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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEILA N. SADAT; K. ALEXA KOENIG; NAOMI ROHT-ARRIAZA; and STEVEN M. WATT,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; U.S. DEPARTMENT OF STATE; ANTONY J. BLINKEN, in his official capacity as Secretary of State; U.S. DEPARTMENT OF THE TREASURY; JANET L. YELLEN, in her official capacity as Secretary of the Treasury; U.S. DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General; OFFICE OF FOREIGN ASSETS CONTROL; and BRADLEY T. SMITH, in his official capacity as Acting Director of the Office of Foreign Assets Control,

Defendants.[1]

Civil Case No.: 21-00416

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Date: May 14, 2021
Time: 10:00 a.m.
Location: Courtroom 6 - 17th Floor
Judge: Hon. Charles R. Breyer

[1] Pursuant to Federal Rule of Civil Procedure 25(d), the Defendants originally named in this action have been substituted with the names of their successors in office.

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on May 14, 2021, at 10:00 am, or as soon thereafter as counsel may be heard before the Honorable Judge Charles R. Breyer in Courtroom 6 of the United States District Court, Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, California, Plaintiffs Leila N. Sadat, K. Alexa Koenig, Naomi Roht-Arriaza, and Steven M. Watt ("Plaintiffs") will move for a preliminary injunction to prevent Defendants Joseph R. Biden, Jr., in his official capacity, U.S. Department of State, Antony J. Blinken, in his official capacity, U.S. Department of the Treasury, Janet L. Yellen, in her official capacity, U.S. Department of Justice, Merrick B. Garland, in his official capacity, Office of Foreign Assets Control, and Bradley T. Smith, in his official capacity ("Defendants") from imposing civil or criminal penalties on Plaintiffs, their students, support staff, and others working with them at their respective institutions in support of the International Criminal Court (the "ICC") and the ICC's Office of the Prosecutor (the "OTP"), specifically for violating sanctions imposed by Defendants on the Prosecutor of the ICC, Ms. Fatou Bensouda, and the Director of the OTP's Jurisdiction, Complementarity and Cooperation Division, Mr. Phakiso Mochochoko.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case concerns whether the government can use the threat of civil and criminal penalties to prevent Americans from speaking, writing, and otherwise supporting the efforts of the Office of the Prosecutor (the "OTP") to pursue justice and accountability for the gravest international crimes before the International Criminal Court (the "ICC"). The government has imposed economic sanctions on two senior officials of the OTP, and these sanctions inflict harm on Plaintiffs, who are three international human rights law scholars and an attorney representing victims of war crimes before the ICC. As a result of the sanctions, Plaintiffs are forced to stop their speech in support of the OTP's efforts. Plaintiffs' activities include advising the OTP on whether information received by the OTP is sufficient to open formal crimes against humanity inquiries in particular cases, consulting with the OTP on ongoing investigations and its use of technology to investigate human rights atrocities, advocating to the OTP on how to best make prosecutorial decisions with respect to Venezuelan officials, and representing victims of torture before the ICC. All of these activities are protected speech.

Yet Defendants have prohibited Plaintiffs' speech, subject to the threat of civil and criminal penalties. Specifically, former President Donald Trump issued Executive Order 13,928, *Blocking Property of Certain Persons Associated With the International Criminal Court* (the "Executive Order"), declaring that any attempt to investigate, arrest, or prosecute U.S. personnel or personnel of allied nations that have not consented to ICC jurisdiction constitutes an "unusual and extraordinary threat to the national security and foreign policy of the United States." Executive Order, at preamble. President Trump's declaration of this national emergency invoked the potent weaponry of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq.*, a statute more commonly used to sanction foreign governments like Iran or North Korea that engage in and sponsor human rights abuses and illicitly traffic in arms, counterfeit currency, and narcotics. Acting under the Executive Order, former Secretary of State Michael Pompeo designated the Prosecutor of the ICC, Ms. Fatou Bensouda, and the Head of the OTP's Jurisdiction, Complementarity and Cooperation Division, Mr. Phakiso Mochochoko (the "Designations"). The Department of the Treasury's Office of Foreign Assets Control ("OFAC") added Ms. Bensouda and Mr. Mochochoko to the Specially Designated Nationals List ("SDN List") and promulgated implementing regulations, 31 C.F.R. § 520.101 *et seq.* (the "Regulations"). Collectively, the Executive Order, Designations, and Regulations (the "Restrictions") prohibit any U.S. person from providing "services to, or in support of" Ms. Bensouda or Mr. Mochochoko, and impose substantial civil and criminal penalties for violations.

Plaintiffs are four U.S. persons who, through their speech, have provided services to or in support of Ms. Bensouda and Mr. Mochochoko, and would continue their First Amendment-protected activities were it not for the threat of substantial civil and criminal penalties under the sanctions regime. Plaintiffs seek an injunction because the Restrictions violate the First Amendment; the Executive Order and Regulations are *ultra vires* because Congress specifically denied to the executive branch the authority under IEEPA to regulate "information or informational materials," 50 U.S.C. § 1702(b)(3); and the Regulations are not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). One district court has already found that another group of plaintiffs, some of whom were providing similar advisory, consulting, and advocacy services to or in support of the OTP as Plaintiffs here, were entitled to injunctive relief on First Amendment grounds. *See Open Soc'y Just. Initiative v. Trump*, No. 20 Civ. 8121 (KPF), 2021 WL 22013 (S.D.N.Y. Jan. 4, 2021). This Court should also preliminarily enjoin Defendants

from implementing or enforcing the Restrictions against Plaintiffs, their students, support staff, and others working with them at their respective institutions in support of the ICC and the OTP.

BACKGROUND

I. The International Criminal Court

The ICC is a permanent court based in The Hague, The Netherlands. It was created by the 1998 Rome Statute, a treaty ratified by 123 States Parties, which was the outgrowth of a decades-long push by the international community for a transnational system of justice for victims of the gravest international crimes. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (the "Rome Statute"). The ICC's jurisdiction includes genocide, war crimes, and crimes against humanity (collectively known as "atrocity crimes"). Rome Statute art. 5. Its jurisdiction also reflects the international community's desire to address atrocity crimes where national legal systems are unable or unwilling to provide meaningful redress for their victims. Thus, the jurisdiction of the ICC is founded on respect for national sovereignty: it is "complementary to national criminal jurisdictions," *id.* art. 1, and the ICC may not exercise jurisdiction over crimes adequately addressed by national criminal justice systems, *see id.* art. 17(1).

The long movement for international criminal justice arose in particular out of the aftermath of World War II and the Holocaust, and the United States was a driving force behind the effort to hold Nazi-era war criminals to account during the Nuremberg Trials. American support for justice and accountability for atrocity crimes continued throughout the latter half of the 20th century. As unspeakable horrors unfolded in Cambodia, the former Yugoslavia, Rwanda, Sierra Leone, and other conflict zones, the United States supported the creation of international criminal tribunals to address the atrocity crimes that occurred in these jurisdictions. In signing the Rome Statute, President William J. Clinton noted the United States' "long history of commitment to the principle of accountability, from our involvement in the Nuremberg tribunals that brought Nazi war criminals to justice, to our leadership in the effort to establish the International Criminal Tribunals for the former Yugoslavia and Rwanda." *See* Signing Statement on the Rome Treaty on the International Criminal Court, Dec. 31, 2000.

