UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, and CENTER FOR CONSTITUTIONAL RIGHTS, Plaintiffs, v. TIMOTHY F. GEITHNER, in his official capacity as Secretary of the Treasury, and ADAM J. SZUBIN, in his official capacity as Director of the Office of Foreign Assets Control, Defendants.	No.

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

This case challenges the legality of a regulatory scheme that requires attorneys to seek permission from the government before providing uncompensated legal representation to or for the benefit of individuals whom the government has designated as terrorists. In this case, the effect of the scheme may be to deny legal representation to a United States citizen whom the government is attempting to kill without any legal process.

On July 7, 2010, Plaintiffs American Civil Liberties Union Foundation (ACLU) and the Center for Constitutional Rights (CCR) were retained by Nasser al-Aulaqi to provide uncompensated legal representation in connection with the government's reported decision to add his son, U.S. citizen Anwar al-Aulaqi, to its list of suspected terrorists approved for "targeted killing." According to published reports, Anwar al-Aulaqi has already been the target of several unsuccessful drone strikes, and both the CIA and the U.S. military are actively attempting to kill him.

Many months after the government had made clear its intention to kill Anwar al-Aulaqi, it undertook to freeze his assets. On July 16, 2010, the Office of Foreign Asset Control (OFAC), a division of the Department of the Treasury, labeled Mr. Aulaqi a "Specially Designated Global Terrorist" (SDGT). As a consequence of that designation and regulations promulgated by OFAC, Mr. Aulaqi's assets have been blocked, and U.S. persons are generally prohibited from engaging in any transactions with him or for his benefit under threat of criminal sanction. OFAC's regulations make it illegal for attorneys to provide "legal services" to or for the benefit of a blocked individual in Aulaqi's circumstances without a license from OFAC. Unless the government grants the

ACLU and CCR a specific license, OFAC's regulations make it a criminal offense for ACLU and CCR attorneys to file a lawsuit on Mr. Aulaqi's father's behalf seeking to protect the constitutional rights of his U.S. citizen son. In other words, under the regulations at issue in this case, the same government that is seeking to kill Anwar al-Aulaqi has prohibited attorneys from contesting the legality of the government's decision to use lethal force against him.

Pursuant to this regulatory scheme, on July 23, 2010 Plaintiffs ACLU and CCR submitted to OFAC an application for a license to provide uncompensated legal representation to Nasser al-Aulaqi as representative of the interests of his son, Anwar al-Aulaqi, who remains in hiding. Plaintiffs emphasized that the application was extremely urgent because of the nature of the action planned by the government against Mr. Aulaqi, and they requested that the license be issued immediately. Nonetheless, more than ten days have now elapsed, and defendants have not granted the requested license.

Plaintiffs bring this action challenging the legality and constitutionality of the regulatory and licensing scheme as applied to attorneys seeking to provide uncompensated legal representation. As an initial matter, OFAC has exceeded its statutory authority by promulgating regulations that purport to prohibit a U.S. citizen or a person acting on his behalf or in his interest from retaining even uncompensated lawyers to assert legal rights; no plausible reading of the relevant statute evinces a congressional intent to regulate non-economic activity of this nature. Even if this Court were to conclude that the regulations at issue are not *ultra vires*, those regulations are unconstitutional insofar as they condition the provision of uncompensated legal services on the acquiescence of the very government that the designated citizen and his attorneys

are seeking to sue. As non-profit organizations dedicated to protecting civil and human rights and civil liberties, Plaintiffs have a First Amendment right to represent clients in litigation consistent with their organizational missions. Even if OFAC could constitutionally regulate this activity, the licensing scheme established by its regulations is unconstitutional because it fails to provide procedural safeguards against abuse and invests executive officers with unbridled discretion to suppress activity that is protected by the First Amendment. By allowing the government to deprive a U.S. citizen of the ability to obtain representation in litigation against the United States in U.S. courts, the regulations also violate due process and the separation of powers.

Plaintiffs seek a declaration from this Court that the regulations at issue in this case are unlawful, and that, accordingly, Plaintiffs may proceed with their uncompensated legal representation of Nasser al-Aulaqi without a specific license from OFAC. Alternatively, Plaintiffs seek an injunction directing the government to grant the specific license that Plaintiffs have sought.[1]

Legal Framework

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706, grants to the President certain authorities that "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been

[1] Because the government has granted and continues to grant licenses to U.S. lawyers representing designated terrorists in legal proceedings of various sorts, Plaintiffs are proceeding under the assumption that the representation described in their license application would not violate any other statute or regulation. If the government believes otherwise, it should say so explicitly so that Plaintiffs can amend their complaint accordingly to seek appropriate relief. All parties in this litigation have a clear and obvious interest in knowing what the rules are.

declared." *Id*. § 1701(b). Those authorities include the authority to, "by means of instructions, licenses, or otherwise,"

> 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). It is unlawful for a person to violate any license, order, regulation, or prohibition issued under IEEPA. *Id*. § 1705(b) (civil penalties); *id*. § 1705(c) (criminal penalties).

