UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPEN SOCIETY JUSTICE INITIATIVE; DIANE MARIE AMANN; MILENA STERIO; MARGARET DEGUZMAN; GABOR RONA,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States; UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, Secretary of State; UNITED STATES DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN, Secretary of the Treasury; UNITED STATES DEPARTMENT OF JUSTICE; WILLIAM P. BARR, United States Attorney General; OFFICE OF FOREIGN ASSETS CONTROL; ANDREA M. GACKI, Director of the Office of Foreign Assets Control,

Defendants.

Civil Action No. 1:20-cv-08121-KPF

REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. The Claims are Ripe

The speech described in the motion puts Plaintiffs at imminent risk of two distinct harms: enforcement of IEEPA's criminal and civil penalties for violating the Executive Order, and designation under the Order. Defendants do not dispute that the claims based on the threat of enforcement are ripe because there is a "credible threat" that Defendants will prosecute Plaintiffs. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). Defendants contend, however, that the designation-based claims are not ripe because Plaintiffs are not at risk of designation under the same Order that they are at risk of being prosecuted for violating. Opp. at 11-12. This is risible. Defendants provide no reason to conclude that the administration officials who would cause Plaintiffs to be prosecuted would not also designate them.

Plaintiffs' fear of designation is not based on speculation that they will be "treated equivalently to the ICC's prosecutor [Fatou Bensouda], who has taken a leading role in pressing for the Afghanistan investigation, and one of her senior team members [Phakiso Mochochoko]," both of whom have already been designated. Opp. at 13. Defendant Pompeo, when announcing their designations, warned: "[i]ndividuals and entities that continue to support Prosecutor Bensouda and Mr. Mochochoko *materially risk exposure to sanctions*." Jude Decl. Ex. D (emphasis added). He did not limit this threat of sanctions to "senior" ICC officials; nor did he confine it to those who press for the Afghanistan investigation. Defendant Pompeo made clear that *all* who "continue to support" Ms. Bensouda and Mr. Mochochoko, regardless of their support's objective, "materially risk exposure to sanctions." *Id*.

This case thus bears no resemblance to *Clapper*, where the plaintiffs had to "speculate" as to how the relevant government officials might "exercise their discretion in determining which communications to target" for surveillance. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013). There, the plaintiffs had to rely on an "attenuated chain of possibilities," including

whether "their contacts would be subject to" surveillance, whether "surveillance of those contacts' communications" would be authorized, and whether the "plaintiffs' own communications would [therefore] be intercepted." *Reddy v. Foster*, No. 14-cv-299-JL, 2016 U.S. Dist. LEXIS 44965, at *15-16 (D.N.H. Apr. 1, 2016) (citing *Clapper*, 568 U.S. at 410-13). Finding a credible threat of surveillance would have thus required too much "guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 413.

Guesswork is not required here. In Defendant Pompeo's own words, those who support Ms. Bensouda or Mr. Mochochoko "materially risk[]" designation. His admonition squarely encompasses Plaintiffs, who are at heightened risk because the speech at issue involves interacting with Ms. Bensouda and/or Mr. Mochochoko, or providing support for their benefit. *E.g.*, Amann Decl. ¶ 8 ("advising Ms. Bensouda … in her role as Special Adviser to the Prosecutor"); Sterio Decl. ¶ 8 (providing support to Ms. Bensouda and/or Mr. Mochochoko); *accord* DeGuzmann Decl. ¶ 9; Rona Decl. ¶ 7; Goldston Decl. ¶ 8. The designation-based claims are thus ripe. *Susan B. Anthony List*, 573 U.S. at 165 (threat of "administrative action" can "give rise to harm sufficient to justify pre-enforcement review"; *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013) (assessment of imminent injury is "somewhat relaxed" in "pre-enforcement First Amendment" challenge); *Huff v. Telecheck Servs.*, 923 F.3d 458, 463 (6th Cir. 2019) (standing may be established by "material risk of harm"); *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 34 (D.D.C. 2019) ("'threatened' agency action … must be taken just as seriously as already-completed injury").[1]