Although the United States has never ratified the Rome Statute, both Democratic and Republican administrations have supported critical aspects of the ICC's work. The United States has expressed bipartisan support through statements from senior American officials, U.N. Security Council votes in favor of

referring particular matters to the ICC (or abstentions from such votes, which enable those measures to pass in light of the United States' veto power), and even the transfer of individuals from U.S. custody to the ICC for prosecution. *See*, *e.g.,* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), https://www.un.org/press/en/2005/sc8351.doc.htm (statement by Acting U.S. Permanent Representative to the United Nations Anne Patterson that the United States "strongly supported bringing to justice those responsible for the crimes and atrocities that had occurred in Darfur and ending the climate of impunity there"); Remarks, Ambassador-at-Large for War Crimes Issues, Office of Glob. Crim. Just., Statement of the U.S. at the Twelfth Session of the Assembly of States Parties of the International Criminal Court (Nov. 21, 2013), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2013/218069.htm (statement by United States Ambassador-at-Large for War Crimes Issues Stephen J. Rapp commending the United States' "key role" in facilitating "the surrender of [Congolese warlord] Bosco Ntaganda to the ICC" after he had surrendered himself to the U.S. Embassy in Rwanda). *See also* Compl. ¶ 42.

ICC proceedings begin when a State Party or the U.N. Security Council refers a matter potentially involving crimes within the ICC's jurisdiction—a "situation," in ICC parlance—to the Prosecutor of the ICC, *id.* art. 13(a)–(b), or when the Prosecutor initiates a preliminary examination without such referral based on information available to her, *id.* art. 13(c), 15. Matters before the ICC proceed in several stages: (1) the preliminary examination stage, involving an initial assessment of various preconditions to a formal investigation, including jurisdictional criteria, evidentiary sufficiency, the gravity of the alleged crimes, and the interests of justice and victims; (2) the formal investigation stage, involving evidence-gathering, identification of suspects, and the issuance of arrest warrants or summonses to appear; (3) the pre-trial stage, involving a determination by the ICC judges of whether there is sufficient cause to take the case to trial; (4) the trial stage, requiring proof of guilt beyond a reasonable doubt before the ICC judges may convict and impose a sentence and/or order reparations for victims; (5) the appeals stage; and (6) the enforcement of any sentence in a country that has agreed to enforce ICC sentences. *See generally How the Court Works: Legal Process*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess (last visited March 12, 2021).

II. The Office of the Prosecutor: Structure and Powers

The OTP is an independent entity of the ICC that conducts preliminary examinations of situations, carries out formal investigations of the alleged crimes associated with those situations, and prosecutes the allegedly responsible individuals before the judges of the ICC. The OTP is staffed by approximately 380 people from around the world and headed by the Prosecutor of the ICC. Ms. Fatou Bensouda is the current Prosecutor, and she is assisted by, among others, Mr. Phakiso Mochochoko, the Head of the OTP's Jurisdiction, Complementarity and Cooperation Division. The Division conducts preliminary examinations, advises the Prosecutor, and coordinates judicial cooperation and external relations for the OTP.

The Prosecutor has full authority over OTP investigations and prosecutions. *See* Rome Statute art. 42(2) (prosecutor "shall have full authority over the management and administration of the Office, including the staff, facilities, and other resources thereof"); *id.* art. 54(1)(b) (prosecutor has the power and duty to "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes" within the ICC's jurisdiction). The ICC's Rules of Procedure and Evidence further stipulate that the "inherent powers of the Prosecutor" may not be delegated to another member of the office. *See* ICC Rule 11.[2] The non-delegable functions exercised by the Prosecutor include: "analys[ing]" the seriousness of the information received from states parties and "seek[ing] additional guidance from states, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources" to pursue potential investigations, Art. 15(2), and seeking authorization from the Pre-Trial Chamber to proceed with an investigation, Art. 15(3). The Prosecutor is therefore required to personally exercise decision-making power over critical aspects of the OTP's investigative and prosecutorial authority, including determining whether a particular situation warrants additional investigation.

At the preliminary examination stage, the OTP assesses the aforementioned preconditions for initiating or requesting a formal investigation, and the Prosecutor decides whether an investigation is warranted. *See* Rome Statute art. 15, 53. The Prosecutor's decision may be subject to review by the judges of the ICC's Pre-Trial Chamber. *See id.* art. 15(3)-(5), 53(3). During the investigation stage, the OTP often

[2] Rule 11 ("Delegation of the Prosecutor's Function"), *available at* https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf.

sends missions composed of investigators, cooperation advisers, and prosecutors to relevant countries to collect evidence. *Office of the Prosecutor*, INT'L CRIM. CT., https://www.icc-cpi.int/about/otp (last visited March 12, 2021). When, after formal investigation, the Prosecutor concludes that prosecutions are warranted, she must request that the Pre-Trial Chamber judges issue arrest warrants or summonses to appear before the ICC. Rome Statute art. 58. The ICC relies upon States Parties to enforce these warrants, as it lacks independent enforcement power. *Id.* art. 59. Additionally, in conducting preliminary examinations, investigations, and prosecutions, the OTP seeks and obtains information and assistance from a range of entities and individuals: States Parties and non-States Parties, international and regional organizations, formal and informal advisers to the OTP, and members of civil society, such as law professors, law school clinics, and victims and their legal representatives. *See Office of the Prosecutor*, *supra*.

The OTP has successfully prosecuted atrocity crimes committed by some of the most notorious war criminals from various conflict zones. For example, in the ICC Situation in the Democratic Republic of the Congo, the ICC convicted Thomas Lubanga Dyilo, a former warlord, of enlisting and conscripting children under the age of 15 and using them to participate actively in military hostilities. *See The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842 (Judgment) (5 Apr. 2012). The ICC has convicted Ahmad Al Faqi Al Madi, a member of an Al-Qaeda-affiliated militant group in Mali, of intentionally directing attacks against religious shrines and historic buildings in Timbuktu, the first prosecution of its kind for such a crime. *See The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-171 (Judgment and Sentence) (27 Sept. 2016). And earlier this year, the ICC convicted Dominic Ongwen, a former commander of the Lord's Resistance Army guerilla group in Uganda, of various crimes including forced marriage, torture, rape, and sexual slavery imposed on the civilian population. *See The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1762 (Trial Judgment) (4 Feb. 2021). In addition to these cases, which have successfully proceeded through trial, current situations under investigation by the OTP include alleged war crimes committed in Georgia during Russia's 2008 invasion of that country; alleged forced displacement of the Rohingya and related atrocities, including genocide, committed by the Myanmar military in Rakhine State, Myanmar; and alleged war crimes committed by high-ranking officials of the ousted Gaddafi regime in Libya during the 2011 revolution, including directing attacks against civilians. The ICC has also issued arrest warrants for former Sudanese President Omar al-Bashir for genocide and other crimes

arising from atrocities committed in Darfur, an investigation that the United States has supported since 2005.

