UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPEN SOCIETY JUSTICE INITIATIVE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	No. 20 Civ. 8121 (KPF)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Defendants Donald J. Trump, in his official capacity as the President of the United States; the U.S. Department of State; Michael R. Pompeo, in his official capacity as Secretary of State; the U.S. Department of the Treasury; Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; the U.S. Department of Justice; William P. Barr, in his official capacity as the Attorney General of the United States; the Office of Foreign Assets Control ("OFAC"); and Andrea M. Gacki, in her official capacity as the Director of OFAC (together, "Defendants" or the "Government"), by and through their attorney, Audrey Strauss, Acting United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to Plaintiffs' motion for a preliminary injunction, Dkt. No. 28.

PRELIMINARY STATEMENT

Executive Order 13,928, "Blocking Property of Certain Persons Associated with the International Criminal Court" (the "EO"), which was issued on June 11, 2020, declares a national emergency with respect to the recent efforts of the International Criminal Court ("ICC") to investigate and prosecute the personnel of the United States and its allies without their consent and provides authority to designate persons for sanctions in connection with those efforts. At present, the restrictions in this order apply narrowly, as only two people—the ICC's Prosecutor and a member of her senior leadership team—have been designated under this authority. As a result of these designations, Plaintiffs, a U.S.-based organization and four U.S.-based individuals, may not deal in the property or interests in property of the two designated individuals, including by providing goods, funds, or services to them or for their benefit or receiving the same from them. Plaintiffs filed this suit alleging that the EO is a content-based prohibition infringing on their First Amendment speech rights, contains several terms that are unconstitutionally vague, and is *ultra vires* because it regulates conduct that is covered by an exemption to the statutory authority under which the President issued this EO.

Plaintiffs' motion for a preliminary injunction—a "drastic remedy"—should be denied because Plaintiffs cannot show they have a substantial likelihood of prevailing on any of these claims. As an initial matter, the portion of each of Plaintiffs' claims that concerns the possibility that Plaintiffs themselves could be designated for sanctions under the EO (as opposed to running afoul of the EO's prohibition on dealing or transacting with already designated persons) is not ripe because Plaintiffs do not face a credible threat of designation. Each of Plaintiffs' claims also fails on its merits. Plaintiffs' as-applied First Amendment claim fails because the EO and its regulations are content-neutral restrictions that are narrowly tailored to a compelling governmental national security and foreign policy interest. None of the terms in the EO that Plaintiffs challenge are unconstitutionally vague as numerous courts have found that the same or similar terms provide fair notice of what conduct is prohibited. Finally, Plaintiffs have no private right of action to bring an "*ultra vires*" challenge to the EO, but such a claim would fail in any event because the EO and its regulations are fully consistent with the relevant statutory text.

BACKGROUND

A. The International Emergency Economic Powers Act

For nearly its entire history, the United States has utilized economic sanctions as a tool of foreign policy and national security. In much of the 20th century, U.S. sanctions programs were governed by the Trading With the Enemy Act ("TWEA"), enacted in 1917. *See* 40 Stat. 411 (codified as amended at 50 U.S.C. § 4301 *et seq.*). As amended in 1933, TWEA granted the President "broad authority" to "investigate, regulate . . . prevent or prohibit . . . transactions" in times of war or declared national emergencies. *See* 50 U.S.C. § 4305(b)(1)(B); *Dames & Moore v. Regan*, 453 U.S. 654, 672 (1981).

In 1977, Congress amended TWEA and enacted the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1707, to delineate "the President's authority to

regulate international economic transactions during wars or national emergencies." *See* S. Rep. No. 95-466 at 2, *reprinted in* 1977 U.S.C.C.A.N. 4540, 4541. IEEPA limited TWEA's application to periods of declared wars and to certain existing TWEA programs, with IEEPA available during other times of declared national emergency. *See Regan v. Wald*, 468 U.S. 222, 227-28 (1984). Under IEEPA, the President may declare a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." *See* 50 U.S.C. § 1701(a). Similar to TWEA, IEEPA authorized the President to:

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States . . . .

Id. § 1702(a)(1)(B). In addition, the National Emergencies Act ("NEA"), 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651), established procedures for regular congressional review over a President's national emergency declarations.

IEEPA includes several exemptions to the President's authority, including that the President may not "regulate or prohibit, directly or indirectly . . . the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds." 50 U.S.C. § 1702(b)(3). This exclusion, which Congress added to IEEPA in 1988 and amended in 1994, is part of what is commonly known as the "Berman Amendment." *United States v. Amirnazmi*, 645 F.3d 564, 584–86 (3d Cir. 2011).

Presidents have designated persons under sanctions programs based on IEEPA in response to a variety of declared national emergencies. *See, e.g.*, Exec. Order No. 13,382, 70 Fed. Reg. 38567 (June 28, 2005) (blocking the property and interests in property of persons who, among other things, are determined to have engaged in transactions that have materially contributed to the proliferation of weapons of mass destruction). In general, persons who are designated under an IEEPA-based sanctions program are added to the List of Specially Designated Nationals and Blocked Persons (the "SDN List"), which is administered by OFAC.[1] *See, e.g.*, 31 C.F.R. § 520.201, Note 1. Persons on the SDN List have their assets subject to U.S. jurisdiction "blocked" (*i.e.*, frozen) and U.S. individuals and entities are generally prohibited from dealing in them. *See* 50 U.S.C. § 1705(b) (civil penalties), *id.* § 1705(c) (criminal penalties).[2]

[1] *See* OFAC, Specially Designated Nationals and Blocked Persons List, available at https://www.treasury.gov/sdn (last visited October 18, 2020).

