UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILMER CUTLER PICKERING HALE AND DORR LLP, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *et al.*, *Defendants*.	Civil Action No. 25-cv-917-RJL

BRIEF OF *AMICI CURIAE* 676 LAW PROFESSORS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IDENTITY AND INTEREST OF *AMICI*

Amici 676 law professors submit this brief in support of Plaintiff's Motion for Summary Judgment (the "Motion") to emphasize the threat that the President's Executive Order (the "Order")[1] presents to the independence and integrity of the legal profession, the rights of clients to seek redress in the courts, and, by extension, the rule of law. As experts in constitutional law, legal ethics, and the history of the legal profession, among other fields, we have a significant interest in ensuring that the principles of free speech, freedom of association, the right to petition the government, and the right to counsel are upheld. As educators, *amici* have an interest in fostering the next generation of attorneys, and in preparing them to zealously represent clients and causes without fear of reprisal. Many of the *amici* also recently filed a similar brief in *Perkins Coie LLP v. U.S. Department of Justice, et al.*, Case No. 1:25-cv-00716 (D.D.C.). WilmerHale has consented to the filing of this brief and the Government has indicated it does not object to its filing. This brief is accompanied by *amici*'s motion for leave to file.[2] A list of *amici* is provided in Appendix A.

SUMMARY OF ARGUMENT

The President's Order is a self-declared act of retribution that targets a law firm for representing clients and causes the President disfavors.[3] In inflicting this retribution, the Order

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[1] Throughout this brief, "Executive Order" or "Order" refers to Executive Order No. 14250, codified at 90 Fed. Reg. 14,549 (Mar. 27, 2025) titled "Addressing Risks from WilmerHale," as well as the accompanying Fact Sheet titled "Fact Sheet: President Donald J. Trump Addresses Risks from WilmerHale" of the same date.

[2] *Amici* law professors state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amici* law professors or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[3] This brief focuses on the sections of the Order for which the Court has enjoined enforcement—namely, Sections 3 and 5.

contradicts centuries of precedent safeguarding free speech, the right of association, and the right to petition. These precedents establish that the First Amendment "prohibits government officials from 'relying on the threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression' of disfavored speech." *Nat'l Rifle Ass'n v. Vullo*, 602 U.S. 175, 176 (2024) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). Targeting WilmerHale[4] for representing clients and espousing views the President dislikes is viewpoint discrimination, plain and simple.

The Order violates the Fifth and Sixth Amendments as well. The Fifth and Sixth Amendments were designed to check executive power and to ensure a meaningful way to assert rights before a judicial authority. *Powell v. Alabama*, 287 U.S. 45, 61, 64–65 (1932). Forcing lawyers to bend to the preferences of federal officials robs clients of their right to counsel and introduces the very type of government interference in the administration of justice the Founders acted to prevent.[5]

Finally, the Order threatens the rule of law. If the Order stands, it will be open season on lawyers who have dared to take on clients or causes the President or other officials don't like. This is no hypothetical threat. In the run-up to the election, the President posted on Truth Social that "WHEN I WIN, those people that CHEATED will be prosecuted to the fullest extent of the Law . . . . Please beware that this legal exposure extends to Lawyers . . . ." *Trump Threatens Long*

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[4] Throughout this brief, *amici* refer to Plaintiff Wilmer Cutler Pickering Hale and Dorr, LLP as "WilmerHale" or "Plaintiff."

[5] The Order violates the Constitution in multiple ways and poses a grave threat to the American justice system. This brief focuses on several of those violations; namely, the manner by which it violates the First Amendment, Fifth Amendment, Sixth Amendment, and the manner by which it threatens the rule of law.