The many investigations the OTP has pursued include an investigation into alleged crimes related to the armed conflict in Afghanistan, including crimes allegedly committed by Taliban forces, Afghan security and police forces, and U.S. military and Central Intelligence Agency personnel.[3] In March 2020—after more than a decade of preliminary examination—the ICC's Appeals Chamber authorized the investigation. However, on April 15, 2020, and in accordance with respect for national sovereignty and the principle of complementarity, Ms. Bensouda notified the Pre-Trial Chamber that the Government of Afghanistan had requested, under Article 18(2) of the Rome Statute, that the OTP defer its Afghanistan investigation pending that government's own investigation. On August 24, 2020, the OTP announced that it was "analysing the information provided by the Government of Afghanistan in support of its deferral request," further noting that because of the COVID-19 pandemic, the OTP was "not currently taking active investigative steps."[4] As of the time of the filing of this motion, the OTP has taken no further action. In December 2019, Ms. Bensouda announced a possible investigation into the situation in Palestine but requested the Pre-Trial Chamber determine the ICC's territorial jurisdiction over Palestine. On February 5, 2021, the Pre-Trial Chamber ruled that Palestine qualified as a State Party to the Rome Statute. Following that decision, the Prosecutor announced on March 3, 2021 that she had opened an investigation of potential crimes, and emphasized that the Pre-Trial Chamber had chosen to defer consideration of significant legal questions, including other issues with respect to jurisdiction.[5]

[3] *See Situation in the Islamic Republic of Afghanistan*, Case No. ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF; *Statement of ICC Prosecutor, Fatou Bensouda*, INT'L CRIM. CT. (Dec. 20, 2019), https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine.

[4] *See* International Criminal Court, Report of the International Criminal Court, U.N. Doc. A/75/324, at 10 (Aug. 24, 2020), https://digitallibrary.un.org/record/3883407/files/A_75_324-EN.pdf.

[5] Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine.

III. Former President Trump's Executive Order and Ensuing Designations and Regulations

On June 11, 2020, then-President Trump issued the Executive Order, invoking IEEPA and citing concerns about potential "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." Executive Order, Preamble. In the Executive Order, the former President "declare[d] a national emergency" and determined 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.

The Executive Order goes on to "block" "[a]ll property and interests in property" under U.S. jurisdiction that belong to any "foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General" to have, *inter alia,* "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," to have "directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any personnel of a country that is an ally of the United States without the consent of that country's government," or to have "materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of" those activities or any person whose property is blocked pursuant to the order. Executive Order §§ 1(a)(i)(A)–(D). On September 2, 2020, then-Secretary Pompeo announced the designation of Ms. Bensouda and Mr. Mochochoko under the Executive Order,[6] and OFAC added Ms. Bensouda and Mr. Mochochoko to the SDN List. *Id.*

Prior to the promulgation of this Executive Order and issuance of the Designations, no president had ever wielded IEEPA authority to impose economic sanctions against people pursuing justice at an international court or body. Instead, presidents historically have invoked IEEPA to deal with national security concerns like the proliferation of weapons of mass destruction, or to impose sanctions on foreign

[6] *See Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court*, U.S. DEP'T OF STATE (Sept. 2, 2020), https://www.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/.

states like Iran or North Korea. *See, e.g.,* 31 C.F.R. § 510.201 (North Korea); 31 C.F.R. § 539.201 (nuclear proliferation). Indeed, the imposition of economic sanctions historically has been *aligned* with the goals of the ICC, and the United States has imposed sanctions against some of the very same regimes and groups whose officials the OTP has investigated for committing potential crimes within the ICC's jurisdiction. *See* 31 C.F.R. § 546.201 (Darfur, Sudan); 31 C.F.R. § 547.201 (Democratic Republic of the Congo); 31 C.F.R. § 533.201 (Central African Republic); 31 C.F.R. § 555.201 (Mali); 31 C.F.R. § 570.201 (Libya).

Congress has imposed precise limits on the executive branch's IEEPA authority to protect First Amendment rights that might otherwise be affected by the imposition of sanctions. Specifically, Congress has denied the President "the authority to 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," among other limitations. 50 U.S.C. § 1702(b)(3). Through the 1988 Berman Amendment, Congress added this informational materials limitation to IEEPA to ensure that the executive branch could not impinge First Amendment rights even in the context of a national emergency declared by the President. *Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003) ("The Berman Amendment was designed to prevent the executive branch from restricting the international flow of materials protected by the First Amendment."). Over time Congress broadened this limitation, passing the Free Trade in Ideas Act, codified as amended at 50 U.S.C. § 1702(b)(3), "to restrict the Executive from regulating transactions concerning informational materials 're-gardless of format or medium of transmission.'" *United States v. Amirnazmi*, 645 F.3d 564, 585 (3d Cir. 2011). The informational materials limitation, in other words, "was explicitly intended . . . *to have a broad scope*." H.R. REP. NO. 103-482, at 239 (1994) (Conf. Rep.) (emphasis added).

IV. Plaintiffs Have Been Forced to Stop Their Speech in Support of the OTP Due to the Restrictions.

Plaintiffs are four individuals whose speech in support of the OTP has been curtailed by the Restrictions. Leila N. Sadat, K. Alexa Koenig, Naomi Roht-Arriaza, and Steven M. Watt have each engaged in speech supporting the work of Ms. Bensouda, Mr. Mochochoko, and the OTP, and planned to continue doing so until Defendants imposed the Restrictions.

Plaintiff Sadat is the James Carr Professor of International Criminal Law at Washington University in St. Louis School of Law and was appointed by Ms. Bensouda to the position of Special Adviser on Crimes Against Humanity to the ICC Prosecutor under Article 42(9) of the Rome Statute. *See* Ex. 1, Decl. of Leila N. Sadat ("Sadat Decl.") ¶¶ 2-3. In this role, she has conducted, at the OTP's request, "situation analyses" to determine whether communications to the OTP under Article 15 of the Rome Statute warrant preliminary examinations and shared her findings through legal memoranda to the OTP and in meetings with Ms. Bensouda and other OTP personnel. *Id.* ¶ 5. She has frequently visited the ICC in The Hague during the course of her work, to meet with Ms. Bensouda and other ICC personnel, conduct trainings for the OTP and other ICC personnel on crimes against humanity, and deliver lectures on legal issues of ongoing concern at the ICC. *Id.* ¶ 7. She has also supervised students conducting legal research to assist her work as Special Adviser, including on discrete research questions posed by the OTP to Professor Sadat that are directly related to the OTP's investigative and prosecutorial activities. *Id.* ¶ 6. As a result of the Designations, Plaintiff Sadat ceased all communication with the OTP, stopped preparing situation analyses for the OTP and providing advice on ongoing cases and proceedings, abandoned plans to teach a seminar where students conduct research for the OTP in the fall of 2020 and spring of 2021, and abandoned plans to conduct remote legal trainings to the OTP and broader ICC personnel on crimes against humanity. *Id.* ¶¶ 8-9.