[2] When determining whether to issue a civil penalty, OFAC follows a set process outlined in the agency's regulations. *See generally* 31 C.F.R. part 501, App. A, Economic Sanctions Enforcement Guidelines. OFAC begins by reviewing the "facts and circumstances surrounding an apparent violation," then applies a set of General Factors to determine whether to initiate a civil penalty proceeding and, where applicable, to determine the appropriate amount of a civil monetary penalty. *Id.* § 501, App. A(V). The General Factors OFAC considers include whether any apparent violation was willful or reckless, the subject person or entity's awareness of the conduct, involvement of senior management in the conduct, harm to the sanctions program objectives, and individual factors such as the commercial sophistication and size of the subject person or entity. *Id.* § 501, App. A(III). Depending on the facts and circumstances of particular cases, OFAC may determine after investigation, among other outcomes, that no response is warranted (because, for example, the conduct does not rise to a level warranting a response); that additional information is needed; that a cautionary letter should be issued; or that a violation occurred. *Id.* § 501, App. A(II).

B. Executive Order No. 13,928

On June 11, 2020, President Trump issued Executive Order No. 13,928, in which he found that "any attempt by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States, or of personnel of countries that are United States allies and who are not parties to the Rome Statute or have not otherwise consented to ICC jurisdiction, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States" and declares a national emergency with respect to that threat, invoking the authority of IEEPA. *See* Exec. Order No. 13,928, Preamble. The preamble of the EO explains that the emergency stems from the ICC's "illegitimate assertions of jurisdiction over personnel of the United States and certain of its allies, including the ICC Prosecutor's investigation into actions allegedly committed by United States military, intelligence, and other personnel in or relating to Afghanistan." *Id.*

The EO is part of a long string of actions taken by the United States related to its concern about the ICC's threat to the United States' sovereignty and national interests. The United States has never ratified the Rome Statute (the treaty establishing the ICC) and thus has never undertaken any obligations related to the ICC, nor has it agreed to subject its citizens to the ICC's jurisdiction. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 n.16 (2d Cir. 2010) (describing U.S. decision to "un-sign" the Rome Statute). In 2002, the same year the ICC was established, Congress passed the American Service-Members' Protection Act ("ASPA"), Pub. L. No. 107-206 (codified at 22 U.S.C. § 7421 *et seq.*), which prohibits several forms of cooperation between the United States and the ICC.

Concerns about the risks to U.S. persons posed by the ICC became more pronounced recently after the ICC Prosecutor requested authority to investigate alleged war crimes, including by U.S. personnel, committed during the war in Afghanistan. Declaration of Jennifer Jude ("Jude

Decl.") Ex. A. They became even more pronounced when, on March 5, 2020, the ICC's Appeals Chamber authorized that investigation. *Id.* Ex. B. On the same day, Secretary of State Pompeo proclaimed in a press statement that, as the "United States is not a party to the ICC, . . . we will take all necessary measures to protect our citizens from this renegade, so-called court." *Id.* Although the EO is a direct response to the ICC Prosecutor's continued pursuit of an investigation into the conflict in Afghanistan that covers U.S. personnel, the Government has enumerated several other serious concerns about the ICC, which were referenced by Secretary Pompeo when he announced the EO on June 11, 2020, including that the ICC is threatening U.S. ally Israel with a separate investigation despite the fact that Israel is also not party to the Rome Statute. *Id.* Ex. C at 3-4.

Section 1 of the EO authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate persons who meet certain criteria for sanctions. Exec. Order 13,928 § 1. Specifically, under Section 1, the Secretary may designate foreign persons determined to have "directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States" or "any personnel of a country that is an ally of the United States without the consent of that country's government." *Id.* § 1(a)(i)(A), (B). That section of the EO also authorizes the designation of foreign persons determined to have "materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in subsection (a)(i)(A) or (a)(i)(B)" or any person designated under the EO.[3] *Id.* § 1(a)(i)(C).

[3] The EO also authorizes the designation of foreign persons who are determined to be "owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order." Exec. Order No. 13,928 § 1(a)(1)(D).

Designated persons have "[a]ll property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, . . . blocked and [such property interests] may not be transferred, paid, exported, withdrawn, or otherwise dealt in." *Id.* § 1(a). Section 3 of the EO specifies that this prohibition includes the making or receipt "of any contribution or provision of funds, goods, or services by, to, or for the benefit of any" or from any person designated pursuant to the EO. *Id.* § 3(a), (b); *see also* 31 C.F.R. §§ 520.306; 520.310. Accordingly, absent an applicable exception or authorization, U.S. persons are prohibited from providing funds, goods, or services to, or for the benefit of, a designated person.

On September 2, 2020, Secretary Pompeo announced the designation of two persons pursuant to the EO: ICC Prosecutor Fatou Bensouda "for having directly engaged in an effort to investigate U.S. personnel" and the ICC's Head of Jurisdiction, Complementarity and Cooperation Division, Phakiso Mochochoko "for having materially assisted Prosecutor Bensouda." Jude Decl. Ex. D. To date, no other person has been designated under Section 1 of the EO. *See supra* note 1.