[1] It is telling that at no point do Defendants state they will *not* designate Plaintiffs. This strengthens the designation threat. *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 302 (1979) (claim justiciable where party was "not without some reason in fearing prosecution" because "the State ha[d] not disavowed any intention of invoking the criminal penalty

II. The First Amendment Claim is Likely to Succeed

Defendants argue that the restrictions on Plaintiffs' speech are not content-based. Opp. at 14. This argument is foreclosed by *Holder*, which ruled that a statute which prohibited "knowingly provid[ing] material support or resources to a foreign terrorist organization," and which defined material support to include "service[s]," "regulate[d] speech on the basis of its content." *Holder*, 561 U.S. at 12, 13, 27. That conclusion was required because, "as applied to plaintiffs, the conduct triggering coverage under the statute consist[ed] of communicating a message," and the regulation prohibited speech based on the message it conveyed. *Id*. at 27-28.

Both are true here. As applied to Plaintiffs, the conduct triggering the restrictions consists of communicating messages that materially support, materially assist, or serve designated persons. Executive Order, § 1(a)(i). Further, the restrictions prohibit speech based on its message because whether speech is covered depends on the message's content: speech that supports or assists Ms. Bensouda or Mr. Mochochoko subjects the speaker to designation and enforcement; speech that undermines them does not. In similar circumstances, the Ninth Circuit found to be content-based an order that prohibited "contribution of . . . services to or for the benefit of designated entities," as applied to First Amendment conduct like that at issue here, ruling there was "no difference" between that regulation and the *Holder* statute. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 995-97 (9th Cir. 2012).

Defendants are not helped by *Kadi v. Geithner*, 42 F. Supp. 3d 1 (D.D.C. 2012). The court applied intermediate scrutiny because the claim related to conduct that was *not* "pure-speech activities," namely non-politically-motivated "financial transfers" to designated global

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provision"); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (credible fear in part because "Government ha[d] not argued … that plaintiffs will not be prosecuted").

terrorists. *Id*. at 33-34. Here, in contrast, the claims concern speech alone. *Lone Star Sec. & Video, Inc. v. City of L.A* F.3d 1192 (9th Cir 2016) is also inapplicable. The law at issue, which prohibited billboard advertising displays, was content-neutral because it did not "single out a specific subject matter for differential treatment." *Id*. at 1200. In the present case, the Executive Order and Regulations target speech that assists or benefits Ms. Bensouda or Mr. Mochochoko.

Also unavailing is Defendants' argument, Opp. at 15, that the restrictions are not content-based because their purpose is not to "censor certain speech or a certain viewpoint." "Although a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 642 (1994)). *Hobbs v. County of Westchester*, 397 F.3d 133, 150 (2d Cir. 2005), which found to be content-neutral a law barring those convicted of sex offenses against minors from obtaining permits to perform in public if minors would be enticed, is thus inapposite. Likewise, *Stagg P.C. v. United States Dep't of State*, 2019 U.S. Dist. LEXIS 69930 (S.D.N.Y. Apr. 25, 2019) has no bearing here. In that case, the regulation was content-neutral because it "define[d] regulated speech according to the *source* of information." *Id*. at 19 (emphasis in original). The Executive Order and Regulations do not.[2]

Because the restrictions on Plaintiffs' speech are content-based, Defendants must "prove that [they further] a compelling interest" and are "narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. Even if the restrictions were content-neutral, Defendants would be required to prove they "advance[] important governmental interests unrelated to the suppression

[2] *Schickel v. Dilger* is inapt because it concerned a speaker-based gift ban; whether speaker-based restrictions are content-based is determined by asking whether "the legislature's speaker preference reflects a content preference." 925 F.3d 858, 876 (6th Cir. 2019) (quoting *Reed*, 576 U.S. at 157). Speaker-based restrictions are not at issue here.

of free speech" and do "not burden substantially more speech than necessary to further those interests." *Holder*, 561 U.S. at 26-27. The restrictions fail, regardless which test applies.