Plaintiff Koenig, who directs the Human Rights Center at the University of California, Berkeley School of Law, serves as co-chair of the OTP's Technology Advisory Board, and has worked closely with the Director of the OTP's Investigation Division, Michel de Smedt, who reports to Ms. Bensouda. *See* Ex. 2, Decl. of K. Alexa Koenig ("Koenig Decl.") ¶¶ 4-6. The Board's core function is to advise the OTP on technological solutions to various investigative and prosecutorial challenges facing the OTP. *Id.* ¶¶ 5-6. Plaintiff Koenig has conducted research at the OTP's request on technology and other issues related to the OTP's work and has supervised students and staff at the Human Rights Center conducting research for the OTP, including through placements at the ICC. *Id.* ¶¶ 7-8. Plaintiff Koenig also has frequently traveled to the ICC in the course of her work, to meet with OTP personnel, to structure the work of the Board, and to evaluate the OTP's need for assistance from Plaintiff Koenig and the Human Rights Center. *Id.* ¶ 9. As

a result of the Designations, Plaintiff Koenig ceased her work with the Board for the OTP, stopped providing advice to the OTP, and stopped all work involving her students in support of the OTP, including the planned provision of *pro bono* legal services to the OTP under her co-supervision in the fall of 2020 and spring of 2021. *Id.* ¶ 11.

Plaintiff Roht-Arriaza is Distinguished Professor of Law at the University of California, Hastings College of the Law and conducts research into the nexus between atrocity crimes and high-level corruption. *See* Ex. 3, Decl. of Naomi Roht-Arriaza ("Roht-Arriaza Decl.") ¶¶ 2-3, 5. As part of this research, Plaintiff Roht-Arriaza has urged the OTP to address this intersection, including by meeting in The Hague with OTP personnel responsible for the preliminary examination into the situation in Venezuela, including Fabricio Guariglia, the Director of the OTP's Prosecutions Division, who reports to Ms. Bensouda. *Id.* ¶ 6. As a result of the Designations, Plaintiff Roht-Arriaza ceased all communication with the OTP and abandoned plans to have further meetings with the OTP in the summer of 2020 to further educate the OTP about the relevance of high-level corruption to the Venezuela preliminary examination. *Id.* ¶ 8. Plaintiff Roht-Arriaza also abandoned plans to urge the OTP to investigate officials' high-level corruption in other situations in Latin America. *Id*.

Plaintiff Watt is a human rights attorney with the American Civil Liberties Union. *See* Ex. 4, Decl. of Steven M. Watt ("Watt Decl.") ¶ 2. Plaintiff Watt has provided information and evidence relating to the OTP's work on the situation in Afghanistan, including documents and other information unearthed through the Freedom of Information Act and U.S. federal court litigation on behalf of victims of human rights abuses committed in Afghanistan. *Id.* ¶ 4, 5-7. Plaintiff Watt has also sought to represent victims of these abuses in proceedings before the ICC. *Id.* ¶ 4. As a result of the Designations, Plaintiff Watt ceased all communication with the OTP, abandoned plans to provide to the OTP additional documentary evidence of atrocity crimes allegedly committed by U.S. personnel in Afghanistan, and ceased his representation of victims before the ICC, including abandoning plans to, if necessary, file motions before the Pre-Trial Chamber to seek information from the Prosecutor on the Afghanistan investigation. *Id.* ¶ 10.

Each Plaintiff reasonably fears that engaging in the above actions would subject them to IEEPA's substantial civil and criminal penalties and, were it not the Restrictions, they would resume their activities. *See* Sadat Decl. ¶ 9; Koenig Decl. ¶ 12; Roht-Arriaza Decl. ¶ 9; Watt Decl. ¶ 11.

SUMMARY OF THE ARGUMENT[7]

Injunctive relief is warranted because the Restrictions are unconstitutional content-based restrictions on Plaintiffs' speech and are *ultra vires*. With respect to Plaintiffs' First Amendment claim, because only speech that constitutes "services . . . to, or for the benefit of" one of the designated individuals is singled out for disfavored treatment and potential penalties, the Restrictions constitute a classic content-based restriction. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). That conclusion is compelled by Supreme Court and Ninth Circuit precedent finding similar restrictions content-based because "the conduct triggering coverage" under the restrictions involved "communicating a message." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) [*HLP*]; *see also Al Haramain Islamic Found. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 996–97 (9th Cir. 2012). Indeed, one court has already found the restrictions at issue here to be content-based restrictions on speech that trigger strict scrutiny. *See Open Soc'y Just. Initiative v. Trump*, No. 20 Civ. 8121 (KPF), 2021 WL 22013 (S.D.N.Y. Jan. 4, 2021).

The Restrictions cannot survive strict scrutiny. Prohibitions subject to that demanding standard are "presumptively unconstitutional" and "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. The Executive Order asserts a national security and foreign policy interest in preventing ICC attempts to investigate, arrest, detain, or prosecute U.S. personnel or personnel of certain U.S. allies. But the government cannot meet its burden to show an interest of the "highest order" in preventing particular ICC investigations of alleged atrocity crimes, or for imposing sanctions that prohibit law professors and attorneys from providing any support to any ICC prosecutions whatsoever. The ICC is an institution respected by nations around the world, including the United States. Indeed, the United States historically has been a driving force behind the creation and use of international justice tribunals, from Nuremburg through myriad *ad hoc* tribunals to the

[7] Consistent with the court's General Standing Order, Section I.C, counsel understands that this Summary of Argument section is exempt from the page limit requirement.

ICC. The United States—its narrow concern with the ICC's Afghanistan and Palestine investigations notwithstanding—has itself recognized the ICC's legitimacy by facilitating and supporting its important work on various occasions and on a bipartisan basis. In addition, any perceived threat posed by specific ICC investigations is merely conjectural at this point, and far from "urgent," *HLP*, 561 U.S. at 28. The ICC acts according to lengthy and robust legal processes. The two investigations of concern to the United States are either on hold or in their infancy and investigations can take years to culminate, if ever, in arrests and prosecutions.