C. The Regulations

The EO authorizes the Secretary of the Treasury to "employ all powers granted to [the President] by IEEPA," to promulgate rules and regulations to carry out the purposes of the EO, and to re-delegate such functions within the Department of the Treasury. *See* Exec. Order No. 13,928 § 9. On October 1, 2020, OFAC promulgated the "International Criminal Court-Related Sanctions Regulations" (the "Regulations"), codified at 31 C.F.R. part 520. 85 Fed. Reg. 61,816 (Oct. 1, 2020).[4] The preamble to the Regulations states that they are "being published in

[4] OFAC has also promulgated recordkeeping and procedural regulations applicable to all the United States' sanctions programs. *See* 31 C.F.R. part 500; *see also Regan*, 468 U.S. at 226 n.2. These regulations permit persons,

abbreviated form at this time for the purpose of providing immediate guidance to the public" and that "OFAC intends to supplement this part 520 with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance, general licenses, and statements of licensing policy." *Id.* The Regulations provide that "[a]ll transactions prohibited pursuant to [the EO], or any further Executive orders issued pursuant to the national emergency declared in E.O. 13928, are prohibited pursuant to this part." 31 C.F.R. § 520.201.

D. Plaintiffs' Lawsuit

In this case, Plaintiffs, a U.S.-based organization and four U.S.-based law professors who have interacted with the ICC in the past, seek a declaration that the EO and Regulations are unconstitutional and *ultra vires* under IEEPA and seek an order enjoining the Government from designating Plaintiffs under the EO and from enforcing IEEPA's prohibitions against them for engaging in certain conduct. Complaint ("Compl."), Dkt. No. 1 ¶ 4 & Prayer for Relief.

According to Plaintiffs' motion papers, before the EO was issued, they "provided education, training, advice, and other forms of assistance to the [ICC's] Office of the Prosecutor, including to Ms. Bensouda and Mr. Mochochoko." Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Dkt. 28-1 ("Mot.") at 3. Specifically, Plaintiff Open Society Justice Initiative ("OSJI"), a U.S.-based public interest law center, met with the ICC's Office of the Prosecutor (and Ms. Bensouda) multiple times a year and provided assistance on information technology, communications strategies, and performance improvement. *See* Declaration of James A. Goldston, Dkt. 28-2 ¶¶ 3-6. According to OSJI, since the EO was issued, the organization has stopped meeting with Ms. Bensouda, Mr. Mochochoko, and those who work for them, has "limited its participation in an ongoing ICC review process

including a designated or blocked person, to seek a license from OFAC for authorization to engage in otherwise prohibited activities. *See* 31 C.F.R. § 501.801.

with regard to certain activities that pertain specifically to the Office of the Prosecutor," and has refrained from conducting trainings on ICC-related matters in a number of countries. *Id.* ¶ 8. According to their respective declarations, each of the professors has discontinued, abandoned, or reconsidered certain ICC-related activities on account of the EO: Professor Amann has stopped advising Ms. Bensouda and her Office, Declaration of Diane Marie Amann, Dkt. 28-3 ¶ 8; Professor Sterio has abandoned plans to supervise student research and has decided not to submit further *amicus curiae* briefs supportive of the Office of the Prosecutor, Declaration of Milena Sterio, Dkt. 28-4 ¶ 8; Professor deGuzman has ended her participation in drafting an *amicus curiae* brief that supports the positions adopted by the Office of the Prosecutor and has discontinued plans to present her recent book to that Office's staff, Declaration of Margaret deGuzman, Dkt. 28-5 ¶ 9; and Professor Rona has decided not to submit further *amicus curiae* briefs to the ICC. Declaration of Gabor Rona, Dkt. 28-6 ¶ 7. On August 24, 2020, Plaintiff OSJI submitted a request for interpretive guidance with respect to several parts of the EO, which is currently pending. *See* Compl. ¶¶ 111-15 & Exs. A, B. To date, none of Plaintiffs has submitted a request for a license from OFAC. Jude Decl. ¶ 6.

In their complaint, Plaintiffs bring four claims. In Count One, Plaintiffs allege that the EO and Regulations violate the First Amendment's protection of the freedom of speech. Compl. ¶ 123. In Count Two, Plaintiffs allege that the EO and Regulations violate the Due Process Clause of the Fifth Amendment because four terms used in the EO are vague and thus provide Plaintiffs with insufficient notice of what conduct the EO prohibits. *Id.* ¶¶ 125-27. In Count Three, Plaintiffs allege that the EO and Regulations are *ultra vires* because they regulate or prohibit acts that are expressly excluded from the scope of the President's authority by the Berman Amendment. *Id.* ¶¶ 129-32. Finally, in Count Four, Plaintiffs allege that because the EO

and Regulations are unconstitutional as applied to Plaintiffs and *ultra vires*, they also violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). Compl. ¶¶ 133-34.

On October 8, 2020, Plaintiffs filed the instant motion seeking a preliminary injunction. Dkt. No. 28.

ARGUMENT

I. Legal Standard

A preliminary injunction, is an "an extraordinary and drastic remedy," which "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal quotation marks omitted).

Ordinarily, a party seeking a preliminary injunction must demonstrate:

> (1) a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor; (2) a likelihood of irreparable injury in the absence of an injunction; (3) that the balance of hardships tips in the plaintiff's favor; and (4) that the public interest would not be disserved by the issuance of an injunction.

Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887, 895 (2d Cir. 2015) (internal quotation marks and ellipsis omitted). Here, however, Plaintiffs' "burden is . . . increased because the preliminary injunction [they] seek is against the government. . . . [W]here a preliminary injunction is sought against the enforcement of governmental rules, the movant may not invoke the 'fair ground for litigation standard' but must show 'likelihood of success.'" *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 763 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001) (internal citation omitted). Under this "more rigorous" standard, "plaintiffs must establish a clear or substantial likelihood of success on the merits." *Sussman v. Crawford*, 488 F.3d 136, 140 (2d Cir. 2007) (per curiam) (internal quotation marks omitted).

The movant bears the burden of demonstrating by "a clear showing" that the remedy is necessary and that the prerequisites for issuance of the relief are satisfied. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). "That is because the preliminary injunction is one of the most drastic tools in the arsenal of judicial remedies." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (internal quotation marks omitted).

II. Plaintiffs Cannot Show a Likelihood of Success on the Merits of Any of Their Claims

None of Plaintiffs' claims gives rise to the required "clear or substantial likelihood of success on the merits," and thus Plaintiffs cannot make the required showing that they are entitled to injunctive relief. *Sussman*, 488 F.3d at 139-40. Plaintiffs' request for a preliminary injunction should be denied on this basis alone.

A. Plaintiffs' Claims Regarding Potential Designation Are Not Ripe

As a threshold matter, Plaintiffs are unlikely to succeed on the merits of certain parts of their claims because they are not ripe. Ripeness is a justiciability requirement through which courts seek to avoid the premature litigation of disputes. *See Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 579-81 (1985). The ripeness doctrine is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 97 (1977).

In many cases, including this one, the ripeness inquiry is the same as the analysis of whether the plaintiff has suffered an injury in fact for the purpose of establishing standing. *See*

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014). As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

To establish an injury in fact, a plaintiff must show that she suffered an injury that is "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff cannot depend on future injury for standing purposes if that injury will only arise "at some indefinite future time," *see Lujan*, 504 U.S. at 564 n.2, it must be "certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). In a pre-enforcement challenge, imminent injury can be established by a plausible allegation of "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, [for which] there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 159.

Here, a part of each of Plaintiffs' claims challenges the portions of the EO that specify who the Secretary of State, in consultation with the Secretary of the Treasury and Attorney General, may designate.[5] In Count One, Plaintiffs allege that the EO and Regulations violate their First Amendment rights "by subjecting Plaintiffs to the prospect of . . . *designation*." Compl. ¶ 123. In Count Two, Plaintiffs allege that four terms that appear only in the EO's designation criteria are vague and "provide no notice to Plaintiffs as to what acts are prohibited." *Id.* ¶¶ 125-26. And while Count Three, Plaintiffs' "*ultra vires*" claim, does not specify whether

[5] The Government distinguishes these designation-related challenges from Plaintiffs' challenges to the potential application of IEEPA's penalties to them for transacting with Ms. Bensouda and Mr. Mochochoko. *See* 50 U.S.C. § 1705.

the "regulation or prohibition" that Plaintiffs challenge relates to the potential for designation, for the purpose of this argument, the Government presumes that it does.[6] *See id.* ¶¶ 129-32.

Plaintiffs cannot show they face an imminent threat of "enforcement" of the designation criteria in the EO. *See Susan B. Anthony List*, 573 U.S. at 159. Plaintiffs' alleged concerns about possible designation—which requires a specific determination by the Secretary of State in consultation with the Secretary of the Treasury and the Attorney General, and which is discretionary even when a foreign person clearly meets the specified criteria—are highly speculative. Plaintiffs have presented no factual basis to believe that if they, a U.S.-based organization and four U.S.-based law professors, were to engage in the ICC-related activities described in the complaint, they are likely to be designated and treated equivalently to the ICC's Prosecutor, who has taken a leading role in pressing for the Afghanistan investigation, and one of her senior team members at the ICC. *See* Jude Decl. Ex. D. Indeed, given discretionary nature of designation decision-making, Plaintiffs' fear that they will be designated is more akin to concern that a future law might be enacted than a credible threat that an existing law will be enforced against them. *See Clapper*, 568 U.S. at 412 ("Simply put, respondents can only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target."). *Cf. Wolfson v. Brammer*, 616 F.3d 1045, 1062-63 (9th Cir. 2010) (plaintiff's fear must be "plausible and reasonable" and "imminent," not merely that a law "might [later] be construed in a particular manner"). Because Plaintiffs do not face a credible threat of designation, the designation-related portions of their claims are not ripe.

[6] Count Four, Plaintiffs' APA claim (which Plaintiffs do not mention in their motion papers), shares the same deficiency as it is derivative of Plaintiffs' other three claims. *See* Compl. ¶ 134.

B. Plaintiffs Are Not Likely to Succeed on Their First Amendment Claim

1. Strict Scrutiny Does Not Apply Because the EO and Regulations Are Content Neutral

A speech restriction is content-based if it "on its face draws distinctions based on the message a speaker conveys . . . , cannot be justified without reference to the content of the regulated speech, or [was] adopted by the government because of disagreement with the message the speech conveys." *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163-64 (2015) (internal quotation mark). None of these circumstances is present here.

