Andrew Boyle*
Brennan Center for Justice
1140 Connecticut Ave., NW
Suite 1150
Washington, D.C. 20036
(202) 280-4524
boylea@brennan.law.nyu.edu
* *Admission pro hac vice pending*

Counsel for Amicus Curiae
Brennan Center for Justice

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

JOSEPH R. BIDEN, 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 GARLAND, in his official capacity as U.S. Attorney General; U.S. DEPARTMENT OF TREASURY OFFICE OF FOREIGN ASSETS CONTROL; BRADLEY T. SMITH, in his official capacity as Acting Director of the Office of Foreign Assets Control;

Defendants.

Civil Case No. 3:21-cv-00416-CRB

BRIEF *AMICUS CURIAE* OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: May 13, 2021
Time: 10:00 a.m.
Location: Courtroom 6 – 17th Floor
Judge: Hon. Charles R. Breyer

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INTERESTS OF AMICUS[1]

Amicus curiae the Brennan Center for Justice at NYU School of Law ("Brennan Center") is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. The Brennan Center's interest in this case stems from its research and advocacy on various types of emergency powers, including the statutory emergency powers—such as the International Emergency Economic Powers Act—that fall within the purview of the National Emergencies Act of 1976. Based on the expertise we have acquired in this area, we seek to provide the Court with important background and context for the laws Defendants have invoked in Executive Order 13928, "Blocking Property of Certain Persons Associated with the International Criminal Court," and under which Defendants have designated International Criminal Court staff members. Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

INTRODUCTION

Emergency powers, by design, distort the normal functioning of a democracy. They are a license that the legislature gives to the president so that he or she may act rapidly, and in ways that ordinarily would not be authorized, to confront situations that "present[] an imminent threat requiring immediate response." *Regan v. Wald*, 468 U.S. 222, 246 (1984) (Blackmun, J., dissenting). But because they swell the power of the executive beyond what Congress considers appropriate in normal times, they are tempting even in the absence of an emergency to presidents

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation and submission of this brief.

who chafe at constraints. "[E]mergency powers . . . tend to kindle emergencies." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

In Executive Order 13928, "Blocking Property of Certain Persons Associated with the International Criminal Court," President Trump declared a national emergency pursuant to the National Emergencies Act of 1976 (NEA), Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. § 1601-1651), and stated that the International Criminal Court (ICC) poses "an unusual and extraordinary threat to the national security and foreign policy of the United States" pursuant to the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. § 1701 *et seq.*). Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020). Relying on IEEPA's powers, the executive order establishes a sanctions regime targeted at foreign natural or corporate persons working at or with the ICC. The order blocks, or freezes, the property of persons designated under the order. It also prohibits, under penalty of substantial civil fines and criminal prosecution, transactions by U.S. persons with those designated. Specifically, the order prohibits "any contribution or provision of funds, goods, or services by, to, or for the benefit of" persons designated under the order.

IEEPA sanctions are no mere inconvenience. IEEPA's predecessor statute, the Trading With the Enemy Act, Pub. L. No. 65-91, ch. 106 § 5(b)(1), 40 Stat. 415 (1917) (codified as amended at 50 U.S.C. § 4301 *et seq.*), was (and is) a tool of economic warfare that originated in the midst of World War I. Christopher A. Casey et al., Cong. Research Serv., *R45618, The International Emergency Economic Powers Act: Origins, Evolution, and Use* 1 (2020). IEEPA's leverage is derived from the centrality of the United States and the U.S. dollar in the global financial system. Due to the reach of that system, some have described IEEPA sanctions as "civil death." Adam

Smith, *Dissecting the Executive Order on Int'l Criminal Court Sanctions: Scope, Effectiveness, and Tradeoffs,* Just Security (June 15, 2020).

The U.S. Department of Treasury's Office of Foreign Assets Control has issued regulations implementing the ICC executive order, 31 C.F.R. § 520 (2020). Under powers delegated by the executive order, former U.S. Secretary of State Pompeo designated the ICC's chief prosecutor, Fatou Bensouda, and a second ICC employee in the prosecution office, Phakiso Mochochoko. *Blocking Property of Certain Persons Associated with the International Criminal Court Designations*, U.S. Department of the Treasury, (Sept. 2, 2020).

The government's use of the NEA and IEEPA to sanction international civil servants working at an international court with 123 state party members, including many U.S. allies, is an egregious abuse of emergency powers. These professionals have nothing in common with ordinary IEEPA targets: those accused of corruption, organized crime, human rights abuses, terrorism, or drug trafficking. Under no rational analysis could there be said to be a national emergency, or that the ICC staff and their activities pose an "unusual and extraordinary threat" to the United States. Moreover, that the government has devised the sanctions in a way that claims to prohibit[2]—and demonstrably chills—Plaintiffs' ability to engage in speech, such as providing legal advice and trainings, and representing victims in proceedings before the ICC, is further evidence that the sanctions are not only fundamentally misguided, but antithetical to Congress's intent. *See* Mem. of Law in Support of Pls.' Mot. for Prelim. Inj., at *9-11, ECF No. 42.

Congress has explicitly exempted from IEEPA the authority to prohibit the transfer of

[2] In briefing in a separate case challenging similar aspects of the ICC sanctions, the government argued that the provision of education, training, advice, and amicus briefs would run afoul of the sanctions. Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj., *Open Soc'y Justice Initiative*, 2021 WL at *24-25.

information or informational materials, which encompasses Plaintiffs' desired speech. *See* 50 U.S.C. § 1702(b)(3).