Prison Sentences for Those Who 'Cheat' in the Election if He Wins, PBS NEWS (Sept. 8, 2024). More recently, the President pledged before issuing a similar Executive Order targeting law firm Perkins Coie that it was merely among the first of "a lot of law firms that we're going to be going after." Erin Mulvaney & C. Ryan Barber, *Fear of Trump Has Elite Law Firms in Retreat*, WALL ST. J. (Mar. 9, 2025) (quoting President Trump). Indeed, in addition to the Order at issue here, the President has issued four more Executive Orders targeting Perkins Coie; Paul, Weiss, Rifkind, Wharton & Garrison; Jenner & Block; and Susman Godfrey, all leading law firms. *See* Exec. Order No. 14230, 90 Fed. Reg. 11,781 (Mar. 6, 2025) (targeting Perkins Coie); Exec. Order No. 14237, 90 Fed. Reg. 13,039 (Mar. 14, 2025) (targeting Paul Weiss); and Exec. Order No. 14246, 90 Fed. Reg. 13,997 (Mar. 25, 2025) (targeting Jenner & Block); Executive Order, *Addressing Risks from Susman Godfrey* (April 9, 2025).[6] And, one of those firms caved to the President's pressure, donating what the President described as "$40 million in pro bono legal services over the course of President Trump's term to support the Administration's initiatives" in exchange for the Order's revocation. Ali Abbas Ahmadi, *Trump Rescinds Order Targeting Law Firm After It Makes $40m Promise*, BBC (Mar. 21, 2025) (quoting the President's Truth Social post); *see also* Exec. Order No. 14244, 90 Fed. Reg. 13,685 (Mar. 21, 2025) (revoking Executive Order targeting Paul Weiss).

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[6] In addition, the President issued a March 22, 2025 memorandum, titled "Preventing Abuses of the Legal System and the Federal Court," which directs the Attorney General to, among other things, "seek sanctions against attorneys and law firms who engage in frivolous, unreasonable, and vexatious litigation against the United States" and "review conduct by attorneys or their law firms in litigation against the federal government" in order to identify any misconduct that might warrant further disciplinary action. Presidential Memorandum, Preventing Abuses of the Legal System and the Federal Court (Mar. 22, 2025). In different circumstances, a directive to identify and address ethical misconduct among attorneys might be a reasonable exercise of Presidential authority. But, considered alongside his Executive Orders targeting the previously mentioned firms, his decision to deploy governmental resources toward heightened scrutiny of lawyers who challenge his administration warrants concern.

Three other law firms, Skadden, Arps, Slate, Meagher & Flom; Willkie Farr & Gallagher; and Milbank have donated hundreds of millions of dollars in uncompensated legal services to causes the President supports in order stave off similar executive orders.[7]

The impact of the Order reverberates far beyond the particular firm that is targeted. Going forward, a lawyer or law firm that is asked to represent a client on a matter that is likely to trigger the President's ire will have to weigh whether they are willing to be placed on the President's target list—and lose the business such a placement entails. They must also ask whether taking on a client of this sort, and whether zealously advocating on that client's behalf, will hurt other existing clients to whom ethical duties are owed. The Executive branch has no constitutional authority to use executive orders as a cudgel to beat the American legal system into submission.

Beyond the impact on clients and lawyers, orders of this type threaten the integrity of the judicial process, including the core role of judicial review. That anchor of our constitutional system cannot function when one person—regardless of his position—is empowered to threaten and punish lawyers for zealously representing their clients in court. "The Government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Let it not "cease to deserve this high appellation." *Id.*

Amici urge the Court to grant WilmerHale's Motion.

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[7] Daniel Barnes, *Major Law Firm Strikes Preemptive Deal with White House*, POLITICO (Mar. 28, 2025) (reporting that Skadden announced that it would donate the equivalent of $100 million in uncompensated legal services on issues the President supports, and that it would fund fellowships for law school graduates to work on "causes in line with the administration's priorities"); Michael S. Schmidt & Maggie Haberman, *Trump Announces Deal with Doug Emhoff's Law Firm*, N.Y. TIMES (Apr. 1, 2025) (reporting that Willkie Farr reached a similar agreement to provide $100 million in legal services, among other things); *Trump Reaches Agreement with Milbank Law Firm*, REUTERS (Apr. 2, 2025) (reporting that Milbank agreed to provide "at least $100 million" in uncompensated legal services).

ARGUMENT

I. The Executive Order Violates the First Amendment.

The Order violates the First Amendment in at least four ways. First, the Order singles out a speaker and discriminates against it because of its views. Second, the Order unconstitutionally controls the speech and associational freedoms of lawyers engaged in legal work against the government. Third, the Order imposes unconstitutional conditions on a firm's access to government funding and property. Fourth, the Order violates the Petition Clause.

A. The Executive Order Constitutes Unlawful Viewpoint Discrimination.

"At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." *Vullo*, 602 U.S. at 187. Indeed, while the Supreme Court has long expressed deep skepticism toward all content-based speech restrictions, it has reserved its highest opprobrium for those based on viewpoint. As the Court has explained: "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). When the government rests its regulation on "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829.