Plaintiffs argue that the EO and Regulations are content-based restrictions "because whether Plaintiffs may speak 'depends on what they say.'" Mot. at 11 (quoting *Holder v. Humanitarian Law Project,* 561 U.S. 1, 27 (2010)). That is not the case. The EO prohibits Plaintiffs from dealing in the property or interests in property of Ms. Bensouda or Mr. Mochochoko, including by providing "funds, goods, or services" to them or for their benefit. Exec. Order 13,928 §§ 1(a), 3(a); *see* 31 C.F.R. § 520.310. On their face, these restrictions do not implicate speech, and are content-neutral as they draw no distinction based on the message or content of the funds, goods, or services provided. *See Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 149 (2d Cir. 2005) ("Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'"); *Stagg P.C. v. U.S. Dep't of State*, 15 Civ. 8468 (KPF), 2019 WL 1863418, at *8 (S.D.N.Y. Apr. 25, 2019) (regulations defining regulated speech based on the source and destination of information were not content-based).

Plaintiffs argue that "[a]ssuming Plaintiffs are 'foreign person[s]' . . . , under § 1(a)(i)(C) of the EO they are thus forbidden from saying things to Ms. Bensouda or Mr. Mochochoko that materially assist, materially support, or serve those designated persons." Mot. at 11. Thus,

Plaintiffs believe they are "prohibited from submitting *amicus curiae* briefs to the ICC that support positions advanced by Ms. Bensouda and/or Mr. Mochochoko" but not briefs that oppose such positions. *Id.* at 12. But, as discussed above, Plaintiffs are not "forbidden" from engaging in the conduct described in Section 1(a)(i)(A) through (D) of the EO, which comprises the criteria establishing the basis for potential designation by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General. And Defendants' position is that, absent facts that do not appear to apply here, such as that a brief was drafted at the specific request of and in coordination with Ms. Bensouda and/or Mr. Mochochoko, the submission of an *amicus curiae* brief to the ICC is not prohibited by the EO and Regulations regardless of the brief's content. *See Lone Star Security & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198-99 (9th Cir. 2016) (holding laws banning parking of vehicles carrying signs "for the primary purpose of advertising" are content-neutral).

Nor was the EO or Regulations adopted by the Government because of a disagreement with a certain message, and both are justified without any reference to the content of incidentally regulated speech. *See Reed*, 576 U.S. at 163-64. As described further below, the purpose of the EO and Regulations is to protect the personnel of the United States and its allies from ICC investigations and prosecutions by deterring certain persons who are assisting the ICC in these efforts. This does not constitute a broad-based effort to censor certain speech or a certain viewpoint. In fact, Plaintiffs are free to speak openly, or publish widely, in opposition to this foreign policy and are even 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 the two designated persons. *See Schickel v. Dilger*, 925 F.3d 858, 876 (6th Cir. 2019) ("Kentucky's gift ban provision, however, serves an anticorruption purpose unrelated to the content of expression and is justified without any reference to the content of the gifts regulated."); *CompassCare v. Cuomo*, --- F. Supp. 3d ---,

2020 WL 3035648, at *22 (N.D.N.Y. June 5, 2020) (regulation is content-neutral where it "has a primary purpose of regulating conduct, not speech" and it "does nothing to prevent Plaintiffs from continuing to speak against abortion, birth control, contraception, or certain types of marriages"); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 34 (D.D.C. 2012) (applying intermediate scrutiny and noting that "the designation of Kadi as a SDGT and the blocking of his assets merely restricts his ability to make financial transfers to other SDGTs, not his ability to express his views generally.")

2. The EO and Regulations Satisfy Both Intermediate Scrutiny and Strict Scrutiny

Because the EO and Regulations are content-neutral, intermediate scrutiny applies. A regulation survives intermediate scrutiny so long as it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Humanitarian Law Project*, 561 U.S. at 27 (citation omitted). However, even if the Court were to find that the more demanding strict scrutiny standard applies instead, the EO and Regulations also satisfy that standard. Under strict scrutiny, a regulation survives if it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171.

The EO and Regulations serve a governmental interest that is both "important" and "compelling"—protecting the personnel of the United States and its allies from investigation, arrest, detention, and prosecution by the ICC without the consent of the United States or its allies. Jude Decl. Exs. C, D. These are "sensitive and weighty interests of national security and foreign affairs" that constitute critically important governmental interests for purposes of a First Amendment analysis. *Humanitarian Law Project*, 561 U.S. at 33-34; *see also Clancy v. OFAC*, No. 05-C-580, 2007 WL 1051767, at *6 (E.D. Wis. Mar. 31, 2007) (noting that IEEPA sanctions

"relate[] to national security: the most compelling governmental interest") (citing *Haig v. Agee*, 453 U.S. 280, 307 (1981)); *see also OKKO Bus. PE v. Lew*, 133 F. Supp. 3d 17, 28 (D.D.C. 2015) (whether Government action was an "effective strategy" in fulfilling certain "foreign policy objectives . . . is not a question for this Court").[7] Notably, in their motion papers, Plaintiffs offer no basis to doubt the importance of the national security and foreign policy concerns discussed in the EO. *See* Mot. at 13. Nor could they. *Zarmach Oil Servs., Inc. v. U.S. Dep't of the Treasury*, 750 F. Supp. 2d 150, 157-58 (D.D.C. 2010) (declining "to adjudicate such matters of strategy and tactics relating to the conduct of foreign policy, which 'are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (*quoting* Regan, 468 U.S. at 242)).