Likewise, the Restrictions are not narrowly tailored. The government failed to consider less restrictive alternatives to accomplish its stated objectives, as required under strict scrutiny. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). Instead, the government reached for one of the bluntest instruments in its toolkit, without regard to the substantial burdens on the First Amendment rights of U.S. law professors and attorneys who support the ICC's pursuit of justice for atrocity crimes. Moreover, the Restrictions are overinclusive, and thus not narrowly tailored to further the government's asserted interest, even if compelling. Although the government's stated interest is limited to preventing the ICC from asserting jurisdiction over U.S. personnel or personnel of certain U.S. allies, the Restrictions broadly bar U.S. persons like Plaintiff law professors and their students from providing *any* services for the benefit of Ms. Bensouda or Mr. Mochochoko, whether related to investigations of the Maduro regime in Venezuela, efforts to bring former Sudanese President Bashir to justice, or anything else. Thus, the Restrictions bar Plaintiffs from providing *any* services to the OTP, including to assist human rights investigations that the United States government has affirmatively supported.

Plaintiffs are also likely to succeed on the merits of their claim that the Executive Order and Regulations are *ultra vires* and otherwise unlawful in violation of IEEPA. Under IEEPA, the President may not "regulate or prohibit, directly or indirectly," the international transmission of "any information or informational materials." *See* 50 U.S.C. § 1702(b)(3). That limitation on the President's IEEPA authority—which courts have given broad scope—"prevent[s] the executive branch from restricting the international flow of materials protected by the First Amendment." *Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003). Because each Plaintiff has previously transmitted and planned to continue transmitting

information and informational materials, such as legal advice and memoranda, legal filings, and documentary evidence, to OTP or ICC personnel, Plaintiffs' work directly implicates this prohibition.

Finally, Plaintiffs will be irreparably harmed absent a preliminary injunction, and the balance of equities and the public interest favor preliminary injunctive relief. "[T]he loss or threatened infringement upon free speech rights 'for even minimal periods of time[] unquestionably constitutes irreparable injury,'" even if that chill "results from a threat of enforcement rather than actual enforcement." *Cuviello v. City of Vallejo*, 944 F.3d 816, 832–33 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). The Restrictions' broad scope (which the government has not meaningfully clarified), along with the threat of IEEPA's significant penalties and OFAC's past aggressive enforcement of similar IEEPA orders, has chilled Plaintiffs' speech. As the *Open Society* court found, a distinction between "supporting the Office of the Prosecutor and supporting Ms. Bensouda is illusory." *Open Soc'y*, 2021 WL 22013, at *8. Thus, Plaintiffs have had to restrain their own speech under the threat of IEEPA's severe civil and criminal penalties by abandoning past and future speech-based services to the OTP. The irreparable harm resulting from that chill on free speech rights will continue absent a preliminary injunction against implementation and enforcement of the Restrictions.

Further, whereas the courts have consistently recognized a significant public interest in preventing the violation of constitutional rights, particularly free speech rights, the government lacks any interest in enforcing unconstitutional or *ultra vires* prohibitions. A preliminary injunction would further the public interest by enjoining the continuing violation of the free speech rights of Plaintiffs, while posing no hardship for the government, which could still seek to prevent the remote harms it asserts through other means. The balance of the equities and the public interest thus favor granting preliminary injunctive relief.

ARGUMENT

I. Legal Standard

Plaintiffs seeking a preliminary injunction "must make a 'threshold showing' of four factors." *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 844 (9th Cir. 2020) (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam)). "Plaintiffs must show that (1) they are likely to succeed on the merits, (2) they are likely to 'suffer irreparable harm' without relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest." *Id.* at 844–45 (quoting *Am. Trucking Ass'ns,*

Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)). "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

Moreover, "[t]he Ninth Circuit has clarified . . . that courts in this Circuit should . . . evaluate the likelihood of success on a 'sliding scale.'" *California v. Wheeler*, 467 F. Supp. 3d 864, 871 (N.D. Cal. 2020). Under this test, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

II. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

A. The Restrictions Violate the First Amendment.

1. *The Restrictions Prohibit Plaintiffs' Speech on the Basis of Content.*

The Executive Order prohibits any U.S. person from providing any "funds, goods, or services by, to, or for the benefit" of the designated persons, and the Regulations further specify that "services of any nature whatsoever" are prohibited. 31 C.F.R. § 520.310. OFAC has historically interpreted "services of any nature whatsoever" to have a broad meaning. *See, e.g.,* 31 C.F.R. § 510.405(d)(1) (prohibiting U.S. persons from providing "legal, accounting, financial, brokering, freight forwarding, transportation, public relations, or other services" that benefit sanctioned North Korean persons or entities). Under a straightforward interpretation of the Restrictions, informed by OFAC's past interpretation of similar language, Plaintiffs' constitutionally-protected speech would plainly constitute prohibited "services . . . to, or for the benefit of" Ms. Bensouda and Mr. Mochochoko." *See Open Soc'y*, 2021 WL 22013 at * 7 ("Defendants concede this point when they describe the "provision of 'education, training, advice, and other forms of assistance' as "interactive services," and the drafting of amicus curiae briefs as "'bespoke' legal services.").[8] For example, Plaintiff Sadat may not continue to provide legal advice to the OTP, either in

[8] The district court in *Open Society* rejected the government's argument that a distinction could be drawn between "services" offered to the OTP more generally and those provided to Ms. Bensouda directly. *See Open Soc'y*, 2021 WL 22013, at *8 (finding that "it is unclear to the Court how Plaintiffs could provide services to the Office of the Prosecutor or to others involved in ICC investigations without indirectly benefitting Ms. Bensouda, given that she is the head of the Office of the Prosecutor and oversees the investigations Plaintiffs would support if able" and that "the distinction [the Government] attempt[s] to

writing or in meetings with OTP personnel, or run her usual training sessions on crimes against humanity for OTP staff. *See* Sadat Decl. ¶¶ 4, 9. Similarly, Plaintiffs Koenig and Roht-Arriaza may not convey information to the OTP about important aspects of the Prosecutor's work, and they cannot produce research in support of the OTP, whether this research supports the work of the Technology Advisory Board (Koenig) or the situation in Venezuela (Roht-Arriaza). *See* Koenig Decl. ¶ 11; Roht-Arriaza Decl. ¶ 8. Plaintiff Watt is restricted from providing information regarding his clients to the OTP, including documents not currently in OTP's possession, and from filing motions before the Pre-Trial Chamber on his clients' behalf. Watt Decl. ¶ 10.

The Restrictions are moreover content-based restrictions subject to strict scrutiny: they single out speech that constitutes "services . . . to, or for the benefit of" one of the designated individuals. By targeting this speech for disfavored treatment and potential penalties, the Restrictions constitute classic content-based regulation. *See Reed*, 576 U.S. at 163 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *Open Soc'y,* 2021 WL 22013, at *7–9, *12–13 (finding the Restrictions to be content-based restrictions on speech and noting that "Plaintiffs' speech is restricted if, and only if, it has the function or purpose of benefitting Ms. Bensouda or Mr. Mochochoko"). Content-based restrictions on speech are evaluated under strict scrutiny: these restrictions are "presumptively unconstitutional" and "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163.