The Order's viewpoint discrimination is clear on its face. It rebukes WilmerHale for rehiring Special Counsel Robert Mueller and two members of his team that investigated the President, for what the Order calls "weaponiz[ing] the prosecutorial power," Order § 1, and for representing causes the administration dislikes, including, in the Order's words, "partisan representations to achieve political ends." *Id*. It also castigates WilmerHale for advancing specific views through its litigation. *Id.* (criticizing WilmerHale for litigating cases involving voter

identification and election laws, and for cases involving immigration law). In doing so, it punishes WilmerHale for advancing the viewpoints of its clients, despite the well-established premise that an attorney's decision to represent a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 1.2(b).[8]

When a governmental action burdens speech because of its content, the action is reviewed pursuant to strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010)).

The President's Order targeting his political opponents cannot survive strict scrutiny. To begin, discriminating against one's political enemies is not a permissible purpose. Indeed, an act that "seem[s] 'inexplicable by anything but animus'" cannot survive even rationality review. *Trump v. Hawaii*, 585 U.S. 667, 706 (2018) (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)). Nor can the Order be justified by the President's invocation of "the authority vested in me as President by the Constitution and the laws of the United States of America." Order, pmbl. The President is, by his oath of office (and by the Constitution), bound by the dictates of the Bill of Rights, and has no unilateral power to single out and punish speakers based on nebulous criteria

[8] *See also* Eugene Scalia, *John Adams, Legal Representation, and the "Cancel Culture*," 44 HARV. J.L. & PUB. POL'Y 333, 337 (2021) ("[I]ndependence of the lawyer from his client is integral to the freedom and autonomy that are among the privileges of private practice, and it is essential to lawyers' effective performance of their role in our system of justice.").

of his own making.[9]

Today, WilmerHale, like the other targeted firms, has fallen into the President's disfavor. Tomorrow, it could be any one of us whose speech the President unilaterally deems antithetical to "the interests of the United States" because that person or organization has chosen to litigate against him. Order § 5.

The threat is far from hypothetical. As noted at the outset, the President has vowed to "go[] after . . . a lot of law firms." Mulvaney & Barber, *supra* (quoting President Trump). Indeed, the President has already targeted five other law firms through separate executive actions. Exec. Order No. 14230, 90 Fed. Reg. 11,781 (Mar. 6, 2025) (targeting Perkins Coie); Exec. Order No. 14237, 90 Fed. Reg. 13,039 (Mar. 14, 2025) (targeting Paul Weiss); Exec. Order No. 14246, 90 Fed. Reg. 13,997 (Mar. 25. 2025) (targeting Jenner & Block); Executive Order, *Addressing Risks from Susman Godfrey* (April 9, 2025) (targeting Susman Godfrey); Presidential Memorandum, Suspension of Security Clearances and Evaluation of Government Contracts (Feb. 25, 2025) (targeting Covington & Burling LLP).

To the extent the President expected that these orders would cause the firms in question to bend to his will, he has been proven correct: Paul Weiss, facing a potential exodus of clients and an inability to "survive a protracted dispute with the administration," agreed to donate the equivalent of $40 million in uncompensated legal services toward causes consistent with the President's agenda. *See* Michael S. Schmidt & Matthew Goldstein, *Head of Paul, Weiss Says Firm Would Not Have Survived Without Deal with Trump*, N.Y. TIMES (Mar. 23, 2025) (quoting Paul

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[9] In *New York Times v. United States*, Justice Black observed that the government's power in this area is particularly weak when "[t]he Government does not even attempt to rely on any act of Congress." 403 U.S. 713, 718 (1971) (Black, J., concurring).

Weiss Chairman Brad Karp). In exchange, the President revoked the relevant Executive Order. *Id.*; *see also* Exec. Order No. 14244, 90 Fed. Reg. 13,685 (Mar. 21, 2025) (revoking Executive Order targeting Paul Weiss, citing the firm's decision to donate its legal services).