The EO and Regulations also satisfy the applicable tailoring standards under either level of scrutiny. Plaintiffs argue that the EO and Regulations are overbroad because they prohibit providing assistance of any kind to Ms. Bensouda and Mr. Mochochoko while the EO "states that it is intended to address concerns regarding the investigation or prosecution by the ICC of United States personnel." Mot. at 13-14. But Plaintiffs misunderstand how the U.S. sanctions authorities are designed to work. Sanctions authorities such as those in the EO allow the President to address a threat by, among other things, discouraging certain types of conduct and preventing transactions with specified persons, or in areas that may create leverage on those responsible for the activities of concern. *See Zarmach*, 750 F. Supp. 2d at 157-58. By sanctioning Ms. Bensouda and Mr. Mochochoko, the Government is seeking to deter them from continuing

[7] Even outside of the national security context, courts "generally defer" to the Government in "determining whether the government's ends are advanced by a regulation." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006). Applying such deference, the Supreme Court has upheld speech restrictions when they are justified in numerous ways, such as with "studies and anecdotes[,]" and through "history, consensus, and 'simple common sense.'" *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quotation omitted); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508-09 (1981) (noting that even in the face of a "meager record," the Court "hesitate[d] to disagree with the accumulated, common-sense judgments of local lawmakers").

to attempt to exercise jurisdiction over the personnel of the United States and its allies without consent.[8] Thus, barring Plaintiffs from transacting with Ms. Bensouda and Mr. Mochochoko, including by providing them with funds, goods, or services of any kind—including outside of their work at the ICC—is narrowly tailored to the government interest served by the EO. *See Teague v. Reg'l Comm'r of Customs, Region II*, 404 F.2d 441, 445 (2d Cir. 1968) ("The restriction of first amendment freedoms is only incidental to the proper general purpose of the [TWEA] regulations: restricting the dollar flow to hostile nations.")

In *Al Haramain Islamic Foundation v. Department of the Treasury*, which Plaintiffs cite, Mot. at 14, the court held that certain content-based prohibitions on speech were not narrowly tailored to the government's interest in fighting terrorism because there was "little evidence that the pure-speech activities proposed by [the plaintiff] on behalf of the domestic branch will aid the larger international organization's sinister purposes." 686 F.3d 965, 1001 (9th Cir. 2012). That rationale does not apply here where the only prohibition is on transacting with or for the benefit of, or dealing in the property or property interests of the two designated individuals. Indeed, Plaintiffs' overbreadth argument appears to assume that the EO is broader than it actually is. The prohibitions in the EO and Regulations do not prevent Plaintiffs from providing assistance or other services to the ICC or the Office of the Prosecutor (which have not been designated) and Plaintiffs generally can assist on ICC investigations so long as they do not transact with the two designated individuals, including by providing funds, goods, or services to them or for their benefit, or otherwise deal in their property or property interests.

[8] Plaintiffs argue that the EO and Regulations are underinclusive because they "do nothing to regulate speech that aids or supports the investigation or prosecution of [war crimes allegedly committed by U.S. personnel] by the competent domestic authorities in [other] countries without the consent of the United States." Mot. at 15. Plaintiffs provide no support for including this distinct concern within the scope of the governmental interest served by the EO and Regulations.

C. Plaintiffs Are Not Likely to Succeed on Their Vagueness Claim

Plaintiffs contend that the EO is unconstitutionally vague under the Fifth Amendment because it contains four terms—"foreign person," "services to or in support of," "material . . . support," and "materially assisted"—that "fail to provide Plaintiffs with adequate notice as to whom is subject to the [EO] and what activities the [EO] proscribes." Mot. at 15. Each of these terms is regularly used in executive orders issued pursuant to IEEPA.[9] *See, e.g.*, Exec. Order 13,902, Imposing Sanctions With Respect to Additional Sectors of Iran, 85 Fed. Reg. 2003 § 1(a)(iii) (Jan. 10, 2020) ("materially assisted," "material . . . support," "services to or in support of"); Exec. Order 13,886, Modernizing Sanctions To Combat Terrorism, 84 Fed. Reg. 48041 (Sept. 9, 2019) (amending Executive Order 13,224 § 1(a)(ii), (iii)(C), "foreign persons," "materially assisted," "material . . . support," "services to or in support of"). And, as stated above, all of these terms appear in the parts of the EO that establish criteria for who may be designated, not proscriptions on any activities of non-designated persons such as Plaintiffs.[10] Plaintiffs need not guess at the meaning of these terms in the EO, because they do not directly regulate their conduct. *See* Exec. Order 13,928 § 1(a)(i). All of Plaintiffs' cited cases regarding vague criminal and immigration statutes are inapposite because they involved laws and regulations that were already enforceable, not Executive Orders directing further discretionary administrative action against foreign persons before taking effect. *See* Mot. at 17-22 (citing cases). And, to the extent that Plaintiffs' challenge relates to the potential application of IEEPA's

[9] This framework is not unique. Executive orders issued pursuant to IEEPA commonly identify broad subject matter of concern while delegating the details of implementation and enforcement to one or more administrative agencies. *See, e.g.*, Exec. Order 13,902 § 1(a).

[10] The term "services" also appears in Section 3 of the EO. *See* Exec. Order 13,928 § 3(a), (b), and, as discussed below, this term has a commonly understood meaning.

penalties to them for transacting with Ms. Bensouda or Mr. Mochochoko, Plaintiffs can (as noted above) seek a license from OFAC authorizing specific conduct but have not done so.