On Sept. 23, 2001, President Bush issued an executive order declaring a national emergency relating to the Sept. 11 terrorist attacks and the "continuing and immediate threat of further attack." Exec. Order No. 13,224, 66 Fed. Reg. 49079 (Sept. 23, 2001). Invoking the authority granted by IEEPA, the order "blocked" the property of:

> (a) foreign persons listed in the Annex to this order;
>
> (b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;
>
> (c) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order;
>
> (d) except as provided in section 5 of this order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General;
>
> > (i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of

> terrorism or those persons listed in the Annex to this order or determined to be subject to this order; or
>
> (ii) to be otherwise associated with those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order.

Id. § 1. Persons whose property has been blocked pursuant to Executive Order 13,224 are known as Specially Designated Global Terrorists (SDGTs).

The Office of Foreign Assets Control has promulgated regulations to implement Executive Order 13,224. 31 C.F.R. §§ 594.101-594.901. The regulations generally bar U.S. persons from engaging in transactions with SDGTs. *Id*. § 594.204 ("Except as otherwise authorized, no U.S. person may engage in any transaction or dealing in property or interests in property of persons whose property or interests in property are blocked . . ., including . . . the making or receiving of any contribution of funds, goods, or services to or for the benefit of persons whose property or interests in property are blocked . . . ."); *see also id*. § 594.206. However, the regulations provide a general license for the provision of certain legal services:

> The provision of the following legal services to or on behalf of persons whose property or interests in property are blocked pursuant to § 594.201(a) is authorized, provided that all receipts of payment of professional fees and reimbursement of incurred expenses must be specifically licensed:
>
> > (1) Provision of legal advice and counseling on the requirements of and compliance with the laws of any jurisdiction within the United States, provided that such advice and counseling are not provided to facilitate transactions in violation of this part;
> >
> > (2) Representation of persons when named as defendants in or otherwise made parties to domestic U.S. legal, arbitration, or administrative proceedings;
> >
> > (3) Initiation and conduct of domestic U.S. legal, arbitration, or administrative proceedings subject to U.S. jurisdiction;

> (4) Representation of persons before any federal or state agency with respect to the imposition, administration, or enforcement of U.S. sanctions against such persons;
>
> (5) Representation of persons, wherever located, detained within the jurisdiction of the United States or by the United States government, with respect to either such detention or any charges made against such persons, including, but not limited to, the conduct of military commission prosecutions and the initiation and conduct of federal court proceedings; and
>
> (6) Provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense.

Id. § 594.506(a).

The same provision, however, states that "The provision of any other legal services to persons whose property or interests in property are blocked pursuant to § 594.201(a), not otherwise authorized in this part, requires the issuance of a specific license." *Id*. § 594.506(b). The provision relating to specific licenses states, in relevant part:

> (1) General course of procedure. Transactions subject to the prohibitions contained in this chapter, or to prohibitions the implementation and administration of which have been delegated to the Director of the Office of Foreign Assets Control, which are not authorized by general license may be effected only under specific licenses.
>
> . . .
>
> (3) Information to be supplied. The applicant must supply all information specified by relevant instructions and/or forms, and must fully disclose the names of all parties who are concerned with or interested in the proposed transaction. If the application is filed by an agent, the agent must disclose the name of his principal(s). . . . Applicants may be required to furnish such further information as is deemed necessary to a proper determination by the Office of Foreign Assets Control. Any applicant or other party in interest desiring to present additional information may do so at any time before or after decision. Arrangements for oral presentation should be made with the Office of Foreign Assets Control.
>
> (4) Effect of denial. The denial of a license does not preclude the reopening of an application or the filing of a further application. The applicant or any other party

> in interest may at any time request explanation of the reasons for a denial by correspondence or personal interview.
>
> (5) Reports under specific licenses. As a condition for the issuance of any license, the licensee may be required to file reports with respect to the transaction covered by the license, in such form and at such times and places as may be prescribed in the license or otherwise.
>
> (6) Issuance of license. Licenses will be issued by the Office of Foreign Assets Control acting on behalf of the Secretary of the Treasury or licenses may be issued by the Secretary of the Treasury acting directly or through any specifically designated person, agency, or instrumentality.

31 C.F.R. § 501.801(b).

Factual Background

In January of 2010, the Los Angeles Times reported that the CIA was considering placing U.S. citizen Anwar al-Aulaqi on its list of suspected terrorists targeted for assassination. The same article reported that Aulaqi had already been placed on a corresponding U.S. military list and had been the target of an unsuccessful drone strike in December of 2009. In April of 2010, the New York Times confirmed that the U.S. government had taken the "extremely rare, if not unprecedented" step "of authorizing the targeted killing of an American citizen," Mr. Aulaqi. Numerous subsequent reports have corroborated that the United States has approved the use of lethal force against Mr. Aulaqi without criminal charge or trial.