The courts play an essential role in checking such abuses of emergency powers. We expect the government to argue, as it has in other lawsuits challenging the President's use of the NEA and IEEPA, that the court should defer to presidential invocations of emergency powers, and refrain from interpretations that place limits on those powers. As Amicus shows in this brief, however, the legislative history of the NEA and IEEPA demonstrates that they were meant to constrain presidents, not afford them limitless discretion. In addition, the legislative history and content of the "informational materials" exception to IEEPA shows that it was meant to be read broadly to protect First Amendment free speech activities. Judicial review is necessary to ensure that these laws are interpreted and applied in a manner consistent with Congress's intent—not exploited to attack institutions seeking accountability for war crimes, crimes against humanity, and genocide.

SUMMARY OF ARGUMENT[3]

The NEA and IEEPA were enacted to constrain the President's use of emergency powers. Courts' play a critical role in carefully reviewing the exercise of these powers to ensure that they are not abused. *Sierra Club v. Trump*, 977 F.3d 853, 882 (9th Cir. 2020).

Even in situations where use of IEEPA is permissible, Congress included in that statute a broad, un-waivable exception that prohibits using IEEPA's powers to inhibit the transfer of "any information or informational materials." 50 U.S.C. § 1702(b)(3). Congress initially included this exception, known as the Berman Amendment, in IEEPA in 1988 to protect First Amendment

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

free speech concerns and values. When the Treasury Department interpreted the exception narrowly, Congress amended the exception in 1994 to fortify and emphasize its expansive scope. The Congressional conference report for the 1994 amendment stated: "The language was explicitly intended . . . to have a broad scope." H.R. Conf. Rep. 103-482, at 239 (1994).

The Ninth Circuit has recognized that "[t]he Berman Amendment was designed to prevent 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). As a federal district court recently held when granting a preliminary injunction against a use of IEEPA sanction powers: "Congress itself, in enacting the Berman Amendment, created an 'IEEPA-free zone'." *Marland v. Trump*, No. 20-4597, 2020 WL 6381397, at *21 (E.D. Pa. Oct. 30, 2020).

Nevertheless, the government has taken the view that the sanctions against the ICC employees prohibits persons similarly situated to Plaintiffs from continuing to engage in activities and speech such as providing training, answering questions, and submitting amicus briefs. Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj., at *24-25, *Open Soc'y Justice Initiative v. Trump*, No. 20-cv-8121-KPF, 2021 WL 22013 (S.D.N.Y. Jan. 4, 2021). This position exceeds IEEPA's powers, and therefore the sanctions, as applicable to Plaintiffs' desired speech activities, should be enjoined.

ARGUMENT

The history and operation of the NEA and IEEPA inform the application of the particular powers contained within IEEPA that Plaintiffs challenge, demonstrating Congress's intent that these powers be constrained, as well as the need for robust judicial review of their use. For these

reasons, Amicus provides background on both the NEA and IEEPA, before addressing the "informational materials" exception that forms the basis for Plaintiffs' *ultra vires* claim.

I. The National Emergencies Act of 1976

To understand the purpose of the National Emergencies Act (NEA), it is necessary to briefly summarize the history of statutory emergency powers in the United States. Unlike most other countries' constitutions,[4] the U.S. Constitution does not provide the president with any explicit emergency powers. *See generally* U.S. Const. art. II.[5] Accordingly, from the time of the country's founding, presidents have relied on Congress to provide them with enhanced authorities in emergency situations. Throughout the eighteenth and early nineteenth centuries, Congress periodically enacted laws giving presidents standby authorities that they could use in their discretion during military, economic, or labor crises. *See* Elaine Halchin, Cong. Research Serv., *98-505, National Emergency Powers* 1 (2020).

Beginning in World War I, a new procedure for invoking statutory emergency powers evolved. Presidents would declare a national emergency, and this declaration would give them access to statutory authorities that would otherwise lie dormant. *See* Halchin, *supra*, at 1. This system continues to this day. Before the enactment of the NEA, however, there was no overarching statute regulating the process by which presidents could declare a national emergency. *See id*. There was little transparency or congressional oversight with respect to the

[4] A review of current constitutions reveals that at least 180 countries' constitutions have provisions for emergency rule. *See* Constitutions Containing Emergency Provisions, *Constitute*, https://tinyurl.com/y6op33d7 (last visited Mar. 15, 2021).

[5] Those powers that could be considered "emergency powers" are given to Congress under Article I, such as the power to suspend *habeas corpus*, *see* U.S. Const. art. 1, § 9, cl. 2, and to call forth "the Militia" to "suppress Insurrections and repel Invasions." U.S. Const. art. 1, § 8, cl. 15.

president's use of emergency powers, and nothing to prevent states of emergency from lingering indefinitely.

In the 1970s, several scandals involving executive branch overreach—including Watergate, the secret bombing of Cambodia, and domestic spying by the CIA—prompted Congress to investigate the exercise of executive power in national security matters, and to enact several laws aimed at reasserting Congress's role as a coequal branch of government and a check on executive authority. *See generally* Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, 95 Pol. Sci. Q. 209 (1980). It was in this context that a special Senate committee, which eventually came to be named the Special Committee on National Emergencies and Delegated Emergency Powers, was formed to examine presidential use of emergency powers. *See* S. Res. 242, 93rd Cong. (1974); Halchin, *supra*, at 7-8.