In any event, the terms highlighted by Plaintiffs as vague each "provide a person of ordinary intelligence fair notice of what is prohibited" and the EO is not "so standardless that it authorizes or encourages discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304; *see VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186-87, 191 (2d Cir. 2010). The mere fact that these terms have not been defined does not make them unconstitutionally vague as courts may look to other sources, including other statutes and case law to determine an undefined term's meaning. *See Jordan v. De George*, 341 U.S. 223, 229-30 (1951) (upholding phrase "crime of moral turpitude" against vagueness challenge by examining meaning of term in cases and other statutes). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Williams*, 553 U.S. at 304.

Plaintiffs argue that "foreign person," which is not defined in the EO or Regulations, is unconstitutionally vague because it is unclear whether it applies to them as dual citizens and a U.S.-based organization that conducts activities abroad. Mot. at 17-19. As an initial matter, the fact that OFAC has interpreted this term differently for purposes of other sanctions programs does not on its own indicate that the term is unconstitutionally vague. *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 895 (N.D. Ohio 2009). But the prohibitions that apply to Plaintiffs, namely transacting or otherwise dealing with Ms. Bensouda or Mr. Mochohoko, do not depend on whether Plaintiffs are foreign persons; these prohibitions

apply to United States persons, *see* Exec. Order 13,928 §§ 1(a), 3, which Plaintiffs unquestionably are, *see* Compl. ¶¶ 8-12.[11]

Plaintiffs also challenge the phrase "services to or in support of." Mot. at 19-20. But "services" has a commonly understood meaning and several courts have rejected vagueness challenges to "services" in other sanctions laws on that basis. *See Humanitarian Law Project*, 561 U.S. at 23-24 (holding person of ordinary intelligence would understand the meaning of "service" and citing to dictionary definition); *KindHearts*, 647 F. Supp. 2d at 896; *Kadi*, 42 F. Supp. 3d at 40-41; *United States v. Lindh*, 212 F. Supp. 2d 541, 574 (E.D. Va. 2002); *see also United States v. Homa Int'l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (per curiam) (executing money transfers from the U.S. to Iran violates Iran Embargo because "[t]he term 'services' is unambiguous"). Plaintiffs' concern that "services . . . in support of" is particularly unclear is not well founded. A person of ordinary intelligence would understand that "services *in support of*" (in contrast to "services *to*") refers to the indirect provision of services. The Supreme Court's analysis of "services to" in *Humanitarian Law Project* supports this understanding. *See Humanitarian Law Project*, 561 U.S. at 23-24 ("The use of the word 'to' indicates a connection between the service and the foreign group" that excludes independent advocacy). Courts have also found that the term "material support" has a sufficiently clear meaning. *See Kadi*, 42 F. Supp. 3d at 40-41; *KindHearts*, 647 F. Supp. 2d at 896 ("The INA, AEDPA, existing case law and common meaning provide a 'broad concept' of material support that is sufficiently clear."). Nor is there any reason to believe that a straightforward term like "materially assist" with its

[11] The EO and Regulations define the term "United States person" as "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States." EO 13,928 § 7(c); 31 C.F.R. § 520.313.

similarities to providing "material support" does not have a meaning that an ordinary person would understand.

D. Plaintiffs Are Not Likely to Succeed on Their "*Ultra Vires*" Claim

Plaintiffs' argument that the EO violates IEEPA also fails because Plaintiffs have no entitlement to assert such a claim, and because the EO and Regulations are both consistent with the statute.

First, IEEPA contains no private right of action. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). IEEPA does not contain the sort of "rights-creating language" that courts find "critical" to imputing to Congress an intent to create a private right of action. *Id.* at 288-89. Because IEEPA does not "explicitly confer[] [any] right directly on" individuals affected by an IEEPA Executive Order, *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979), but instead contains provisions that are at most "phrased as a directive" to the Executive Branch, *see Sandoval*, 532 U.S. at 289, no private cause of action exists to enforce the provision cited by Plaintiffs. Similarly, Plaintiffs cannot obtain relief against the President for his actions in connection with the EO. Federal courts have "no jurisdiction . . . to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *see Franklin v. Massachusetts*, 505 U.S. 788, 802-03, 806 (1992) (plurality op.). And separation-of-powers concerns mandate that an "express statement by Congress" is required before even a generally available cause of action may be extended specifically to challenge an action of the President. *See Franklin*, 505 U.S. at 801; *Nixon v. Fitzgerald*, 457 U.S. 73 1, 748 n.27 (1982).

Second, even if Plaintiffs could bring an *ultra vires* claim, it would fail. The Berman Amendment, 50 U.S.C. § 1702(b)(3), exempts from the President's authority under IEEPA the

power to regulate or prohibit the importation from any country or exportation to any country of information or informational materials. Plaintiffs argue that because the Regulations include an exemption that mirrors the "personal communications" exemption in IEEPA, 50 U.S.C. § 1702(b)(1), the absence of an exemption in the Regulations mirroring Section 1702(b)(3) "carries the implication that the Executive Order and Regulations do not exempt the importation [from any country or exportation to any country] of information or informational materials, as the statute requires." Mot. at 23. But any "implication" of this omission cannot override IEEPA's clear language. Additionally, the EO expressly provides that it "shall be implemented consistent with applicable law," which of course includes IEEPA. Exec. Order 13,928 § 11(b). Nor should the Court assume that it was OFAC's intention to prohibit conduct specifically excepted from IEEPA, particularly where it has indicated that the Regulations issued to date are only preliminary and that additional implementing regulations are forthcoming. 85 Fed. Reg. 61,816.