To stave off similar orders, other major firms have preemptively capitulated to the President. Skadden, Arps, Slate, Meagher & Flom recently announced that it would donate the equivalent of $100 million in uncompensated legal services toward issues the President supports in order to escape a similar executive order. *See* Barnes, *supra*. Willkie Farr & Gallagher and Milbank came to similar agreements, and other firms may soon join their ranks. Schmidt & Haberman, *supra* (reporting that Willkie Farr agreed to donate $100 million dollar in legal services toward causes the President backs to avoid an executive order); *Trump Reaches Agreement*, *supra* (reporting that Milbank agreed to a similar deal with the President); Erin Mulvaney, *Kirkland & Ellis in Talk with White House to Avoid Executive Order*, WALL ST. J. (Apr. 3, 2025) (reporting that Kirkland & Ellis was then negotiating with the President to avoid an order). As the President himself has said, "They're all bending and saying, 'Sir, thank you very much.'" Katelyn Polantz, *The Chilling Effect of Trump's War Against the Legal Establishment*, CNN (Mar. 11, 2025) (quoting the President).

The chilling impact of the President's actions is not limited to the firms the President has targeted; it has cast a shadow over the legal profession at large. Firms across the country are declining to represent clients and causes the President disfavors. *See* Michael Birnbaum, *Law Firms Refuse to Represent Trump Opponents in the Wake of His Attacks*, WASH. POST (Mar. 25, 2025) (reporting that potential clients seeking representation in actions adverse to the President have had difficulty finding representation); Polantz, *supra* (reporting on the "chilling" effect of the President's executive actions toward law firms). Lawyers have been cowed into submission,

incentivized to stay quiet, toe the line, and cave to the President's demands—lest they and their clients be punished.

B. The Order Is Especially Dangerous Insofar as It Seeks to Insulate Government Actors from Legal Challenge.

Although viewpoint discrimination is hardly ever tolerated, it is especially dangerous when governmental officials wield it to insulate themselves from legal scrutiny. The Supreme Court expressed just this concern in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). In *Velazquez*, the Court invalidated a federal statute that prohibited Legal Services Corporation (LSC)-funded attorneys from challenging federal or state welfare laws. *Id.* at 537–49. The restriction, said the Court, impermissibly "distort[ed] the legal system by altering the traditional role of attorneys" as zealous advocates for their clients. *Id*. at 544. And, to make matters worse, it "insulate[d] the Government's interpretation of the Constitution from judicial challenge," *id*. at 548, thus implicating "central First Amendment concerns," *id*. at 547.

The Order in this case is considerably more troubling than the statute invalidated in *Velazquez*. Through this Order, the President has arrogated to himself the power to single out lawyers and law firms who cross him, simply by declaring their legal work, past or present, contrary to the national interest. *See* Order § 5. If the Order is allowed to stand, the zealous advocacy that is the hallmark of a functioning court system will be chilled in dramatic ways, as lawyers tiptoe fearfully away from disfavored views and clients.

C. The Order Places Unconstitutional Conditions on a Speaker's Access to Government Funds and Property.

The Order seeks to punish WilmerHale in numerous ways, including terminating its government contracts, Order § 3(b); threatening the contracts of those who do business with them, *id.* §§ 3(a), 3(b); precluding every single firm employee from working for a federal agency in the

future (absent a waiver), *id.* § 5(b); and limiting firm lawyers' access to federal government buildings (potentially including courthouses), *id*. § 5(a). These provisions run afoul of well-established limitations on the government's power to condition benefits on the viewpoint of a recipient.

Indeed, *Velazquez* itself involved a condition on government funding of lawyers' work. The statutory prohibition on LSC-funded lawyers' constitutional arguments applied only to certain congressionally funded legal services (namely, constitutional challenges to welfare laws). *Velazquez*, 531 U.S. at 537–39. The Court concluded, nonetheless, that Congress could not condition funding on viewpoint-based restrictions that distorted the very "medium of expression"—litigation and representation of clients—through which the funded expression took place. *Id*. at 543.

Velazquez fits within a broader framework that the Court has created for evaluating speech-based conditions on accessing public property, programs, or funds. This framework establishes that the government may not dictate private speakers' viewpoints as a condition of allowing them to access such resources. *See Agency for Int'l Dev. v. Alliance for Open Society Inst.*, 570 U.S. 205, 214 (2013) ("[T]he Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.") (cleaned up). The government "offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828. The Order runs well afoul of this essential bar on viewpoint-based conditions.