Many months after the government had made clear its intention to kill Anwar al-Aulaqi, it undertook to freeze his assets. On July 16, 2010, the Office of Foreign Asset Control (OFAC), a division of the Department of the Treasury, labeled Mr. Aulaqi a "Specially Designated Global Terrorist" (SDGT). As a consequence of that designation and regulations promulgated by OFAC, Mr. Aulaqi's assets have been blocked, and U.S. persons are generally prohibited from engaging in any transactions with him under threat

of criminal sanction. OFAC's regulations make it illegal for attorneys to provide "legal services" to a blocked individual in Aulaqi's circumstances unless they first obtain a license from OFAC.

On July 23, 2010 Plaintiffs ACLU and CCR submitted to OFAC an application for a license to provide uncompensated legal representation to Nasser al-Aulaqi as representative of the interests of his son, Anwar al-Aulaqi, who remains in hiding. Plaintiffs emphasized that the application was extremely urgent because of the nature of the action planned by the government against Anwar al-Aulaqi, and they requested that the license be issued immediately. OFAC has not responded to Plaintiffs' application.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction and temporary restraining order because (1) they have "a substantial likelihood of success on the merits"; (2) they and their would-be client "would suffer irreparable injury were an injunction not granted"; (3) an injunction would not "substantially injure other interested parties" and the balance of equities tip in Plaintiffs' favor; and (4) "the grant of an injunction would further the public interest." *Ark. Dairy Coop. Ass'n v. U. S. Dep't of Agric.*, 573 F.3d 815, 821 (D.C. Cir. 2009). Although plaintiffs must "demonstrate that irreparable injury is likely in the absence of an injunction," *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 375 (2008) "[t]hese factors interrelate on a sliding scale and must be balanced against each other." *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 360-61 (D.C. Cir. 1999); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 12 (D.D.C. 2009) (holding that the "D.C. Circuit's sliding-scale standard remains viable even in light of the decision in *Winter*"). Plaintiffs seeking such relief must show

merely that "all four factors, taken together, weigh in favor of the injunction." *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). As such, "[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 747 (D.C. Cir. 1995)); *see also Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) ("Injunctive relief may be granted with either a high likelihood of success and some injury, or *vice versa.*" (citation omitted)). These same standards apply to both temporary restraining orders and preliminary injunctions. *Hall v. Johnson*, 599 F. Supp. 2d 1, 3 n.2 (D.D.C. 2009).

Plaintiffs meet the threshold necessary for a temporary restraining order and preliminary injunction. Plaintiffs' arguments against the requirement for a license to engage in the representation of a particular client are exceedingly strong. Plaintiffs – along with the U.S. citizen whose interests they are being prevented from representing – would suffer the most significant possible irreparable harm if they were not permitted to challenge the legality of the government's plan to deprive Mr. Al Aulaqi of life without due process. Furthermore, Defendants and other interested persons will not suffer any injury as a result of an order permitting Plaintiffs merely to represent Mr. Aulaqi's interests in federal court. Finally, the public interest strongly favors permitting U.S. citizens to raise constitutional questions in court through counsel, especially on issues as momentous as the executive's power to kill citizens without trial or any other legal process outside of the battlefield context.

A. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS WILL PREVAIL ON THE MERITS.

Plaintiffs have several exceptionally strong arguments in support of their contention that OFAC lacks authority to require that they obtain a license before providing legal services for the benefit of a designated U.S. citizen or, in the alternative, that OFAC is obligated to grant them a license in this case. Yet the Plaintiffs need show only a "reasonable probability of success." *Delaware & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 619 (D.C. Cir. 1971). *See also Comm. on the Judiciary v. Miers*, 575 F. Supp. 2d 201, 203 (D.D.C. 2008) ("[T]he D.C. Circuit has explained that the 'substantial likelihood of success' prong does not necessarily imply that a party needs to demonstrate a 50% chance or better of prevailing on appeal. . . . [T]he moving party can satisfy that element by raising a 'serious legal question . . . whether or not [the] movant has shown a mathematical probability of success.'") (quoting *Wash. Metropo. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). In light of the following arguments, Plaintiffs have no trouble satisfying this standard.

1. The SDGT regulations are *ultra vires* insofar as they regulate attorneys' provision of uncompensated legal representation.

IEEPA empowers the President to regulate economic activity of designated entities. It was enacted in 1977 with the "purpose of . . . revis[ing] and delimit[ing] the President's authority to regulate international economic transactions" in order to "grant authority to the President to regulate certain categories of international economic transactions during future national emergencies," S. Rep. 95-466, 1977 U.S.C.C.A.N. 4540, 4541, 4543.

The statute's exclusive focus on economic transactions is plainly reflected in its text. The operative provision permits the President to regulate a foreign national's "property" – or to regulate any kind of "use, transfer . . . or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving" that property. 50 U.S.C. § 1702(a)(1)(B). The scope of the authority granted by the statute thus hinges on what amounts to "property." No court has ever interpreted "property" so broadly as to permit the government to regulate non-economic activity of this type, and certainly no court has interpreted it so broadly as to encompass uncompensated legal services.