Laws are overinclusive if they prohibit speech that is not part of the problem they are meant to solve. *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 805 (2011). Defendants do not dispute that Plaintiffs are subject to restrictions which prohibit them from engaging in speech that is unrelated to the government's purported interest, namely shielding U.S. personnel and its allies from investigation and prosecution by the ICC. Opp. at 16. Such speech includes, *inter alia*, advice on protecting the rights of child victims and assistance for ICC prosecutions that the United States endorses. Defendants do not even try to argue that prohibiting this speech advances any government interest, much less a compelling one.

Defendants argue instead that the restrictions are tailored because depriving Ms. Bensouda and Mr. Mochochoko of Plaintiffs' speech could "create leverage" that might influence their prosecutorial decisions. Opp. at 17-18. Defendants present no evidence to substantiate the claim, despite having the burden to do so. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000). Further, even if restricting Plaintiffs' speech did create "leverage," this would only suggest that the restrictions are a means for furthering Defendants' goal, not that there is no "less restrictive alternative," *id*. at 813, or that the restrictions do not "burden substantially more speech than necessary," *Holder*, 561 U.S. at 27. As the Supreme Court has made clear, the government may not "sacrific[e] speech for efficiency," even where "silencing speech is the path of least resistance." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

Defendants fail to distinguish *Al Haramain*, which held that designating an entity for providing speech-based assistance to a designated organization would violate the First

Amendment outside the "carefully circumscribed" scenario of "wholly foreign organizations currently at war with a United States ally" and where there is "specific evidence concerning the continuing terrorist activities of those organizations and the ability of those organizations to misuse the support offered by the plaintiffs." 686 F.3d. at 1001. Instead, Defendants simply note that there was "little evidence that the pure-speech activities proposed" by the plaintiff would aid the designated organization's "sinister purposes." Opp. at 18 (quoting *Al Haramain*, 686 F.3d at 1001). But here, Defendants introduce *no* evidence at all. *Contrast Holder*, 561 U.S. at 33-34 (upholding statute based on State Department affidavit and congressional findings).

Equally flawed is the attempt to minimize the restrictions on Plaintiffs' speech by arguing that they "do not prevent Plaintiffs from providing assistance or other services to the ICC or the Office of the Prosecutor" for the reason that they only prohibit transactions with Ms. Bensouda and Mr. Mochochoko. Opp. at 18. This is false. The Executive Order prohibits transactions that *support* or *benefit* designated persons, not just those *with* them. Executive Order § 1(a)(i)(C) (allowing designation for providing "services to or in support of" designated persons); *id.* § 3(a) (prohibiting "contribution or . . . services by, to, or for the benefit of," designated persons). Providing services to the Office of the Prosecutor supports and benefits its leaders; Defendants themselves argue that such provision is barred by the prohibition on indirect services. Opp. at 21. Regardless, even a narrowed approach would not satisfy the First Amendment because the restrictions would still prohibit speaking directly to Ms. Bensouda or Mr. Mochochoko, and Defendants have not shown that all direct speech satisfies the tailoring requirements.

III. The Fifth Amendment Claim is Likely to Succeed

Nothing in the Opposition provides reason to doubt that key terms left undefined in the Executive Order are unconstitutionally vague. In regard to "foreign persons," the other "sources" to which Defendants point, Opp. at 20, provide no help. No case has defined the term.

Further, as Defendants concede, the definitions codified in regulations issued by OFAC for other sanctions regimes are mutually inconsistent. *Compare* 31 C.F.R. § 536.304 *with* 31 C.F.R. § 510.310. In any event, per OFAC's official guidance, those definitions cannot be used in other contexts, so that even if they were consistent their definitions would not control here. Mot. at 17.