D. The Order Violates the First Amendment's Petition Clause.

The Order also violates the Petition Clause. The First Amendment forbids "abridging" the "right of the people" to "petition the Government for a redress of grievances." The Supreme Court

has "recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights" and has "explained that the right is implied by the very idea of a government, republican in form." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524–25 (2002) (cleaned up). The Court has repeatedly held that the right of access to courts can implicate "the protections of the Petition Clause." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

The Order directly interferes with access to the courts. It directs federal officials to "limit[] official access from Federal Government buildings to employees of WilmerHale," to the extent permitted by law, whenever such access would "be inconsistent with the interests of the United States." Order § 5(a). The Supreme Court has treated physical access to courthouses as an aspect of "the fundamental right of access to the courts." *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004). The gauzy "interests of the United States" are insufficient to threaten WilmerHale's access to federal courthouses and administrative agencies, or to other government buildings where it seeks to meet to further its clients' interests.

Further, the Order retaliates against WilmerHale for positions it has taken in litigation against government actors—most notably in its pro bono cases representing immigrants and individuals seeking asylum (what the Order labels as "back[ing] the obstruction of efforts to prevent illegal aliens" from committing crimes and trafficking drugs") and representing individuals in election law cases (termed "further[ing] the degradation of the quality of American elections"). Order § 1. This Court should not permit the President to punish WilmerHale for its past actions in petitioning the government for redress of its clients' interests. That retaliation against lawful petitioning itself runs afoul of the Petition Clause. *See Borough of Duryea*, 564 U.S. at 387 (holding that retaliation by government employee can violate the Petition clause); *see also Nader v. Democratic Nat'l Comm.*, 567 F.3d 692, 696 (D.C. Cir. 2009) ("[W]hen a person petitions

the government for redress, the First Amendment prohibits any sanction on that action . . . so long as the petition was in good faith.").

Under the test announced by the Supreme Court in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), WilmerHale is entitled to relief on its First Amendment claim if it "show[s] that [its] conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor'" in the challenged decisions, unless the Government can show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287. Here, WilmerHale's representation of clients and causes the President dislikes is plainly a motivating factor for the actions in the Order.

II. The Executive Order Violates the Fifth and Sixth Amendments.

The Order also violates the Fifth and Sixth Amendments, as it tramples on clients' right to select a lawyer free of government intervention. The right to counsel of choice is a bedrock principle of our constitutional order. That right would be meaningless if the Executive branch of the federal government could decide who represents—and who doesn't represent—its adversaries in court.

The "notion of compulsory counsel," *i.e.,* forcing a party to accept a particular lawyer, "was utterly foreign" to the Founders. *Faretta v. California*, 422 U.S. 806, 833 (1975). "[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." *Id.* at 833–34.

The Founders were well aware that executive control of access to counsel could distort the administration of justice. The English system against which the Sixth Amendment right to counsel was established featured "[a]n inherent imbalance in favor of the prosecution" to protect the

Crown's interest in ensuring conviction of accused felons. J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 L. & HIST. REV. 221, 222 (1991). "The justices of the peace were to deal with felony accusations as agents of the king, not as judicial officers . . . [and] the accused had few rights." *Id.* at 222–23. In the eyes of the Crown, "defense counsel was not only unnecessary, but positively harmful." *Id.* at 223.

Gradually, a right to counsel in felony cases emerged in England, finding its roots in the Treason Act of 1696, which required the presence of defense counsel in response to the obvious "unfairness of a procedure under which the case for the Crown was presented by lawyers, often by the attorney general, while defendants were on their own." *Id.* at 224. Providing counsel in treason cases was a critical first step toward ensuring that the Crown's politically motivated invocations of safety and security to justify criminal prosecution would be tested by a zealous advocate for the accused.

Experience with the inequities of the English system prompted Americans to enshrine the right to counsel in fundamental law. "As early as 1758," Blackstone had "denounced" the prohibition of counsel in felony cases, and in America, "at least twelve of the thirteen colonies" had "definitely rejected" the English prohibition. *Powell v. Alabama*, 287 U.S. 45, 60–61, 64–65 (1932). The "oppressive" English rule, the Supreme Court has emphasized, "never obtained a foothold" here. *Id.* at 65 (quoting *Holden v. Hardy*, 169 U.S. 366, 386 (1898)).