Indeed, the D.C. Circuit has already held that the power to block "property" does not include the power to prohibit or license legal representation. In *American Airways Charter, Inc. v. Regan*, OFAC sought to use its authority over "property" to require a lawyer to obtain a license before representing a blocked Cuban corporation. 746 F.2d 865 (D.C. Cir. 1984). The court emphatically rejected the asserted authority: "The government agency charged with control over a corporation's external transactions . . . appears here to seek as well to stifle any voice the corporation might wish to raise before the courts in protest. We doubt that such an attempt is worthy of our great government. We find no congressional authorization for it." *Id.* at 876 (internal quotations omitted). Specifically, the Court held that "the bare formation of an attorney-client relationship lie[s] outside the reach of the Act and its implementing regulations," *id.* at 871-72, and that the blocked corporation's lawyer was permitted to represent it without a license. While the Court made clear that *payments* to counsel might require OFAC approval, *id*. at 875, its holding – and its reasoning – clearly establish that OFAC's authority to regulate

"property" does not extend to preventing an uncompensated lawyer from raising legal claims on behalf of a blocked entity.

While *AAC v. Regan* was decided under section 5(b) of the Trading With the Enemy Act (TWEA), 12 U.S.C. § 95a(1)(B), that provision is identical in substance to the provision at issue here, section 203 of IEEPA, 50 U.S.C. § 1702(a)(1)(B). *See Regan v. Wald*, 468 U.S. 222, 228 (1984) ("The authorities granted to the President by § 203 of IEEPA are essentially the same as those in § 5(b) of TWEA"). Indeed, IEEPA was enacted in order to regulate the circumstances in which the President could invoke the powers under section 5(b) of TWEA outside the context of war. *See id.*; S. Rep. 95-466, 1977 U.S.C.C.A.N. at 4541-42. Nothing in the text or history of IEEPA suggests any reason why it should be regarded as granting authority to regulate legal representation as a species of "property" while the identical provision of TWEA has been held not to grant such authority.

AAC v. Regan's reasoning in support of its holding applies with equal force to the lawyer-licensing regulations at issue in this case. First, the *AAC* court noted that the statute's "catch-all reference to 'property'" was inserted by a Congress "immediately concerned with . . . more obvious forms of property" and that Congress "never explicitly contemplated the specific application of TWEA authority" to require the licensing of attorneys who represent blocked entities. 746 F.2d at 871 (discussing the legislative history of TWEA).

Second, regulating attorney-client relationships does not serve the purposes of IEEPA, which are "exclusively economic." *Id.* at 872 ("It is doubtful whether any of the exclusively economic purposes legitimately served by the Act would be advanced by

upholding OFAC's novel position" regarding the licensing of attorneys.). As the *AAC* court observed, "[a]n interpretation of TWEA [and the relevant regulations] with an eye to 'the congressional policies behind the act' . . . offers scant support for OFAC's newly-minted claim of authority to preview, and then permit or restrain, a designated national's choice of counsel." *Id.* at 872. Indeed, the rights that Plaintiffs seek to assert on behalf of Aulaqi – the right of a citizen not to be killed in violation of due process – have nothing to do with property or economic activity whatsoever.[2]

The Supreme Court's decision in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), also indicates that IEEPA did not grant the authority to issue regulations that might prevent individuals from making claims in court through counsel. At issue in that case were lawsuits in U.S. courts against the government of Iran. While the Court held that IEEPA granted the President the power to nullify attachments that had been obtained in the course of such litigation, the Court rejected the notion that IEEPA conferred the authority to stop the lawsuits outright. *See Dames & Moore*, 453 U.S. at 675 ("The terms of the IEEPA…do not authorize the President to suspend claims in American courts."). If IEEPA does not authorize the President to block lawsuits that seek recovery out of frozen property, it would be remarkable if IEEPA were interpreted to authorize the President to block a lawsuit seeking to vindicate constitutional rights unrelated to any property at all.

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[2] *AAC v. Regan* was decided 26 years ago, seven years after IEEPA was enacted in 1977. Congress has since amended both IEEPA and TWEA several times. *See* Pub. L. No. 107-56, tit. I, § 106, 115 Stat. 277 (Oct. 26, 2001); Pub. L. No. 103-236, tit. V, § 525, 108 Stat. 474 (Apr. 30, 1994); Pub. L. No. 100-418, tit. II, § 2502, 102 Stat. 1371 (Aug. 23, 1988). That Congress has reconsidered these statutes but never expanded the definition of "property" or otherwise attempted legislatively to reverse the court of appeals' holding in *AAC v. Regan* provides further evidence that the Court's limited interpretation of the authority granted by Congress to regulate "property" is correct.