The immediate impetus for the committee's formation was Republican Senator Charles Mathias's discovery that an emergency declaration issued in 1950, at the start of the Korean War, was still in place and was being used to prosecute the war in Vietnam. *See* Halchin, *supra*, at 17. On closer examination, the committee learned that four clearly outdated states of emergency—issued in 1933, 1950, 1970, and 1971—were still in effect. *See id.* at 7. As Senator Frank Church stated: "few, if any, foresaw that [these] temporary states of emergency . . . would become what are now regarded collectively as virtual permanent states of emergency." 120 Cong. Rec. S. 15784-86 (daily ed. Aug. 22, 1974) (statement of Sen. Church), *reprinted in* S. Comm. on Government Operations and the Spec. Comm. on National Emergencies and Delegated Emergency Powers, *The National Emergencies Act (Public Law 94-412), Source Book: Legislative History, Text, and Other Documents*, at 73 (1976) [hereinafter *Spec. Comm. on National Emergencies Source Book*]. One House Report examining the issue observed:

> [T]here has been an emergency in one form or another for the last 43 years. . . . The history of continued and almost routine utilization of such emergency authorities for years after the original crisis has passed . . . serves only to emphasize the fact that there is an urgent need to provide adequate laws to meet our present day needs. Legislation intended for use in crisis situations is by its nature not well suited to normal, day-to-day government operations.

121 Cong. Rec. H.R. H8325-H8341 (daily ed. Sept. 4, 1972) (statement of Rep. Rodino), *reprinted in Spec. Comm. on National Emergencies Source Book*, *supra*, at 244.

The committee's work culminated in the introduction and passage of the NEA, which took effect in 1978. The purpose of the law, evident in every facet of the legislative history, was to place limits on presidential use of emergency powers. As summarized by the committee in urging passage of the Act:

> While much work remains, none of it is more important than passage of the National Emergencies Act. Right now, hundreds of emergency statutes confer enough authority on the President to rule the country without reference to normal constitutional process. Revelations of how power has been abused by high government officials must give rise to concern about the potential exercise, unchecked by the Congress or the American people, of this extraordinary power. The National Emergencies Act would end this threat and insure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards providing for Congressional review.

Spec. Comm. on National Emergencies Source Book, *supra*, at 50. The law employed various mechanisms to this end.[6] For example the law contained several provisions intended to increase transparency and facilitate congressional oversight with respect to presidents' use of emergency powers. These included requirements for the president to transmit declarations of national emergency to Congress and publish them in the Federal Register, *see* National Emergencies

[6] In addition to regulating future emergency declarations, the NEA returned most emergency powers then active to dormancy after two years (with the possibility they could be activated again by future emergency declarations). *See* Halchin, *supra*, at 11. However, it excepted powers used under the Trading With the Enemy Act, discussed *infra*.

Act, Pub. L. No. 94-412, § 201, 90 Stat. 1255 (codified at 50 U.S.C. § 1621); to identify in the declaration the specific powers he intended to invoke, and to issue updates via published executive order where necessary, *see* 50 U.S.C. § 1631; to transmit to Congress any orders, rules, or regulations issued pursuant to an emergency declaration, *see* 50 U.S.C. § 1621; and to report to Congress every six months on expenditures incurred by the government attributable to the exercise of emergency powers, *see* 50 U.S.C. § 1641(c).

The NEA also included provisions designed to prevent states of emergency from becoming permanent, and to give Congress a stronger and more active role in deciding whether states of emergency should continue. In particular, the law provided that states of emergency would terminate after a year unless renewed by the president, *see* 50 U.S.C. § 1622(d); it allowed Congress to terminate states of emergency at any time through a concurrent resolution (commonly referred to as a "legislative veto" because it would take effect without the president's signature), *see* National Emergencies Act, Pub. L. No. 94-412, § 202, 90 Stat. 1255 (codified as amended at 50 U.S.C. § 1622); and it required both houses of Congress to meet every six months while an emergency declaration was in effect to "consider a vote" on whether to end the emergency, *see* 50 U.S.C. § 1622(b).

As enacted, the law did not include a definition of "national emergency." Critically, however, this omission was not intended as a grant of unlimited discretion. In an earlier draft of the legislation, the president was authorized to declare a national emergency "[i]n the event the President finds that a proclamation of a national emergency is essential to the preservation, protection and defense of the Constitution or to the common defense, safety, or well-being of the territory or people of the United States." S. 977, 94th Cong. § 201(a) (1975). One committee report noted that this definition was "deliberately cast in broad terms that makes it clear that a

proclamation of a state of national emergency requires a grave national crisis." *Spec. Comm. on National Emergencies Source Book*, *supra*, at 96.

The Senate Committee on Government Operations removed this language, not because it was too limiting, but because the committee believed it to be too broad. As stated in the committee's report:

> [F]ollowing consultations with several constitutional law experts, the committee concluded that section 201(a) is overly broad, and might be construed to delegate additional authority to the President with respect to declarations of national emergency. In the judgment of the committee, the language of this provision was unclear and ambiguous and might have been construed to confer upon the President statutory authority to declare national emergencies, other than that which he now has through various statutory delegations.
>
> The Committee amendment clarifies and narrows this language. The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.