The Founders emphatically rejected the English Rule in the Constitution. The Sixth Amendment secures the accused's right "to be defended by the counsel he believes to be the best." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006); *see also Luis v. United States*, 578 U.S. 5, 11 (2016) ("[T]he Sixth Amendment grants a defendant 'a fair opportunity to secure counsel of his own choice.'") (quoting *Powell*, 287 U.S. at 53); *Kaley v. United States*, 571 U.S.

320, 336 (2014) (remarking that defendants "have a vital interest" in "the constitutional right to retain counsel of their own choosing"). "The right to select counsel of one's choice . . . has been regarded as the root meaning of the constitutional guarantee." *Gonzalez-Lopez*, 548 U.S. at 147–48. Critically, the Constitution secures that right *precisely* to prevent the government from controlling the loyalty, quality, and vigor of the defense. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."). Indeed, in criminal cases, the Supreme Court has recognized that "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *see also McCord v. Bailey*, 636 F.2d 606, 618 n.2 (D.C. Cir. 1980) (Wald, J., concurring in part and dissenting in part) ("The right to the undivided loyalty of one's attorney is 'absolute' in the sense that it does not depend on one's guilt or innocence. That duty of loyalty is a crucial factor in the success of our adversary system of justice.").

In civil matters, the Due Process Clause of the Fifth Amendment protects litigants' access to counsel.[10] "'[T]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (quoting *Powell*, 287 U.S. at 68–69) (holding that the party opposing the government in an

[10] Actions that abridge an individual's or entity's selection of counsel also violate the First Amendment. *See United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 223–25 (1967) (holding that prohibitions on a union's ability to hire attorneys on a salaried basis violated the First Amendment); *Railroad Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 5–7 (1964) (holding that the First Amendment protected a union's ability to recommend attorneys to its members); *NAACP v. Button*, 371 U.S. 415, 438–445 (1963) (invalidating, on First Amendment grounds, a law prohibiting civil rights groups from engaging in public interest litigation).

administrative proceeding generally "must be allowed to retain an attorney if he so desires").[11] Interference with the free choice of counsel and disruption of existing attorney-client relationships in civil cases carries similar costs to the impartial, fair, and accurate administration of justice as it does in criminal cases. Legal ethics rules fortify this constitutional requirement by restricting a lawyer's ability to represent clients when their loyalties are divided. The ABA's Model Rules provide that, with certain exceptions, "a lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a third person or by the personal interest of the lawyer." AM. BAR ASS'N, MODEL RULES OF PRO. CONDUCT R. 1.7(a).[12]

By making loyalty to the whims of federal officeholders a practical condition of counsels' availability to serve a client, the Order violates the Fifth Amendment. The risks to a law firm subject to this Order or a similar one are significant: loss of, among other things, access to any "[g]overnment goods, property, material, and services," government contracts, access to government buildings (presumptively including courts) unless specifically authorized, and the firm's clients' loss of *their* government contracts. Order §§ 2, 3, 5. That is not to mention the risk that employees of such a firm cannot be hired by any government agency absent a waiver from the head of the agency, made in consultation with the Director of the Office of Personnel Management. *Id*. § 5(b). Many lawyers will find these risks to themselves and their clients to be unacceptably

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[11] Just as the freedom to choose counsel is protected by the Fifth Amendment, so too does the Fifth Amendment prohibit the Government from unlawfully infringing upon a lawyer's right to practice their chosen profession. *See Bd. of Regents v. Roth*, 408 U.S. 564, 576 n.15 (1972) (discussing *Goldsmith v. Bd. of Tax Appeals*, 270 U.S. 117 (1926)).

[12] A lawyer's representation of a client can certainly be "materially limited . . . by the personal interests of the lawyer" when the lawyer operates in a climate of fear of Presidential retribution if a particular argument is met with disfavor. *Id.*

high. They will instead avoid cases and clients that touch on issues that might anger the President—or (perhaps worse) avoid raising arguments that may incur the President's wrath.

The Executive Order eviscerates the client's right to a lawyer whose fidelity is undivided, runs roughshod over the Fifth and Sixth Amendments, and revives precisely the system of abuse of centralized power which the Founders rejected. By threatening attorneys' livelihood for their having spoken out against the preferred policy positions of a sitting President, the Order is intended to—and will—cow attorneys into silence, depriving clients of rights secured by the Fifth and Sixth Amendments. An attorney whose "lips" are "sealed . . . on crucial matters" for fear that she will provoke the ire of the Executive, is no attorney at all. *See Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (commenting, in a case where a single attorney represented multiple defendants with conflicting interests, "[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.").