If there remained any doubt that OFAC's regulations far outstrip the authority granted to it by statute, those doubts must be settled in Plaintiffs' favor because a ruling to the contrary would raise exceptionally serious constitutional concerns. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). As the court of appeals recognized in *AAC*, individuals have a right under the First Amendment and the Due Process Clause to associate with counsel and to be represented by counsel in court. *See AAC v. Regan*, 746 F.2d at 873 ("[I]n our complex, highly adversarial legal system, an individual . . . may in fact be denied the most fundamental elements of justice without prompt access to counsel."); *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) ("[W]hile private parties must ordinarily pay their own legal fees, *they have an undeniable right to retain counsel to ascertain their legal rights*.") (emphasis added); *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000) ("The right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association, and petition."); *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 945 (5th Cir. 1981) ("The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process."), *cert. denied* 452 U.S. 906 (1981); *Jacobs v. Schiffer*, 47 F. Supp. 2d 16, 22 (D.D.C. 1999) (agency rule that could result in government employees "be[ing]

deprived of legal counsel for months or years" pending agency approval violated the First Amendment).

The Constitution also protects the right of advocacy organizations to solicit and represent clients in *pro bono* litigation consistent with their organizational missions. *See NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978). Both the ACLU and CCR fall squarely within this First Amendment protection. *See infra* section A.2.

In addition, OFAC's regulations also raise exceptionally serious separation-of-powers issues. Because a lawsuit cannot be filed for the benefit of Mr. Aulaqi without an OFAC license, OFAC's regulations have the effect of giving the executive branch effective veto power over a citizen's right to go to court to challenge executive branch conduct. The notion that the government can compel a citizen to seek its permission before challenging the constitutionality of its actions in court is wholly foreign to our constitutional system. The Supreme Court has consistently reiterated a "well-settled presumption favoring interpretation of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 480 (1991); s*ee also INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001) (emphasizing "the strong presumption in favor of judicial review of administrative action" and holding that Congress "must articulate specific and unambiguous statutory directives" in order to repeal federal court jurisdiction). In this case, OFAC's restrictions are particularly

severe: they prevent designated individuals, including Mr. Aulaqi, from vindicating their rights in court without the express permission of the U.S. government.[3]

For these reasons, IEEPA cannot be interpreted to have granted OFAC the authority to require uncompensated legal counsel to obtain a license before representing blocked individuals. The lawyer-licensing scheme must therefore be held unlawful and set aside.[4]

2. The regulatory regime imposes an unconstitutional burden on the right of attorneys to provide uncompensated legal representation.

As non-profit organizations dedicated to protecting civil liberties and human rights, Plaintiffs have a First Amendment right to represent clients in litigation consistent with their organizational missions. Burdens on this right are evaluated under strict scrutiny, a review that the regulatory scheme at issue here cannot survive. The Court should invalidate the regulatory regime as applied to Plaintiffs' provision of uncompensated legal services.

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[3] OFAC's regulations are also arbitrary and capricious insofar as they require government permission for a constitutional lawsuit in defense of life, while extending a general license to lawsuits "in defense of property interests. . . ." 31 C.F.R. § 594.201(a).

[4] More fundamentally, Plaintiffs do not believe that IEEPA gives the executive the authority to designate a U.S. citizen, thereby freezing all of that citizen's property and criminalizing transactions with him. The statute grants the President sweeping authority over "property in which *any foreign country or a national thereof* has any interest." 50 U.S.C. § 1702(a)(1)(B) (emphasis added). But the effect of freezing a U.S. citizen's property is to block *all* of his property, not only property in which a foreign country or national has an interest. The statute does not grant this authority, and interpreting it to do so would raise serious questions under the Due Process clause. Ultimately, however, this case does not require the court to address the question whether IEEPA grants the executive the authority to designate U.S. persons as SDGTs. The court can simply hold, on the narrow grounds discussed above, that OFAC has no authority to license uncompensated legal services.

The right of non-profit advocacy organizations to solicit, advise, and represent clients is an aspect of the freedom of association protected by the First Amendment. Thus, in *NAACP v. Button*, 371 U.S. 415 (1963), the Supreme Court invalidated a statute prohibiting the "improper solicitation of any legal or professional business" as applied to the NAACP because the statute "broadly curtail[ed] group activity leading to litigation." *Id*. at 436. The Court wrote: "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id*. at 429. The Court expressly recognized that public interest litigation was a "form of political expression." *Id*.

The Court reaffirmed this holding in *In re Primus*, 436 U.S. 412 (1978). In that case, the Court held that the First Amendment prohibited the State of South Carolina from punishing a member of its Bar for advising a person of her legal rights and offering free legal assistance from the ACLU. The Court reasoned that "[t]he First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance.'" *Id.* at 431-32 (quoting *Button*, 371 U.S. at 434, 437) (internal citations omitted). The Court noted: "[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *Id*. at 431 (emphasis added).

Together, "*Button* and *Primus* undeniably stand for the proposition that a right of access to the courts is guaranteed to those who seek to engage in litigation as a form of

political expression." *Charles v. Daley*, 846 F.2d 1057, 1075 (7th Cir. 1988); *cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (holding that certain government restrictions on funding for Legal Services Corporation were unconstitutional under the First Amendment because, in part, "[t]he Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge").