S. Rep. No. 94-1168, at 3 (1976), *reprinted in Spec. Comm. on National Emergencies Source Book, supra*, at 292. The committee's solution ultimately proved to be flawed, as the majority of the statutes in place today that confer power on the president during "national emergencies" do not include definitions of the term or criteria that must be met beyond the issuance of the declaration. *See A Guide to Emergency Powers and Their Use*, Brennan Ctr. for Justice (Apr. 24, 2020). It is nonetheless significant that Congress believed that even a definition limiting national emergencies to grave national crises would be "overly broad." The notion that Congress intended the NEA as an affirmative delegation of unlimited discretion to the president is contradicted by this and every other aspect of the legislative history.

Moreover, where statutes granting emergency powers *do* include criteria beyond the mere declaration of an emergency, this legislative history underscores the importance of strictly interpreting and enforcing those limitations. In the current case, President Trump, in Executive Order 13928, invoked a statutory authority, IEEPA, that provides authorization for sanctions only during emergencies that constitute an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States," 50 U.S.C. § 1701(a). In passing the NEA, Congress clearly intended for criteria like these to provide meaningful and enforceable checks on the president's authority to issue emergency declarations.

The most significant check on the president's use of emergency powers provided by the NEA was Congress's ability to terminate declarations of national emergency by concurrent resolution, *i.e.*, legislative veto. The NEA's effectiveness was thus significantly undermined by the Supreme Court's subsequent 1983 ruling that concurrent resolutions are unconstitutional. *See I.N.S. v. Chadha*, 462 U.S. 919, 954-55 (1983). Congress responded to the decision by substituting a joint resolution as the mechanism for terminating emergencies. *See* 50 U.S.C. § 1622(a)(1). Like any other legislation, a joint resolution must be signed into law by the president, and if the president vetoes the resolution, Congress can override the veto only with a two-thirds majority in both houses. This change greatly diluted the role of Congress as originally envisioned in the NEA. As a result, national emergencies are extremely easy for a president to invoke, and extremely difficult for Congress to terminate.[7] The NEA has thus proven weaker in implementation than in concept.

[7] In addition, until recently, Congress has essentially ignored the NEA's requirement to meet every six months while an emergency is in place and consider a vote on whether to end the

II. The International Emergency Economic Powers Act

Congress enacted the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. § 1701 *et seq.*), in 1977 as part of the same wave of reforms in the post-Nixon era that led to the passage of the NEA. Congress was of the view that IEEPA's predecessor, the 1917 Trading With the Enemy Act (TWEA), Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. § 4301 *et seq.*), which was originally intended for use only during wartime but was later amended to include national emergencies, had been used improperly. As Justice Blackmun explained, in enacting IEEPA "[i]t is clear that Congress intended to curtail the discretionary authority over foreign affairs that the President had accumulated because of past 'emergencies' that no longer fit Congress' conception of that term. To accomplish this goal, Congress amended the TWEA and enacted the IEEPA." *Regan*, 468 U.S. at 244 (1984) (Blackmun, J., dissenting).

Although the NEA terminated almost all emergency authorities then in effect, 90 Stat. 1255, § 101(a); *see also Regan*, 468 U.S. at 246 n. 1 (1984), the NEA exempted TWEA's Section 5(b), which provided various sanctions powers, due to the complex and multiple ways in which the government was using those powers. 90 Stat. 1255, § 502(a)(1); 123 Cong. Rec. H2217 (1977) (daily ed. March 16, 1977) (statement of Rep. Bingham) (NEA excepted Section 5(b) of TWEA "because of that section's importance to the day-to-day functioning of the Government"). Instead, the NEA ordered that the relevant House and Senate Committees "make a complete

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emergency. There is no indication that Congress ever did so prior to President Trump's declaration of a national emergency to fund the border wall in 2019. Before that time, only one resolution to end a state of emergency had ever been introduced in Congress, and the emergency declaration at issue was revoked before Congress could vote on it. *See* Tamara Keith, *If Trump Declares an Emergency to Build the Wall, Congress Can Block Him*, N.P.R. (Feb. 11, 2019).

study and investigation concerning that provision of law" and report on recommended revisions within 270 days. 90 Stat. 1255, § 502(b); *Revision of Trading With the Enemy Act: Hearing Before the H. Comm. on Int'l Relations*, 95th Cong. 1 (1977). This work fell to the House Committee on International Relations and the Senate Committee on Banking, Housing, and Urban Affairs. 123 Cong. Rec. H2217 (1977) (daily ed. March 16, 1977) (statement of Rep. Bingham).