Supreme Court and Ninth Circuit precedent establish that the criminal prohibitions imposed on Plaintiffs are content-based restrictions subject to strict scrutiny. In *HLP,* the Supreme Court rejected the government's argument that plaintiffs who sought, *inter alia*, to provide two designated foreign terrorist organizations with training on international law and nonviolent mediation programs and to advocate on those organizations' behalf were engaged in pure conduct rather than speech. 561 U.S. at 27. The Court explained that "Plaintiffs want to speak to the [designated organizations], and whether they may do so"

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draw between supporting the Office of the Prosecutor and supporting Ms. Bensouda is illusory"). Any such argument made by the government in this case should similarly be rejected.

under the statute prohibiting "material support" for foreign terrorist organizations, 18 U.S.C. § 2239B, "depends on what they say"—namely, on whether their proposed speech would violate the statutory prohibitions on "impart[ing] a 'specific skill' or communicat[ing] advice derived from 'specialized knowledge.'" *HLP*, 561 U.S. at 27. Because "the conduct triggering coverage under the statute" involved "communicating a message," "a more demanding standard" of constitutional scrutiny applied. *Id.* at 28 (internal quotation marks omitted) (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)). The Court further rejected the government's argument that, even if properly viewed as speech instead of conduct, the restrictions at issue were content-neutral. Indeed, the Court expressly declined to apply intermediate scrutiny, the less demanding standard for content-neutral restrictions. *See HLP*, 561 U.S. at 27.

Similarly, in *Al Haramain*, the Ninth Circuit, following *HLP*, applied strict scrutiny in reviewing plaintiffs' claims that a regime imposing sanctions on persons and entities for supporting terrorism infringed on their protected speech rights by limiting their ability to engage in advocacy efforts on behalf of designated entities. *See* 686 F.3d at 996–98. Like the Executive Order here, the challenged order in *Al Haramain* prohibited, *inter alia*, the provision of "services to or for the benefit of" specified sanctioned persons, *id.* at 995. "For purposes of the First Amendment analysis," the court saw "no difference" between the challenged executive order and the statute at issue in *HLP*." *Id.* at 997; *see also Open Soc'y*, 2021 WL 22013, at *8 (citing *Al Haramain* and finding that strict scrutiny applies to the Restrictions).

Like the *HLP* plaintiffs' training and advocacy activities, Plaintiffs' planned activities with and for the OTP—such as providing legal advice, participating in meetings with OTP personnel, conducting trainings, and providing information and evidence to support the OTP's work—involve "communicating a message." Plaintiffs similarly "want to speak to" and for the benefit of the OTP, and "whether they may do so . . . depends on what they say." Because their speech would amount to the "contribution or provision of . . . services . . . to, or for the benefit of" Ms. Bensouda or Mr. Mochochoko, Executive Order § 3(a), it is barred by the Restrictions. Like the material support statute at issue in *HLP*, the Restrictions therefore "regulate[] speech on the basis of its content," *HLP*, 561 U.S. at 27, and as a result, the government must satisfy the demanding strict scrutiny standard to apply them to Plaintiffs. *See Reed*, 576 U.S. at 163–64 (holding that speech prohibitions that are "content based"—whether on their face or in their justification —"must . . . satisfy strict scrutiny"). .

2. *The Restrictions Fail Strict Scrutiny.*

Strict scrutiny is a "demanding standard," and "[i]t is rare that a regulation restricting speech because of its content"—no matter the context—will survive it. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (internal quotation marks omitted) (quoting *Playboy*, 529 U.S. at 803). Such prohibitions are "presumptively unconstitutional" and, under strict scrutiny, "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. The government cannot meet that high bar.

a) *The Government Cannot Prove a Compelling Interest.*

The government bears the burden to demonstrate that its interests in the Restrictions are compelling, *Playboy*, 529 U.S. at 813, and it cannot do so here. Only government interests "of the highest order" are considered compelling. *Id.* at 172; *see also HLP*, 561 U.S. at 28. Moreover, "when the government seeks to restrict speech '[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)). The government's interest does not satisfy these requirements.

No compelling interest justifies the imposition of sanctions on senior ICC leaders pursuing justice and accountability for atrocity crimes at the very court that the United Stated helped create for that purpose, or for prohibiting law professors and attorneys from supporting those efforts. *See* Section I, *supra*. For over half a century, the United States has served as a driving force behind the investigation and prosecution of atrocity crimes by international tribunals from Nuremburg through the *ad hoc* courts established for the conflicts in Cambodia, the former Yugoslavia, Rwanda, and Sierra Leone, and to the ICC itself. The government cannot plausibly contend that it has an interest "of the highest order," *Reed*, 576 U.S. at 172, in seeking to preclude particular investigations of alleged atrocity crimes now before that body. It is illogical and self-defeating for the government to contend that its supposed interest in the imposition of sanctions with respect to the very legal architecture that it helped build is so compelling that it justifies burdening the First Amendment rights of U.S. citizen law professors and attorneys who help support that architecture.

Further undermining the government's understanding of the ICC as posing a threat, the ICC is a widely-recognized institution that acts according to lengthy and robust legal processes under the auspices of an international treaty. It is not a "kangaroo court"[9] that rubber stamps investigations initiated by the Prosecutor. Under the Rome Statute, the ICC cannot simply authorize a full-scale investigation and prosecution of particular individuals without substantial process, including a judicial check. *See* Rome Statute, Art. 15(3)–(5), 53(3). The decision to authorize the Afghanistan investigation was subject to appellate review in the ICC Appeals Chamber. Further process is required in response to Afghanistan's request for a deferral based on its own investigations, with the OTP currently taking "no active steps." The Prosecutor also referred the Palestine situation to the Pre-Trial Chamber before initiating that investigation, and she continues to recognize that significant legal questions, including with respect to jurisdiction, remain unresolved.

In addition, the government's concern is too conjectural, and not sufficiently "urgent," *HLP*, 561 U.S. at 28, to amount to a compelling governmental interest. The Executive Order asserts an interest in preventing "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." But the prospect of any real threat to U.S. or allied personnel without the consent of those countries to ICC jurisdiction is highly speculative, and far from imminent. ICC investigations typically take years before resulting, if at all, in prosecutions, including arrests and trial proceedings. The Afghanistan and Palestine investigations are in their earliest stages and one is on hold. Even in instances where arrest warrants have issued, the ICC has no enforcement power and depends on states to effectuate its warrants. Finally, as discussed above, various phases of judicial process would need to unfold before any investigations could lead to actual prosecutions, including arrests and trial proceedings (indeed if they ever do so).