Unable to say what "foreign persons" means, Defendants argue that the definition is irrelevant because Plaintiffs are subject to enforcement if they violate the Executive Order by "transacting or otherwise dealing with Ms. Bensouda" even if they are not "foreign persons." Opp. at 20. This, however, conflates two distinct harms: first, enforcement under IEEPA for violating the Executive Order, and second, designation under the Order. Only the latter applies to "foreign persons." Designation is also permitted based on different conduct than that which permits enforcement. *Compare* 50 U.S.C. § 1705(a) *with* Executive Order, § 1(a)(i). Moreover, the harms consequent to designation are different (and potentially more severe). *Al Haramain*, 660 F.3d at 1033 ("designation" can "indefinitely render[]" the designee "financially defunct").[3]

With respect to another term in the Executive Order, "services to or in support of," Defendants argue that the term refers to "indirect provision of services." Opp. at 21. But this contradicts their argument that Plaintiffs are "generally free to provide services to the ICC and others in the Office of the Prosecutor so long as they do not do so for the benefit of [Ms. Bensouda and Mr. Mochochoko]." *Id*. at 15. Defendants do not explain how Plaintiffs could provide services to the Office of the Prosecutor without indirectly benefitting Ms. Bensouda,

[3] Defendants are not helped by arguing, Opp. at 19-20, that Plaintiffs have not sought a license from OFAC. *See Harrell v. Fla. Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010) ("immaterial whether the party challenging the measure" has "applied for permission to engage in the challenged conduct").

given that she leads the Office. *Id.*[4] Further, it remains unclear what "services . . . in support of [] any activity" means, as Defendants have provided no definition. *Holder* is not instructive. The Court was interpreting a statute that only prohibited the provision of material support or resources "to" designated foreign terrorist organizations; the Executive Order, on the other hand, more broadly covers the provision of services "to or in support of" designated persons.[5]

Defendants' argument that still another term, "material support," is not vague is meritless. Defendants rely on *Kindhearts for Charitable Humanitarian Dev. Inc. v. Geithner*, to argue that statutory definitions of "material support" provide a "broad concept" of the term that is "sufficiently clear." 647 F. Supp. 2d 857, 896 (N.D. Ohio 2009). But this was a facial challenge that required showing the order was "vague in all its potential applications." *Id.* By contrast, Plaintiffs bring an as-applied challenge in regard to specific activities. Further, *Kindhearts* noted that statutes provide different definitions for "material support." *Id.* at 895. Defendants do not say which of those meanings, if any, applies here.

Defendants' argument that "material assistance" is not vague consists of nothing more than a conclusory statement that this term has a meaning "an ordinary person would understand." Opp. at 21-22. Defendants, however, fail to articulate what that meaning is. Nor do they describe how the term means something different than "material support," as it must in order to satisfy the rule against surplusage. *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019). Indeed, the argument that the term is "similar[]" to "material support" only

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[4] Defendants' argument also contradicts official OFAC guidance. *See* OFAC Frequently Asked Question 398 ("OFAC sanctions generally prohibit transactions involving, directly or indirectly, a blocked person").

[5] Moreover, as Plaintiffs previously pointed out, Mot. at 20 n.4, while *Holder* reasoned that services "to" a person refers to activities coordinated with that person, it left open "exactly how much direction or coordination is necessary for an activity to constitute a 'service.'" *Holder*, 561 U.S. at 24. It remains unclear whether Plaintiffs' speech would qualify as coordinated or independent activity, a point to which Defendants failed to respond.

accentuates the vagueness of both terms because the examples of "material . . . support" contained in the Regulations, *e.g.*, "weapons," suggest that "material" as used in "material support" refers to *items*, whereas a statutory definition suggests that "material" in "material assistance" refers to a *degree* of support. *See* 113 P.L. 278, 128 Stat. 3011 (defining "materially assisted" as "provision of assistance that is significant").