III. The Executive Order Threatens the Rule of Law.

That the Order violates core First, Fifth, and Sixth Amendment rights by restricting the ability of WilmerHale and its clients to participate in the legal system is cause enough for the Court to grant the Motion. The need to provide WilmerHale relief is all the more urgent, however, because the Order poses a broader threat to the rule of law.

Lawyers play an essential role in upholding America's democratic institutions. As Alexis de Tocqueville observed in the early days of the Republic, lawyers' ability to vindicate the rights of their clients and their attachment to the Constitution and laws serves as "the most powerful existing security against the excesses of democracy." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 301 (Henry Reeve trans., 2002) (1835). Lawyers' response to governmental abuses is no

less essential to the rule of law and an independent judiciary today than it was then. *See Velazquez*, 531 U.S. at 545 ("An informed, independent judiciary presumes an informed, independent bar."). "Intolerance and pressure to suppress ideas that may be unwelcome to some poses a special threat to the legal profession." Scalia, *supra* at 334. "One of the great traditions of the profession is respect for the right to representation of those with whom we disagree, and even to undertake that representation ourselves." *Id.*; *see also* Hon. J. Michael Luttig, Address to the Am. Bar Ass'n Annual Meeting of the Nat'l Conf. of State Bar Leaders (Aug. 4, 2023) (recognizing that lawyers are "uniquely qualified and obligated to defend our Constitution, [r]ule of [l]aw, and [d]emocracy").

Courts must maintain unwavering "vigilance" when the government "imposes rules and conditions" on attorneys that restrict their ability to effectively represent their clients, particularly when such restrictions "in effect insulate its own laws from legitimate judicial challenge." *Velazquez*, 531 U.S. at 544. Restricting attorneys "in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys." *Id.* And, chilling attorneys alters the basic role of the courts in a government that relies on judicial review to protect constitutional rights. In an adversarial system, courts consider issues only when lawyers have presented them. Limits on lawyers readily become limits on courts.

The Order is a blatant attempt to hamstring attorneys' ability to zealously represent clients—and, particularly, clients who seek to challenge the Executive's authority. At the most basic level, the President seeks to interfere not only with prospective federal contractors' counsel of choice, but with the rights of WilmerHale's existing clients involved in civil and criminal matters with the government, and with the firm's constitutional and ethical obligations to clients in such cases.

But the threat from the Order goes far beyond WilmerHale and its clients. Under the specter of the Order, any firm that has, or hopes to, retain clients who contract with the federal government will have to shape its practice to meet the whims of the President. By the same token, clients who want to stay in the President's good graces will either drop a firm or demand that the firm drop other clients perceived to be enemies of the President.[13]

The challenged Order names only one law firm, but in so doing, it dangles a Sword of Damocles over all those who refuse to place loyalty to the President above the interests of their clients and the law. It seeks to destroy a functional bar that ensures the government follows the law, substituting instead a bar that is, at best, reluctant to challenge the government, and, at worst, one that is a plaything of the party in power. That sword has already fallen on at least eight other firms, *see supra* pages 7–8. This Court should enjoin this abuse of executive power before it goes any further.

[13] As detailed in the WilmerHale's declarations, the Order has already caused the firm to lose clients and is discouraging other clients from working with the firm. One client "terminated its retention of the Firm for [a new] matter following the Order, citing the Order's issuance as the reason for terminating the engagement," while "several existing clients have paused WilmerHale's engagements in government-facing matters—or declined to engage WilmerHale for new work—citing the Order." Supplemental Declaration of Bruce M. Berman in Support of Plaintiff's Motion for Summary Judgment, [ECF No. 16-3], at ¶¶ 6–7. Other current clients "have indicated to WilmerHale partners that they are considering whether to replace WilmerHale—or engage an additional firm on ongoing matters" because of fallout from the order. *Id*. at ¶ 8.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant WilmerHale's Motion for Summary Judgment.

Dated: April 10th, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to LCvR 7(o), I hereby certify that this brief conforms to the requirements of LCvR 5.4, complies with the requirements set forth in Fed. R. App. P. 29(a)(4), and does not exceed 25 pages in length.

DATED this 10th day of April 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10th, 2025, I electronically filed the original of this brief with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

DATED this 10th day of April 2025.

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