Representative Jonathan Bingham, who chaired the House subcommittee that held hearings regarding TWEA reform, observed that "the executive branch wants to be free to continue to act with an enormous degree of discretion on the basis that an emergency exists, although by no commonsense application of the term could the situation be called an emergency," and that "the reaction of the subcommittee, and the reaction of the witnesses that we have had, has been that the situation that we are in is quite an incredible one, and it has to be substantially altered to try to conform with reality and with principle." *Emergency Controls on International Economic Transactions: Hearing Before the Subcomm. on Int'l Policy and Trade of the H. Comm on Foreign Affs.*, 95th Cong. 113-114 (1977) (statement of Rep. Bingham); *Regan,* 468 U.S. at 248 (Blackmun, J., dissenting). By the time of hearings on the legislation in the Senate later that year, the message had apparently gotten through. A representative of the executive branch testified that emergency powers "should be exercised within carefully constructed constraints . . . Furthermore, we are keenly aware that, on several occasions, section 5(b) has been hurriedly broadened during moments of national crisis . . . during which cases very little attention, frankly, was given to procedural safeguards consonant with the constitutional balance of powers." *Amending the Trading With the Enemy Act: Hearing Before the Subcomm. on Int'l Finance of*

the H. Comm. on Banking and Currency, 95th Cong. 2 (1977) (statement of C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs).

The bill resulting out of these hearings, introduced in June 1977, was H.R. 7738. The Report of the House Committee on International Relations concerning IEEPA stated that it intended for IEEPA to be used for emergencies that

> are by their nature rare and brief, and are not to be equated with normal ongoing problems. A national emergency should be declared and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose. The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in effect for use in other circumstances. A state of national emergency should not be a normal state of affairs.

H.R. Rep. No. 95-459, at 10 (1977). H.R. 7738 expressly limited TWEA to war-time use (*i.e.,* removing its ability to be utilized in time of national emergency), and created IEEPA for peacetime use of most of section 5(b)'s powers in cases of national emergency under a new legal framework. *See* Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Financing Regime*, 43 Wake Forest L. Rev. 643, 647-48 (2008).

IEEPA's procedural requirements and congressional checks, as described below, reflect Congress's concern at presidents' previous quotidian use of TWEA's powers. As Chairman Bingham stated: "Since the Nation has been in a declared state of emergency since 1933, the 'emergency' authorities provided in section 5(b) have in effect become routine authorities used to conduct the day-to-day business of the Government." 95 Cong. Rec. H235 (daily ed. Jan. 10, 1977) (statement of Rep. Bingham). Congress realized that the procedural requirements of the recently-passed NEA—including its potent legislative veto provision—would provide many of the safeguards that they considered advisable in relation to emergency economic powers, and

that it therefore made sense for IEEPA to be subject to the NEA. As proposed by the House subcommittee studying the issue:

> [W]e should establish tighter procedures for future use of these powers, including consultation and reporting requirements, time limits on the use of the powers without review, and provision for congressional (as well as Presidential) termination. Since the National Emergencies Act already provides such procedures for all authorities based on national emergency, it seems logical to make the uses of international economic emergency powers subject to the National Emergencies Act.

Revision of Trading With the Enemy Act: Hearing before the H. Comm. on Int'l Relations, 95th Cong. 9 (1977) (statement of Rep. Bingham).

Unlike many other emergency powers that become available pursuant to national emergency declarations, Congress chose to include in IEEPA additional requirements beyond those required in the NEA. Under IEEPA, a president must declare that the national emergency is based on an "unusual and extraordinary threat" to the U.S. national security, foreign policy, or economy "which has its source in whole or substantial part outside the United States." 50 U.S.C. § 1701(a). In addition, Congress required a new declaration of national emergency invoking IEEPA for each "new threat", 50 U.S.C. § 1701(b), and included additional consultation and reporting mechanisms. 50 U.S.C. § 1703.

The Carter administration ultimately was supportive of the additional checks and constraints contained in IEEPA, and engaged with Congress on TWEA's revisions. A U.S. Department of Treasury official testified:

> The administration also supports the requirement of section 202 which states that a national emergency for purposes of this International Emergency Economic Powers Act must be based on an unusual and extraordinary threat to the national security, foreign policy, or economy of the United States. We believe that this approach emphasizes that such powers should be available only in true emergencies, a view which we most certainly share.

Revision of Trading With the Enemy Act: Hearing Before the H. Comm. on Int'l Relations, 95th Cong. 12 (1977) (statement of Hon. C. Fred Bergsten).

In a signing statement, President Carter wrote that "H.R. 7738 is the result of a cooperative effort by the Congress and this administration. . . . It places additional constraints on use of the President's emergency economic powers in future national emergencies and ensures that the Congress and the public will be kept informed of activities carried out under these powers." Jimmy Carter, *Presidential War Powers Bill Statement on Signing H.R. 7738 Into Law*, American Presidency Project (Dec. 28, 1977). As mentioned above, subsequent to IEEPA's passage, the U.S. Supreme Court ruled the NEA's legislative veto provision (which applied to IEEPA declarations) unconstitutional, and it was replaced with a joint resolution mechanism.

In short, the legislative history of IEEPA, like that of the NEA, reflects a clear intent to limit the president's use of emergency powers. Moreover, when read in the context of the NEA's legislative history, IEEPA's substantive requirements for declaring a national emergency take on added significance. In passing the NEA, Congress deliberately left it to individual statutory powers—like IEEPA—to fulfill the critical task of defining the boundaries of what constitutes an activating emergency. IEEPA includes such a definition; to honor the congressional intent behind the NEA framework, that definition must be scrupulously applied.

a. Background to the Informational Materials Exception

In addition to restrictions on invoking its powers, IEEPA contains explicit exceptions, including what is commonly known as the "informational materials" exception. Although for brevity and consistency Amicus also refers to the exception contained at 50 U.S.C. § 1702(b)(3) as the "informational materials" exception, this moniker captures only some of what is covered by the exception. As plainly stated by the statutory language, the exception covers "*any*

information or informational materials." 50 U.S.C. § 1702(b)(3) (emphasis added). The exception in its current form states:

> **Exceptions to Grant of Authority** The authority granted to the President by this section does not include 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, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 4604 of this title, or under section 4605 of this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18[.]