OFAC has interpreted Section 1702(b)(3) not to extend to "information or informational materials not fully created and in existence at the date of the transactions, or to the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services." *See, e.g.*, 31 C.F.R. § 560.210(c)(2) (Iranian Transactions and Sanctions Regulations).[12] That interpretation—which distinguishes between "informational materials that are widely circulated in a standardized format and those that are bespoke"—has

[12] The same language appears in 31 C.F.R. § 582.205(b)(2) (Nicaragua Sanctions Regulations), *id.* § 583.205(b)(2) (Global Magnitsky Sanctions Regulations); *id.* § 569.205(b)(2) (Syria-related Sanctions Regulations); *id.* § 547.206(c)(2) (Democratic Republic of the Congo Sanctions Regulations); *id.* § 555.205(c)(2) (Mali Sanctions Regulations); *id.* § 549.206(b)(2) (Lebanon Sanctions Regulations); *id.* § 548.206(b)(2) (Belarus Sanctions Regulations); *id.* § 584.206(b)(2) (Magnitsky Act Sanctions Regulations); *id.* § 579.205(b)(2) (Foreign Interference in U.S. Elections Sanctions Regulations); *id.* § 541.206(b)(2) (Zimbabwe Sanctions Regulations); *id.* § 544.206(b)(2) (Weapons of Mass Destruction Proliferators Sanctions Regulations); 576.209(b)(2) (Iraq Stabilization and Insurgency Sanctions Regulations); *id.* § 536.205(b)(2) (Narcotics Trafficking Sanctions Regulations); *id.* § 510.213(c)(2) (North Korea Sanctions Regulations); *id.* § 542.211(b)(2) (Syrian Sanctions Regulations); *id.* § 539.204(b)(2) (Weapons of Mass Destruction Trade Control Regulations); *id.* § 515.206(a)(2) (Cuban Assets Control Regulations).

been upheld as reasonable under *Chevron*. *Amirnazmi*, 645 F.3d at 587-88 ("[T]here is ample evidence to suggest Congress has accepted OFAC's decision to permit the circulation of informational materials already in existence while concomitantly regulating transactions that contemplate the creation of new materials."); *see also Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007, 1011-13 (S.D.N.Y. 1990). OFAC's interpretation is consistent with the list of examples of "informational materials" in Section 1702(b)(3)—"publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feed"—all embodiments of information in fixed form. 50 U.S.C. § 1702(b)(3). It is also consistent with the legislative intent of the Berman Amendment. *Amirnazmi*, 645 F.3d at 587.

Plaintiffs' as-applied challenge fails because the Section 1702(b)(3) exemption does not apply to their described actions. Plaintiffs attempt to shoehorn their actions into the exemption by arguing that they wish to engage in speech that "is informational in nature, exported to the Netherlands, and transmitted telephonically or via the Internet." Mot. at 23. But the actions they have described—the provision of "education, training, advice, and other forms of assistance" to the ICC and the Office of the Prosecutor—are interactive services provided to a specific recipient over a period of time, not the export of "standardized" information or informational materials in a "widely circulated" fashion.[13] *See Amirnazmi*, 645 F.3d at 587. The same is true for Plaintiffs' proposed submission of *amicus curiae* briefs, as Plaintiffs seemingly do not wish to "export"

[13] The recent decision in *TikTok Inc. v. Trump*, No. 1:20-CV-02658 (CJN), 2020 WL 5763634 (D.D.C. Sept. 27, 2020), which is currently on appeal, D.C. Cir. No. 20-5302 (filed Oct. 8, 2020), is distinguishable. In that case, the court found that "[t]he content exchanged by TikTok users constitutes 'information and informational materials' [because] much of that content appears to be (or to be analogous to) 'publications, films, . . . photographs, . . . artworks, . . . and news wire feeds.'" *TikTok Inc.*, 2020 WL 5763634, at *5. Similarly, in *Marland v. Trump*, a related case, the court found that the prohibition at issue would effectively shut down the TikTok mobile app within the United States and thus indirectly regulate the importation and exportation of informational materials. --- F. Supp. 3d ---, 2020 WL 6381397, at *11-12 (E.D. Pa. Oct. 30, 2020). That is not the case with respect to the legal work and other services that Plaintiffs have stated that they wish to provide to persons associated with the ICC.

ready-made briefs to the Netherlands, but rather to perform the "bespoke" legal services of writing those briefs. *See id*. This conduct, even if it were prohibited by the EO and Regulations, would fall outside of the exemption's scope.

III. Plaintiffs Do Not Meet the Remaining Requirements to Establish Entitlement to Injunctive Relief

Plaintiffs also have not made a "clear showing," *Winter*, 555 U.S. at 22, that they meet the remaining requirements for injunctive relief.Plaintiffs' argument that they have demonstrated irreparable harm depends entirely on them demonstrating a clear likelihood of success on the merits of their First Amendment claim which, for the reasons discussed above, they cannot do. Mot. at 23-24; *see N.Y. Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("Consideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor.").

Additionally, the balance of the equities and the public interest favor the Government. At stake here are significant national security and foreign policy interests that weigh strongly against an injunction. *See Winter*, 555 U.S. at 24; *cf. United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 84 (D.D.C. 2002). The injunction Plaintiffs seek would frustrate and displace the President's determination of how best to address threats to national security. *Milena Ship Mgmt. Co. v. Newcomb*, 804 F. Supp. 846, 854 (E.D. La. 1992) (holding that injunction "unblocking the plaintiffs' vessels and bank accounts . . . would risk impermissible interference with Executive and Congressional decisions").

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

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