IV. The *Ultra Vires* Claim Is Likely to Succeed

Defendants are wrong that Plaintiffs may not challenge the *ultra vires* exercise of authority because IEEPA does not provide a private right of action. D.E. 51 at 33. "Equitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a statutory cause of action; instead, they seek a 'judge-made remedy' for injuries stemming from unauthorized government conduct." *Sierra Club v. Trump*, 963 F.3d 874, 890-91 (9th Cir. 2020) (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015)). *See also Dart v. United States*, 848 F.2d 217, 223 (D.C. Cir. 1988) ("When Congress limits its delegation of power, courts infer (unless the statute clearly directs otherwise) that Congress expects this limitation to be judicially enforced.").[6] Nothing in IEEPA forecloses this equitable remedy, and Defendants point to none. The limitations Congress imposed are thus enforceable. *Tiktok Inc. v. Trump*, Case No. 1:20-cv-2658 (CJN), 2020 U.S. Dist. LEXIS 177250, at *11, *13-*14 (D.D.C. Sept. 27, 2020) (enjoining President and Commerce Secretary from enforcing restrictions where the "prohibitions likely exceed the lawful bounds proscribed by [§ 1702(b)(3) of] IEEPA").[7]

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[6] *See also, e.g.*, *New York v. Trump*, No. 20-CV-5770 (RCW) (PWH) (JMF), 2020 U.S. Dist. LEXIS 165827, at *122 (S.D.N.Y. Sept. 10, 2020) ("When an executive acts *ultra vires*… courts are normally available to reestablish the limits on his authority.").

[7] Even if the Court were to find there is no equitable *ultra vires* cause of action, the Regulations, which were issued by OFAC, still should be found to violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(C), Compl. ¶¶ 133-134. *See Marland v. Trump*, No. 20-cv-4597, 2020 U.S. Dist. LEXIS 202572, at *19 (E.D. Pa. Oct. 20,

Nor are Defendants correct that the claim is unlikely to succeed on the merits. The Executive Order and Regulations restrict the export of information and informational materials even though 50 U.S.C. § 1702(b)(2) prohibits such restrictions. Defendants are not helped by the fact that the Executive Order must be "implemented consistent with applicable law." D.E. 51, at 30. Defendants' disregard for this statutory exception is made clear by its omission from the Regulations, in contrast to the same Regulations' inclusion of the personal communications exception (which is also codified in § 1702(b)). *Greene v. United States*, 79 F.3d 1348, 1355 (2d Cir. 1996) (inclusion of one but not others "impliedly excludes [those] others").

The fact that OFAC, in *other* sanctions regimes, issued regulations giving effect to § 1702(b)(2) but interpreted it in a way that Defendants contend removes Plaintiffs' speech from the exception's coverage, Opp. at 23-24, is irrelevant. OFAC has *not* issued such regulations for the Executive Order, and the regulations Defendants cite state that they may not be relied upon for other sanctions regimes. *E.g.*, 31 C.F.R. § 560.101. Regardless, those regulations would not have the effect that Defendants posit – excluding materials not fully created and in existence at the date of the transaction – because Plaintiffs' advice, memoranda, and *amicus* briefs are complete upon transmission. Nor, as Defendants claim, do those regulations interpret § 1702(b)(2) as carving out "bespoke" materials; at most, only "payment of advances" for such materials could be deemed to fall outside the exception. *E.g.* 31 C.F.R. § 560.210(c)(2). Section 1702(b)(2), accordingly, fully applies to the speech at issue here.

2020). Defendants' cases, Opp. at 22, are inapposite. *Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992), holds that the president is not an "agency" under the APA. *Mississippi v. Johnson*, 71 U.S. 475 (1866), concerns an effort to block the president from enforcing unconstitutional laws, not to stop the exceedance of statutory authority.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on November 23, 2020.

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