50 U.S.C. § 1702(b)(3).

Although IEEPA, as originally enacted, contained an exception for "any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value," 50 U.S.C. § 1702(b)(1), it did not explicitly carve out an exception for other activities or materials protected by the First Amendment's free speech guarantees. Indeed, IEEPA's legislative history demonstrates that Congress believed the very existence of the First Amendment would be sufficient to protect the interests contained within that amendment. While IEEPA was under consideration, Congress deleted from the bill a provision that would have protected "collection and dissemination of news by the news media." In removing that exception, the committee explained: "The committee does not intend by this deletion to authorize regulation or prohibition of the collection and dissemination of news. The news media have long maintained that the First Amendment to the Constitution provides adequate and complete protection of freedom of the press, and the committee, therefore, considered further statutory

protection of that freedom unnecessary, redundant, and inappropriate." H.R. Rep. No. 95-459, at 15-16 (1977).

In the 1980s, however, Congress grew concerned that authorities had been seizing books and magazines shipped from countries sanctioned under IEEPA or TWEA, and realized it needed to more explicitly protect free speech within those statutes. *See Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003). In 1988, Representative Howard Berman introduced, as part of the 1988 Omnibus Trade and Competitiveness Act, what came to be known as the Berman Amendment. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 2502, 102 Stat. 1107 (1988). The amendment carved out from IEEPA (and from TWEA) the president's "authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials." Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 2502, 102 Stat. 1107, 1371-72 (1988).[8]

As described below, Congress would feel compelled to expand, strengthen, and clarify this exception after only a few short years, but even before that augmentation a federal court had the opportunity to recognize the breadth of what the Berman Amendment protected. In rejecting a government claim that the informational materials exception under TWEA did not apply to

[8] Speaking in support of a predecessor of the Berman Amendment in 1986, Senator Mathias exhorted: "As President Reagan has said: Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one's people from the rest of the world reduce it." 132 Cong. Rec. S3707-04 (1986) (statement of Sen. Mathias).

artwork, the court in *Cernuda v. Heavey* looked to the most relevant legislative history available,[9] a House Committee on Foreign Affairs report, which stated:

> The committee notes that the American Bar Association House of Delegates approved, in February 1985, the principle that no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment. That principle applies with equal force to the exportation of ideas and information from this country to the rest of the world. Accordingly, these sections also exempt informational materials and publications from the export restrictions that may be imposed under these acts.

Cernuda, 720 F.Supp. 1544, 1548 (S.D. Fla. 1989) (quoting H.R. Rep. No. 100-40, pt. 3, at 113 (1987)).

In *Cernuda*, the government argued that the informational materials exception did not extend to all materials protected by the First Amendment. The court observed that this argument "seems to ignore the plain language of the [ABA] report and the obvious First Amendment orientation of the words 'informational materials.'" *Id.* at 1550. In ruling against the government, the court held that the "statutory construction and the legislative history of the 1988 TWEA amendment show that Congress amended the TWEA to exempt 'informational materials,' in order to prevent the statute from running afoul of the First Amendment." *Id.* at 1553. The government did not appeal.

Other courts, however, upheld some of the Treasury Department's narrow interpretations of the Berman Amendment. *See, e.g., Capital Cities/ABC, Inc. v. Brady,* 740 F.Supp. 1007 (S.D.N.Y. 1990) (deferring to government interpretation of Berman Amendment that excluded broadcasts). The Treasury Department's narrow readings included some that permitted the

[9] The court found a near void of direct legislative history for the 1988 amendment, and thus looked to legislative history for the Berman Amendment's legislative predecessor that had failed because of an unrelated provision. See *Cernuda v. Heavey,* 720 F.Supp. 1544, 1547-1548 (S.D. Fla. 1989) ("the 1988 act specifically provides that the legislative history for the predecessor bill, H.R. 3, generally is treated as its own legislative history").

government to regulate transactions related to "informational materials not fully created and in existence at the date of the transaction," those regarding "the substantive or artistic alteration or enhancement of informational materials," and "intangible items, such as telecommunications transmissions." *See, e.g.,* Foreign Assets Control Regulations and Cuban Assets Control Regulations, 54 Fed. Reg. 5229 (Feb. 2, 1989).

These cramped interpretations prompted Congress to amend IEEPA again in 1994 with the Free Trade in Ideas Act (FTIA), which created the "informational materials" exception as it exists today. *See Kalantari*, 352 F.3d at 1205. The FTIA clarified the expansive reach of the informational materials exception in both the IEEPA and TWEA through a number of changes. In particular, it stated that the exception applied not only to "informational materials" but also to "information"; it stated that the exception applied "regardless of format or medium of transmission"; and it made clear that the list of exempted media (to which the FTIA added new examples) was only illustrative by prefacing that list with the words "including but not limited to." Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525, 108 Stat 382, 474 (1994).