The proposed representation falls squarely within the right recognized by *Button* and *Primus*. Both the ACLU and CCR are engaged in a broad range of advocacy on issues of civil liberties and human rights, and their litigation activities are an extension of this advocacy. *Cf. Primus,* 436 U.S. at 428 ("For the ACLU, as for the NAACP, 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association.'"); *id* at 427-28 (noting that the ACLU "only enter[s] cases in which substantial civil liberties questions are involved," often "engag[ing] in the defense of unpopular causes and unpopular defendants and . . . represent[ing] individuals in litigation that has defined the scope of constitutional protection in [many] areas"). The advocacy of the ACLU and CCR concerning the targeted killing program in particular stems from grave concerns about the program's implications for civil liberties and human rights. *See, e.g.*, Letter to President Barack Obama from Anthony Romero, Executive Director of the ACLU (Apr. 28, 2010)[5] (urging President Obama to reconsider his targeted killing policy); ACLU, *Urge President*

[5] Available at http://www.aclu.org/human-rights-national-security/letter-president-obama-regarding-targeted-killings.

Obama to Reject the Policy of Targeted Killings Outside Zones of Actual Armed Conflict (asking the public to send the President a letter opposing his targeted killing policy).[6]

The regulatory regime at issue here imposes a substantial – and in some cases fatal – burden on Plaintiffs' First Amendment rights. Before advising or engaging in litigation for the benefit of anyone whom Defendants have designated an SDGT, Plaintiffs must apply to the same defendants for a license. Defendants are invested with the power to grant the license, to ignore it (as they have done thus far with the license application that is the subject of this litigation), or to deny it altogether. If they grant the license, they retain the power to rescind or modify it at any time. If Plaintiffs choose to represent SDGTs without a license they are subject to civil and criminal penalties. Because the Secretary of the Treasury reports to, and serves at the pleasure of, the President, the regulatory regime at issue here conditions Plaintiffs' uncompensated representation of a U.S. citizen on the acquiescence of the very officials whose practices Plaintiffs seek to challenge, and it does so under threat of severe penalties.

Because the regulatory regime at issue here burdens Plaintiffs' First Amendment rights, it is unconstitutional unless narrowly tailored to a compelling government interest. *See Button*, 371 U.S. at 438 ("[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); *id.* at 433 ("Because First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity."). OFAC's regulations cannot survive this scrutiny. The government has no compelling interest in restricting the ability of Plaintiffs and other non-profit legal organizations to

[6] Available at https://secure.aclu.org/site/Advocacy?id=2305.

provide uncompensated legal representation for the benefit of individuals on the SDGT list. Whatever interest the government may have in regulating payments to and from SDGTs simply has no bearing in this context. *Cf. AAC v. Regan*, 746 F.2d 865 at 872 ("OFAC asserts an interest in preserving . . . blocked assets . . . against improper disposition [by a lawyer] or exorbitant claims asserted by him. But counsel for a designated national has no authority to dispose of the designated national's assets; and no fee can be paid counsel absent a separate, and express, authorization from OFAC."). If the regulatory regime is meant to serve the government's interest in regulating economic transactions, the regime is simply not narrowly tailored.[7]

3. The regulatory scheme is an unconstitutional licensing scheme.

The SDGT regulations condition Plaintiffs' exercise of a First Amendment right – the right to offer and provide uncompensated legal representation – on the consent of OFAC. 31 C.F.R. § 594.204 (barring "transaction[s] or dealing in property or interests in property" of SDGTs); *id.* § 594.506 (setting out general license for certain legal services and requiring specific license for other legal services). A scheme that conditions the exercise of First Amendment rights on the consent of executive branch officials is a prior restraint, *see, e.g., Alexander v. United States,* 509 U.S. 544 (1993); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); Erwin Chemersinky, *Constitutional Law Principles and Policies* § 11.2.3.4 (2d ed. 2002) (characterizing licensing schemes as "the classic type of prior restraint"), and is subject to the most searching constitutional review, *see, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70

[7] Even if the scheme itself could survive strict scrutiny, its application in the instant case – to deny Plaintiffs a license to represent a U.S. citizen who is the subject of a pending targeted assassination order – could not. At a minimum, then, the Court should order the government to grant Plaintiffs the license for which they have applied.

(1963) ("any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity"); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Such a scheme can be constitutional only if it (i) provides procedural safeguards to minimize the risk that constitutionally protected activity will be prohibited; and (ii) constrains executive discretion with standards that are narrow, objective, and definite. The scheme at issue here does neither of these things.

i. The regulatory scheme fails to provide procedural safeguards to minimize the risk that constitutionally protected activity will be prohibited.

The Supreme Court's seminal case in this area is *Freedman v. Maryland*, 380 U.S. 51 (1965), which involved the constitutionality of a Maryland statute that made it unlawful to exhibit any motion picture without first obtaining the approval of a state licensing board. In invalidating the licensing scheme, the Court observed that "[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression." *Id.* at 57-58. The Court held that a licensing scheme "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. First, any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained. *Id*. at 58-59. Second, expeditious judicial review of that decision must be available. *Id*. Third, the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Id*. at 58.

