the October 2003 designation complied with the procedures set out in *National Council of Resistance of Iran*. After reaching a "determination that the designation is impending," the Secretary offered to "provide notice of those unclassified items upon which he proposes to rely to the entity to be designated." 251 F.3d at 209. Since no entity timely asked for the administrative record before Congress was required to be notified, the Secretary acted without hearing from any entity.

2. Furthermore, any procedural miscue prior to the October 2003 designation is harmless in view of the record in this sensitive case.

In January 2004, the Coordinator for Counter-Terrorism wrote to Mr. Abady and Mr. Klein inviting Kahane Chai to submit materials relevant to the Foreign Terrorist Organization designation. AR 557-558. See AR 569-570. Kahane Chai, Kach, and Kahane.org submitted a response to the proposed redesignation (AR 604-620) and an additional response (AR 621-654). The State Department then prepared a Summary and Analysis of Materials Submitted by Counsel to Kahane Chai, Kach, and Kahane.org. AR 656-665. See Pet. Br., at 32 (describing process). On December 22, 2004, based on a de novo review of the administrative record, the Secretary decided to maintain the October 2003 redesignation of Kahane Chai (a.k.a. Kach and other aliases) as a Foreign Terrorist Organization. AR 667.

Plainly, the Secretary's actions supporting the December 2004 designation fully complied with *National Council of Resistance of Iran*. The Secretary

provided the unclassified items upon which he proposed to rely to the entities to be designated; afforded the entities considered for imminent designation the opportunity to present written responses; and articulated reasons for rejecting those response. That is precisely what the Court contemplated occurring in *National Council of Resistance of Iran*. Indeed, Kahane Chai does not suggest that the procedures supporting the December 2004 redesignation were improper.

Nonetheless, Kahane Chai argues (at 32) that the Secretary's failure to consider its written submission prior to the October 2003 designation was "prejudicial and harmful." Kahane Chai, however, did not suffer any prejudice from the Secretary's alleged procedural error because the organization's material was indeed considered by the Secretary in his de novo review. As the State Department's Analysis demonstrates, the written submissions, even if considered in October 2003, would not have made a difference to the Secretary's ultimate designation decision. See *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (district court's procedural error harmless where additional discovery would not have made any difference to district court's determination), *cert. denied*, 540 U.S. 1218 (2004). As in *Holy Land Foundation*, "all evidence from the government that is unclassified and otherwise discoverable is in the record before [the Court], as is the evidence [Kahane Chai] produced in an effort" to persuade the Secretary not to designate the organization. 333 F.3d at 166. That record evidence (including the classified information presented to the Court under seal) establishes that Kahane Chai engages in terrorist activity. Despite the

Secretary's alleged failure to follow proper procedures, Kahane Chai has had ample opportunity and incentive to come forward with evidence that it is not a terrorist organization. Thus, as in *Holy Land Foundation*, this Court can "review an adequate record and conclude that [even if the Secretary's] conclusion may have been based on improper procedure, there is no substantial question as to the material facts necessary to support the [Secretary's] judgment." 333 F.3d at 166.

In any event, this Court has previously made clear that any procedural error does not at all warrant revocation of an organization's designation as a Foreign Terrorist Organization, which is the only relief Kahane Chai seeks. See *National Council of Resistance of Iran*, 251 F.3d at 209 (requiring the Secretary to provide additional process while the designations remained in force).

III. Petitioners' Remaining Claims Lack Merit

Petitioners' brief raises several additional constitutional claims. Each lacks merit.

1. Petitioners' contention (at 38-40) that the constitution entitles them to see the classified information relied on by the Secretary of State is foreclosed by this Court's precedent. See, e.g., *National Council of Resistance*, 251 F.3d at 208-09 ("The notice must include the action sought, but need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute. This is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect"). Accord *id.* at 202 ("We acknowledge that in reviewing the whole record, we have

included the classified material. As we noted above and in *People's Mojahedin*, we will not and cannot disclose the contents of the record.”). Accord *People's Mojahedin*, 327 F.3d at 1242-43 (denying claim that due process required access to classified information or elimination of such material from the record).

2. Petitioners' argument that their First Amendment rights have been violated rests on the consequences of the Foreign Terrorist Organization designation. Petitioners argue that Kahane.org is a “portal of free speech ” and thus “should be fully protected as a medium of free speech.” Pet. Br., at 41-42. But, as this Court has already held, “[i]t is conduct and not communication that the statute controls.” 327 F.3d at 1244. As demonstrated above, Kahane.org raised money for a terrorist organization. “[T]here is no constitutional right to facilitate terrorism * * * [by] provid[ing] resources with which terrorists can buy weapons and explosives.” 327 F.3d at 1244-1245, quoting with approval *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001). See also *Holy Land Foundation*, 333 F.3d at 166 (“we hold as other courts have that there is no First Amendment nor any other constitutional right to support terrorists”).

3. Finally, petitioners' argument (at 41) that designation of Kahane.org amounts to religious discrimination is totally without foundation. Petitioners appear to make a selective prosecution type of argument, emphasizing that the October 2003 designation did not list web sites controlled by other Foreign Terrorist Organizations. As the designation list makes clear, petitioners have used

an exceptionally large number of aliases. See 68 Fed. Reg. at 56861 (listing 37 aliases for Kahane Chai). The Secretary reasonably sought to designate all these aliases, including the web sites, to assure that Kahane Chai's terrorist activities cease. Assuming, for the sake of argument, that the Constitution permits judicial review of executive enforcement discretion in the designation of Foreign Terrorist Organizations context, the facts here do not begin to overcome the strong presumption of "regularity" that accompanies government enforcement decisions. See generally *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("in the absence of clear evidence to the contrary, courts presume that [government prosecutors] have properly discharged their official duties"); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 458 (1999) (standard for proving selective prosecution is "particularly demanding").

Conclusion

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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Certificate of Compliance

As required by FRAP 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 10,847 words.

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Mark Davies

Certificate of Service

I hereby certify that on this 3rd day of May, 2006, I filed the foregoing Brief for the Respondents by causing the original and 15 copies of the brief to be delivered to the Clerk of the Court. I further certify that on this same day I served two copies of the foregoing brief by FedEx to:

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