The congressional conference report to the FTIA reiterated that the Berman Amendment was meant to protect free speech under the First Amendment, and explained that the FTIA was meant to remedy narrow governmental interpretations of that amendment:

> [T]he Berman Amendment to the Omnibus Trade and Competitiveness Act . . . established that no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment to the U.S. Constitution. The language was explicitly intended, by including the words 'directly or indirectly,' to have a broad scope. However, the Treasury Department has narrowly and restrictively interpreted the language in ways not originally intended.

H.R. Conf. Rep. 103-482, at 239 (1994).

The report noted that the 1994 amendment enacted through the FTIA addressed only some of the government's overly narrow interpretations of the Berman Amendment, but the report did not provide a comprehensive list of which restrictions those were. *Id.* However, in addition to affirming that the Berman Amendment was meant to protect First Amendment activities, the report explained that the 1994 amendment to the "informational materials" exception was intended to protect a penumbra of activity around those exempted activities, including activities leading to their creation:

> The committee of conference intends these amendments to facilitate transactions and activities incident to the flow of information and informational materials without regard to the type of information, its format, or means of transmission, and electronically transmitted information, transactions for which must normally be entered into in advance of the information's creation.
>
> The committee of conference further understands that it was not necessary to include any explicit reference in the statutory language to "transactions incident" to the importation or exportation of information or informational materials, because the conferees believe that such transactions are covered by the statutory language.

H.R. Conf. Rep. 103-482, at 239 (1994).

Even after the passage of the 1994 amendment, however, OFAC has continued to interpret the informational materials exception in ways that run counter to Congress's intent to robustly protect free speech and related activities. For instance, some OFAC regulations continue to aver that the informational materials exception does not apply to "transactions related to information and informational materials not fully created and in existence at the date of the transactions, or . . . the substantive or artistic alteration or enhancement of informational materials." *See, e.g.,* Iranian Transactions and Sanctions Regulations, 31 C.F.R. § 560.210(c)(2).

b. Applicable Scope of the Informational Materials Exception

Plaintiffs' desire to transfer information to, and receive information from, the International Criminal Court, including by providing legal advice, training, and information to the ICC Office of the Prosecutor, would clearly be protected by the informational materials exception. To the extent the government believes the executive order and implementing regulations would not permit the information exchanges Plaintiffs contemplate, such a result would be inconsistent with the letter and intent of IEEPA. *See CHW W. Bay v. Thompson,* 246 F.3d 1218, 1223 (9th Cir. 2001) ("deference is not owed to an agency decision if it construes a statute in a way that is contrary to congressional intent or frustrates congressional policy."). As already described, Congress has repeatedly evidenced its intent that IEEPA not be used to regulate First Amendment free speech activities. "The Berman Amendment was designed to prevent the executive branch from restricting the international flow of materials protected by the First Amendment." *Kalantari*, 352 F.3d at 1205. "Congress has stressed that [the informational materials exception] be given 'broad scope.'" *TikTok Inc. v. Trump*, No. 1:20-cv-02658 CJN, 2020 WL 5763634, at *4 (D.D.C. Sept. 27, 2020).

Significantly, unlike IEEPA's exception for humanitarian donations, 50 U.S.C. § 1702(b)(2), IEEPA does not allow the president to waive the informational materials exception under any circumstances. Moreover, by stating clearly within the informational materials exception the narrow areas of information and informational materials not encompassed by it—certain items controlled for export and that relate to nonproliferation, espionage, and anti-terrorism—Congress indicated that other limitations to the scope of this exception do not apply. *See TRW Inc. v. Andrews*, 534 U.S. 19, 20 (2001) ("Where Congress explicitly enumerates certain exceptions to a

general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

In sum, to construe the informational materials exception in a crabbed manner—as would be necessary to interpret the executive order and implementing regulations to prohibit informational exchanges between Plaintiffs and ICC staff—would be flatly contrary to the statute's language and legislative history.

III. Robust Judicial Review of the ICC Executive Order is Imperative

In recent litigation concerning IEEPA-based sanctions, the government has argued that the President's decisions under IEEPA are entitled to "maximum judicial deference." Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj., at *5, *TikTok Inc. v. Trump*, No. 1:20-cv-02658 CJN (D.D.C. Sept. 25, 2020). But, as explained above, such an approach would be contrary to Congress's intent in cabining emergency powers under the NEA and IEEPA, and in protecting free speech within IEEPA.

Rather than receiving deference, the president's exercise and potential for abuse of emergency powers requires exacting judicial scrutiny. As the U.S. Court of Appeals for the Ninth Circuit recently held in rejecting the government's claim that the use of emergency powers to fund a border wall was unreviewable:

> [J]udicial review of statutes conferring specific emergency powers to the President is critical . . . Were we to conclude that judicial review of such a statute was precluded, the President's emergency authority would be effectively unbounded, contravening the purpose of the NEA. Thus, the language of [the law] is not only susceptible to judicial review, but its statutory context requires it.

Sierra Club, 977 F.3d at 882.

In *Sierra Club*, the Ninth Circuit carefully parsed the enabling language of the relevant statutory emergency power, explaining that to interpret its provisions broadly "would run afoul .

. . of the NEA, which was passed to ensure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards providing for Congressional review." *See Sierra Club*, 977 F.3d at 888 (internal punctuation omitted); *see also id.* at 885 (holding that construing emergency power "broadly would also be contrary to the purpose of the statutory scheme of which [the power] is a part—the NEA" because "the National Emergencies Act is not intended to enlarge or add to Executive power" (internal punctuation omitted)).