The courts have applied the *Freedman* analysis in a variety of contexts. *See, e.g., Blount v. Rizzi*, 400 U.S. 410 (1971) (invalidating statute under which the Postmaster

General, following administrative hearings, could halt use of the mails for commerce in allegedly obscene materials); *Southeastern Promotions, Ltd*., 420 U.S. 546 (invalidating procedures under which directors of a municipal theatre considered applications for use of theatre facility). It is now well settled that "[w]hen the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights – rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521 (1958). In particular, a scheme conditioning the exercise of First Amendment rights on a licensing body's prior approval must afford the "procedural safeguards" described by the Court in *Freedman*. *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002); *see also City of Littleton v. Z.J. Gifts, D-4, L.L.C.*, 541 U.S. 774, 779-80 (2004); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 802 (1988); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971); *Bantam Books*, 372 U.S. at 70.

The regulatory scheme at issue here provides none of the safeguards that *Freedman* requires – indeed it provides no procedural safeguards at all. It specifies no time period within which OFAC must respond to a license application. *Cf*. 31 C.F.R. § 501.802 ("[OFAC] will advise each applicant of the decision respecting filed applications"). If an application is denied – or constructively denied, as in this case – the applicant bears the burden of initiating judicial review, as Plaintiffs have had to do in the instant case. During the pendency of judicial proceedings, activity protected by the First Amendment – the provision of uncompensated legal services by advocacy organizations,

like Plaintiffs – may be suppressed. In short, the regulatory regime fails to provide the procedural safeguards that the Constitution requires.

ii. The regulatory scheme fails to constrain executive discretion with standards that are narrow, objective, and definite.

The regulatory regime is also unconstitutional in these circumstances because it fails to cabin the discretion of OFAC officers. In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the Supreme Court addressed the constitutionality of a Birmingham, Alabama ordinance that allowed city officials to refuse a parade permit if, in their judgment, "the public welfare, peace, safety, health, decency, good order, morals or convenience require[d] that [the permit] be refused." *Id.* at 149-50. The Supreme Court found the ordinance unconstitutional because it "conferred upon [city officials] virtually unbridled and absolute power to prohibit any parade, procession, or demonstration on the city's streets or public ways." *Id* at 150 (internal quotations omitted). The Court wrote,

> [A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without *narrow, objective, and definite standards* to guide the licensing authority, is unconstitutional. It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Id. at 150-151 (emphasis added, internal quotations omitted); *cf. Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (finding that a statute authorizing the Secretary of State to deny passports for travel to Cuba could not be read to "grant the Executive totally unrestricted freedom of choice"); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (finding that the Secretary of State's authority to deny passports to citizens could not constitutionally be construed "to give

him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose").

In *Shuttlesworth*, the Court determined that the challenged law allowed excessive discretion because it permitted prior restraints to be issued upon an executive officer's consideration of such amorphous criteria as "decency," "good order," and "morals." *Shuttlesworth*, 394 U.S. at 156-58. Since *Shuttlesworth*, the courts have consistently invalidated licensing schemes that invest executive agents with unfettered discretion to permit or prohibit First Amendment activity. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 769 (1988) (invalidating ordinance that invested Mayor with discretion to deny licenses on the basis of any condition that he "deemed necessary"); *MacDonald v. Safir*, 206 F.3d 183, 192 (2d Cir. 2000) (finding constitutionally problematic a regulation that allowed city official to deny a parade permit if he believed parade would be "disorderly in character or tend to disturb the public peace"). In a relatively recent case, the Supreme Court held that "if [a] permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion . . . by the licensing authority, the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted." *Forsyth County*, 505 U.S. at 131 (internal quotations omitted).

The regulatory regime at issue here does not constrain the discretion of OFAC – let alone with narrow, objective, and definite standards. In fact the regulatory regime sets out no standards at all to govern OFAC's consideration of license applications. Nothing in the statute, the Executive Order, or the SDGT regulations forecloses OFAC from granting licenses to favored attorneys and denying them to disfavored ones; from

responding expeditiously to favored attorneys and leisurely to disfavored ones; or from granting licenses in run-of-the-mill cases but denying them in politically controversial ones. And nothing prevents the government from using the licensing scheme as a means of insulating its own policies and conduct from judicial review. The regulatory regime violates the First Amendment by investing OFAC with unbridled discretion.

B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM DURING THE PENDENCY OF THE ACTION.

OFAC's regulations are preventing Plaintiffs from providing legal services for the benefit of a U.S. citizen against the government's decision to kill him without due process. The regulations deprive Plaintiffs of their First Amendment right to represent and litigate on behalf of individuals in furtherance of their organizations' missions.

Plaintiffs who demonstrate a threatened deprivation of a constitutional right "unquestionably" meet the irreparable injury standard. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); Charles Alan Wrights & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). The D.C. Circuit has held that irreparable injury is shown where "the party seeking [the injunction] can demonstrate that First Amendment interests are either threatened or in fact being impaired at the time relief is sought." *Nat'l Treasury Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (internal quotations and alterations omitted); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299-304 (D.C. Cir. 2006). Because Plaintiffs

are being prevented from exercising their First Amendment right to represent and litigate on behalf of clients as part of their advocacy on issues of targeted killing, executive impunity, and secrecy, they plainly are suffering an irreparable constitutional harm.