[9] *See* Reuters, *Pompeo on ICC: U.S. won't be threatened by 'kangaroo court'*, June 11, 2020, https://www.reuters.com/article/us-warcrimes-afghanistan-trump-pompeo/pompeo-on-icc-u-s-wont-be-threatened-by-kangaroo-court-idUSKBN23I2AJ.

b) *The Restrictions Are Not Narrowly Tailored.*

Even if the government could satisfy its burden to show that its interest is compelling—which it cannot—the Restrictions are not narrowly tailored to advance that interest. The tailoring requirement forces the government to "choose[] the least restrictive means to further the articulated interest." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrificing speech for efficiency.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

It is axiomatic that under strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the [Government] must use that alternative." *Playboy*, 529 U.S. at 813. The government has tools at its disposal that would impose no burdens whatsoever on the speech of U.S. persons. For instance, the United States could have sought through direct engagement with or submissions to the ICC to demonstrate, in accordance with the ICC's principle of complementarity, that its own legal system was adequately addressing any potential crimes, thereby depriving the ICC of jurisdiction. Similarly, under Article 16 of the Rome Statute, the United States and other concerned allies could seek a U.N. Security Council Resolution seeking a deferral of the investigation for a renewable period of twelve months, but to date, no such action has been pursued. These tools would not involve threatening the imposition of civil and criminal penalties on U.S. persons providing services to the OTP on any and all aspects of the Prosecutor's work.

Additionally, strict scrutiny demands that the Government choose "means that are neither seriously underinclusive nor seriously overinclusive." *Ent. Merchs. Ass'n*, 564 U.S. at 799; *see also IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) (similar). The Restrictions are far from that mark as well because they are "vastly overinclusive." *Ent. Merchs. Ass'n*, 564 U.S. at 804; *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991) (law fails strict scrutiny where it is "significantly overinclusive" and not narrowly tailored to the asserted interest). The Executive Order purports to address: "illegitimate assertions of jurisdiction over personnel of the United States and certain

of its allies." Executive Order, Preamble. But the Restrictions bar U.S. persons from providing *any* services to or for the benefit of Ms. Bensouda or Mr. Mochochoko whether they are related to the Afghanistan or Palestine investigations or not.

Illustrating the significant overbreadth of the Restrictions, the government has never articulated any interest that would be advanced by, for example, prohibiting Plaintiff Roht-Arriaza from supplying Ms. Bensouda with information supporting her investigation of potential crimes by the Maduro regime in Venezuela. Nor is the government's asserted interest furthered by prohibiting Plaintiff Koenig from advising the OTP on digital fact-finding and other technological solutions for specific ICC investigations unrelated to Afghanistan or Palestine, or in preventing Plaintiff Sadat from conducting legal trainings on crimes against humanity for OTP personnel involved in various investigations, including those unrelated to Afghanistan or Palestine. Indeed, the Restrictions would have prevented Plaintiffs from providing services to the OTP in support of investigations that the U.S. government has historically supported, such as investigations into the recruitment and use of child soldiers by warlords in the Democratic Republic of the Congo, mass rape and murder by the Lord's Resistance Army in Uganda, and the deliberate destruction of historic Muslim shrines in Timbuktu, Mali. The Restrictions thus "prohibit or chill significantly more speech than even Defendants seem to believe is necessary to achieve their end." *Open Soc'y*, 2021 WL 22013, at *9.

B. The Executive Order and Regulations Are *Ultra Vires* in Violation of IEEPA.

The Executive Order and Regulations independently run afoul of IEEPA's "informational materials" limitation, which prohibits the President, subject to enumerated exceptions not relevant here, from:

> regulat[ing] or prohibit[ing], 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 limitation denies to the executive branch any authority to "regulat[e] transactions concerning informational materials 'regardless of format or medium of transmission.'" *Amirnazmi*, 645 F.3d at 585. As noted in Section III, *supra*, Congress added this restriction on the executive branch's power and subsequently expanded it specifically to "prevent the executive branch from restricting the

international flow of materials protected by the First Amendment." *Kalantari*, 352 F.3d at 1205. Consistent with the congressional intent that the limitation be given "broad scope," courts have since interpreted IEEPA's limitations broadly and have restricted the executive branch's power under IEEPA. *See TikTok Inc. v. Trump*, No. 1:20-cv-02658 (CJN), 2020 WL 5763634, at *4–7 (D.D.C. Sept. 27, 2020) [*TikTok I*] (noting that "Congress has stressed that these limitations be given 'broad scope'" and granting preliminary injunction against implementation of executive order likely violating §§ 1702(b)(1) and 1702(b)(3)); *Kalantari*, 352 F.3d at 1207 (citing House conference report and holding that § 1702(b)(3) prevents the President from regulating payment for importation of movies).

The Executive Order and Regulations do not mention this important limitation on the executive branch's authority under IEEPA, even though the Executive Order does address one of the two IEEPA limitations neighboring § 1702(b)(3), and the Regulations incorporate the other. *See* Executive Order § 2 (regulating humanitarian donations after making findings required by 50 U.S.C. § 1702(b)(2)); 31 C.F.R. § 520.205(a) (clarifying that the prohibitions do not apply to personal communications exempt from regulation under 50 U.S.C. § 1702(b)(1)). Other sanctions regulations, by contrast, have typically included an exemption for information and informational materials. *See, e.g.*, 31 C.F.R. § 569.205(b) (Syria-Related Sanctions Regulations); 31 C.F.R. § 582.205(b) (Nicaragua Sanctions Regulations).

The Executive Order and Regulations on their face therefore purport to prohibit the international flow of information and informational materials to the extent such transmissions amount to "goods[] or services" provided "to, or for the benefit of" Ms. Bensouda or Mr. Mochochoko. This ban directly implicates Plaintiffs' work. Each Plaintiff has previously transmitted and planned to continue transmitting information and informational materials, such as legal advice and memoranda, legal and technical advice, and documentary evidence, to OTP personnel, including, in some cases, directly to Ms. Bensouda and Mr. Mochochoko. The various written, oral, and other forms of communication that are the heart of Plaintiffs' activities plainly constitute "information or informational materials" that are protected by the First Amendment, *see* Section II.A, *supra*, and that fall within IEEPA's limitation on the regulation of the importation or exportation of "information or informational materials," "regardless of format or medium of transmission" 50 U.S.C. § 1702(b)(3). By prohibiting those activities, the Executive Order and Regulations flout IEEPA's plain text and undermine Congress's efforts to protect First Amendment rights. The

Executive Order and Regulations are therefore *ultra vires* and otherwise unlawful because they directly prohibit acts that are exempt from regulation or prohibition under § 1702(b)(3). Plaintiffs are therefore likely to prevail on their *ultra vires* claim.[10]

Based on OFAC's past regulatory interpretation, Plaintiffs have no reason to believe that OFAC will respect the informational materials limitation in this instance. *See 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 provision"); *HLP*, 561 U.S. at 16 (finding a credible fear in part because "Government ha[d] not argued . . . that plaintiffs will not be prosecuted"). And even if OFAC were to incorporate into the Regulations the language it has used in the context of other regulations acknowledging the informational materials limitation, that crabbed language fails to fully implement the limitation. *See, e.g.,* 50 C.F.R. § 560.210(c)(2) (in the context of the Iranian sanctions regime, excluding from the informational materials limitation, *inter alia*, "information or informational materials not fully created and in existence at the date of the transactions," "business consulting services," and "services to market, produce or co-produce, create, or assist in the creation of information or informational materials"); 31 C.F.R. § 582.205(b)(2) (similar language in the Nicaragua Sanctions Regulations). Indeed, the government has taken the position in the *Open Society* case that the speech of a law professor and other scholars providing training, technical assistance, and presentations on war crimes issues to the OTP, as well as submitting *amicus curiae* briefs in support of OTP's efforts, does not involve the transfer of informational materials because they are "not fully created and in existence at the date of the transaction." *See* Def's Mem. of Law in Opp'n to Pls.' Mot. for a Preliminary Injunction, 20-cv-8121-SDNY, ECF No. 51, at 23-24.