The courts' role as a backstop to misuse of emergency powers is even more important in light of the Supreme Court's scuttling of the NEA's legislative veto provision in *Chadha*. Even when a majority of Congress opposes a use of emergency powers, it cannot play that role. *See Sierra Club*, 977 F.3d at 865 ("*Chadha*, therefore, made it more difficult for Congress to check the President's use of emergency powers than originally intended."). Significantly, the Supreme Court's decision in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), often cited as an endorsement of judicial deference to the president's exercise of powers under IEEPA, predated both the inclusion of the travel and informational materials exceptions in that statute, and the elimination of the legislative veto following *Chadha*.

In recent months, federal courts have been particularly skeptical of the Trump Administration's unprecedented uses of IEEPA, particularly where, as here, those uses implicate free speech. In September 2020, a court granted a preliminary injunction against IEEPA sanctions targeted at the mobile application TikTok because it found the regulated activity fell within the informational materials and personal communications exceptions. *TikTok Inc.,* 2020 WL 5763634, at *5-7. There, the government contended that the "plain-language" view of the informational materials exception could not possibly be correct because it would create "an

IEEPA-free zone." *Id.* at *6. The court rejected this argument, stating "it does not find support in the text of the statute." *Id.* Only a couple of months later, the court had the opportunity to once again consider the informational materials exception in the context of additional sanctions that were due to take effect against TikTok, and once again it issued a preliminary injunction, finding, *inter alia*, that the government had violated the informational materials exception. *TikTok Inc. v. Trump*, No. 1:20-cv-02658-CJN, 2020 WL 7233557, at *12-13 (D.D.C. Dec. 7, 2020).

In October 2020, a second court also granted a preliminary injunction against the same TikTok sanctions based on the informational materials exception. *Marland*, 2020 WL 6381397. In *Marland*, the court rejected the government's argument that the exception should be read narrowly as "clearly incorrect," *id.* at *15, concluding: "The Government urges that a ruling finding the [sanctions] violative of IEEPA will create an 'IEEPA-free zone,' unduly restricting the President's ability to respond to national security threats. But Congress itself, in enacting the Berman Amendment, created an 'IEEPA-free zone'." *Id.* at 21.

This district has also recently granted a preliminary injunction against IEEPA; in September 2020, the Northern District of California found that the government's sanctions of WeChat were not sufficiently narrowly tailored and therefore likely violated the First Amendment. *U.S. WeChat Users All. v. Trump*, No. 20-cv-05910-LB, 2020 WL 5592848, at *10 (N.D. Cal. Sept. 19, 2020); *stay denied,* Order Denying Mot. to Stay, No. 20-cv-05910 (N.D. Cal. Oct. 23, 2020); *stay denied*, Order, No. 20-16908 (9th Cir. Oct. 26, 2020); *stay denied,* Order Denying Mot. to Stay, No. 20-cv-05910, 2020 WL 6891820 (N.D. Cal. Nov. 24, 2020).

Moreover, just a few weeks ago, in a case challenging the same sanctions challenged here, the U.S. District Court for the Southern District of New York granted a preliminary injunction to

a group of plaintiffs who, similarly to Plaintiffs here, are law professors and human rights practitioners that wish to continue to engage in speech with ICC staff. There, the court held that the plaintiffs were likely to succeed on their First Amendment free speech claims because the sanctions included content-based restrictions on speech that were not sufficiently narrowly tailored to satisfy strict scrutiny. *Open Soc'y Justice Initiative v. Trump*, No. 20-cv-8121-KPF, 2021 WL 22013, at *7-9 (S.D.N.Y. Jan. 4, 2021). The court also stated that "[a]ny attempt by OFAC to impose IEEPA penalties for conduct covered by the 'informational materials' exception plainly would be *ultra vires*." *Id.* at *11.

Like these courts, this court has an essential role in ensuring that the executive exercises its authority pursuant to IEEPA within the bounds of the law. "For all 'its defects, delays and inconveniences,' it remains critical in all areas, but particularly with respect to the emergency powers, that 'the Executive be under the law, and that the law be made by parliamentary deliberations.'" *Sierra Club*, 977 F.3d at 890 (quoting *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring)).

CONCLUSION

The limitations on executive authority in the NEA and IEEPA are not merely suggestions or preferences. They are essential guardrails that Congress implemented after multiple experiences with executive abuse of emergency powers. The informational materials exception is a broad, un-waivable limitation on these powers meant to protect the exercise of free speech. As the Ninth Circuit recently reiterated, "'Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress,' and '[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Sierra Club*, 977 F.3d at 887 (quoting *Youngstown*, 343 U.S. at 635, 637 (Jackson, J.,

concurring)). Congress's intent to prohibit the use of IEEPA to prevent the exchange of information or informational materials like those Plaintiffs wish to undertake is manifest, and the government's actions should be enjoined.

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Respectfully submitted,

/s/ Andrew Boyle
Andrew Boyle
(admission *pro hac vice* pending)
Brennan Center for Justice
1140 Connecticut Ave., NW, Suite 1150
Washington, D.C. 20036
Telephone: (202) 280-4524
E-mail: boylea@brennan.law.nyu.edu

Counsel for Amicus Curiae Brennan Center