That injury is magnified by the nature of the legal services Plaintiffs seek to provide; it is possible that those legal services are all that stand between a U.S. citizen and his extrajudicial death at the hands of his government. It is well settled that death is precisely the type of irreparable harm that preliminary injunctions are designed to prevent. *See, e.g., Wilson v. Group Hospitalization & Med. Servs., Inc.*, 791 F. Supp. 309, 313-314 (D.D.C. 1992) (finding irreparable injury where, absent injunctive relief preventing denial of medical benefits, plaintiff "would have died within months"); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (holding that "pain, infection, amputation, medical complications, and death" constitute irreparable harm).

In the absence of preliminary injunctive relief, Plaintiffs will suffer an immediate injury by being prevented from fulfilling their core mandates: to challenge, in the courts and other fora, government conduct that violates the Constitution. Even if Plaintiffs' constitutional challenge is ultimately unsuccessful, Plaintiffs suffer irreparable harm by being prevented from bringing the issue to the courts for adjudication, and thereby foregoing perhaps the most powerful advocacy tool available to them.

C. DEFENDANTS WILL NOT SUFFER SUBSTANTIAL HARM – OR INDEED ANY COGNIZABLE HARM – FROM THE ISSUANCE OF AN INJUNCTION.

An injunction issued by this Court permitting Plaintiffs to bring litigation on Mr. Aulaqi's behalf would not substantially harm Defendants or anyone else. There is no precedent for the proposition that the government is "harmed" by the initiation of legal

proceedings by a citizen-Plaintiff represented by counsel. Indeed, the notion that this could constitute a cognizable harm at all runs contrary to the most basic elements of our legal system and must be emphatically rejected. *See AAC v. Regan*, 746 F.2d at 872-73 ("[I]n our highly complex, adversarial legal system, an individual . . . may in fact be denied the most fundamental elements of justice without prompt access to counsel."); *Martin v. Lauer*, 686 F.2d at 32 ("[W]hile private parties must ordinarily pay their own legal fees, *they have an undeniable right to retain counsel to ascertain their legal rights*.") (emphasis added); *see also Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'"). If the relief Plaintiffs seek is granted, the government will have every opportunity to present its legal position in court.

D. THE PUBLIC INTEREST WILL BE SERVED BY THE ISSUANCE OF THE REQUESTED ORDER.

The public has a compelling interest in ensuring that its government abides by the Constitution, the laws of the United States, and international law, and that citizens are able to go to court, assisted by counsel, to assert their basic legal rights. The legal challenge that Plaintiffs are prevented from bringing would therefore undoubtedly "further the public interest." *Ark. Dairy Coop. Ass'n*, 573 F.3d at 821.

The courts in this Circuit have repeatedly ruled that the public interest is served when a preliminary injunction seeks to uphold constitutional protections. *See, e.g., Kotz v. Lappin*, 515 F. Supp. 2d 143, 152 (D.D.C. 2007) ("The public certainly has an interest in the judiciary intervening when prisoners raise allegations of constitutional violations." (citing *Rhodes v. Chapman*, 452 U.S. 337, 362 (1981)); *Seretse-Khama v. Ashcroft*, 215

F. Supp. 2d 37, 54 (D.D.C. 2002) (public interest served by release of detainee where "continued indefinite detention [would] pose[] serious constitutional risks"); *Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 363 (D.D.C. 1996) (public interest served by upholding the Constitution); *see also O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) ("[I]ssuance of a preliminary injunction would serve the public's interest in maintaining a system of laws free of unconstitutional racial classifications."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to protect the violation of a party's constitutional rights."). This same consideration applies to ensuring that government actors abide by the law generally. *See, e.g., N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (noting "the general public interest served by agencies' compliance with the law" in context of preliminary inunctions).

Claims of "national security" do not override these core legal principles. *See, e.g., Al-Marri v. Bush*, No. 04-2035, 2005 WL 774843, *6 (D.D.C. Apr. 4, 2005) ("The Government responds that the requested relief would be contrary to the public interest, because it could frustrate the Government's ability to conduct foreign policy, which ultimately could harm the nation by impairing the effectiveness of the war on terrorism. The Government's argument is unpersuasive, however, for it 'simply conflate[s] the public interest with [the Government's] own position' . . . . In contrast, the public interest undeniably is served by ensuring that [Guantanamo detainees'] constitutional rights can be adjudicated in an appropriate manner." (citations omitted)). Any purported national security interest the government may allege – and it is difficult to see how

responding to a lawsuit in our nation's courts could implicate any national security interests – is far outweighed by the dangers of allowing Defendants to carry out targeted killings of citizens on the basis of secret criteria, insulated from any kind of judicial review.

Respectfully submitted,

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