[10] Plaintiffs have a cause of action to seek equitable relief enforcing § 1702(b)(3). *See Open Soc'y*, 2021 WL 22013, at *10 ("[T]he Court may review the challenged Executive Order and the Regulations for their compliance with the statute that purportedly authorizes their issuance."); *see also Sierra Club v. Trump*, 963 F.3d 874, 891 (9th Cir. 2020), *cert. granted*, 2020 WL 6121565 (Mem.) (2020), *removed from argument calendar* Feb. 3, 2021; *Chamber of Com. v. Reich*, 74 F.3d 1322, 1327–28 (D.C. Cir. 1996). In addition, under the APA, the Regulations are unlawful and must be set aside as "not in accordance with law," 5 U.S.C. § 706(2)(A) and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), because they transgress IEEPA's limitation on the regulation of informational materials for the reasons explained above. Plaintiffs are therefore likely to prevail on the merits of their APA claim as well.

III. Plaintiffs, Their Students, Support Staff, and Others Working With Them in Support of the ICC and the OTP Will Be Irreparably Harmed Absent a Preliminary Injunction.

"[T]he loss or threatened infringement upon free speech rights 'for even minimal periods of time[] unquestionably constitutes irreparable injury.'" *Cuviello v. City of Vallejo*, 944 F.3d 816, 832 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Moreover, a plaintiff who "continues to restrain his own speech under the threat" of enforcement is irreparably injured by the "chill" on his First Amendment rights, even if that chill "results from a threat of enforcement rather than actual enforcement" against the plaintiff or others similarly situated. *Id.* at 833. In such cases, "the need for immediate injunctive relief" is "a direct corollary of the matter's great importance.'" *Id.* (quoting *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012)).

The Restrictions here have chilled Plaintiffs' speech by banning their speech that constitutes "services to, or for the benefit of" Ms. Bensouda and Mr. Mochochoko. Each Plaintiff provided speech-based services to or for the benefit of Ms. Bensouda or Mr. Mochochoko, and each planned to continue doing so when the Executive Order, Designations, and Regulations were published. *See* Sadat Decl. ¶ 9; Koenig Decl. ¶ 12; Roht-Arriaza Decl. ¶ 9; Watt Decl. ¶ 11. As noted in Section IV, *supra*, each Plaintiff has abandoned those plans and stopped working with the OTP, thereby "restrain[ing] [their] own speech under the threat," *Cuviello*, 944 F.3d at 833, that IEEPA's severe civil and criminal penalties will be enforced against them pursuant to the Restrictions, which violate the very statute from which they purport to draw their legal basis. These are ongoing injuries, and the chill on Plaintiffs' exercise of their First Amendment rights will continue to harm them, their students, support staff, and others working with them at their respective institutions in support of the ICC and the OTP absent a preliminary injunction against enforcement of the Restrictions.

OFAC's history of aggressively enforcing its sanctions programs is even more concerning to Plaintiffs here given the central role Ms. Bensouda plays within the OTP. Unlike, for example, sanctions imposed on a particular member of a large government bureaucracy, where business might plausibly be transacted with the agency without providing "services to" a sanctioned official, such distinctions are not possible in the present case, as the *Open Society* court already found. *See Open Soc'y*, 2021 WL 22013, at *8 ("Defendants attempt to draw between supporting the Office of the Prosecutor and supporting Ms.

Bensouda is illusory."). And using the Hong Kong sanctions guidance issued by OFAC as an example, Plaintiffs' activities here, even if not undertaken directly at Ms. Bensouda's request or by communicating with her directly, would still constitute transactions "indirectly . . . with an SDN"[11] given that she supervises the OTP and has core non-delegable functions that encompass much of what Plaintiffs' activities are designed to facilitate, including the opening of particular investigations and a determination as to whether to bring charges.

IV. The Balance of Equities and the Public Interest Favor Injunctive Relief.

The Ninth Circuit has "consistently recognized the 'significant public interest' in upholding free speech principles." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (alteration and omission in original) (internal quotation marks omitted) (quoting *Sammartano v. First Jud. Dist. Ct.*, *in & for Cty. of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogation on other grounds recognized by Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020)). In addition, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted) (quoting *Sammartano*, 303 F.3d at 974).

As explained above, Plaintiffs' speech, and the speech of their students, support staff, and others working with them at their respective institutions in support of the ICC and OTP, continue to be unjustifiably chilled by the Restrictions and threat of associated IEEPA penalties.[12] Granting a preliminary injunction would prevent that violation of free speech rights pending a full hearing on the merits. What is

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[11] Office of Foreign Assets Control, *Frequently Asked Questions, Hong Kong-Related Sanctions*, U.S. DEP'T OF THE TREASURY (Sept. 25, 2020), https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/5571

[12] The Ninth Circuit has recognized that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court," *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011), and that broader injunctive relief extending beyond the parties to the action is only appropriate when it is "necessary to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). Here, the chilling effect on Plaintiffs' speech has necessarily extended to the law students that they would place at the OTP or who would conduct legal research for the OTP were it not for the Restrictions, as well as to the support staff and others working with Plaintiffs at their respective institutions in support of the ICC and the OTP. An appropriately tailored injunctive remedy would necessarily permit these students, staff, and colleagues to also continue to engage in this protected speech without fear of penalties, and therefore a modest expansion of the scope of injunctive relief beyond Plaintiffs is justified under these circumstances.

more, such an order would pose no hardship for the government, which lacks any interest in enforcing unconstitutional or *ultra vires* prohibitions. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("[B]y establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction."); *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) ("[The Government] cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns.").

To the extent that the government has an interest in preventing investigation or prosecution of certain U.S. or allied military personnel, it cannot demonstrate that these interests would be harmed by a preliminary injunction. The two investigations of concern to the government are either on hold or in their infancy. In contrast to the government's stated interest, which is distant and unlikely to manifest until well into the future, if at all, the injury to the Plaintiffs is acute and ongoing.

The balance of the equities and the public interest therefore favor granting preliminary injunctive relief.

CONCLUSION

For these reasons, the Court should grant Plaintiffs' motion for a preliminary injunction and enjoin Defendants from implementing or enforcing the Restrictions against Plaintiffs, their students, support staff, and others working with them at their respective institutions in support of the ICC and the OTP.

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Respectfully submitted,

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